

February 3, 2019

Dave Kuhl, Director  
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RE: Chelan County Increase in SEPA Exemption Thresholds in 2013

Dear Mr. Kuhl and Ms. Larsen,

The purpose of this letter is to follow up on one topic of discussion from our November 15, 2018, meeting at your office. Namely, Chelan County's 2013 increase in the project exemption thresholds used to determine when environmental review is required under the County's State Environmental Policy Act (SEPA) codes (Chelan County Code Chapter 13.04). This increase was accomplished through County Resolution No. 2013-62, signed on August 6, 2013. I have acquired through a public records request all County records related to the development of Resolution 2013-62, which forms the basis for the discussion in this letter. It is assumed that all pertinent records were provided by the County in response to my public records request.

### **Overview**

In this letter, I will provide the necessary evidence for the following set of facts:

- 1) Many areas in Chelan County are old orchard lands with surface soil contaminated with lead and arsenic well above health-based regulatory thresholds established by the Washington Department of Ecology (DOE).
- 2) As a result of this soil contamination, SEPA review of projects on old orchard lands requires mitigation of surface soil exposure prior to project approval.
- 3) Increases to SEPA exemption thresholds in 2013 could not be allowed without having one or more local, state, or federal regulations that would have required mitigation of surface soil exposure prior to approval of projects on contaminated old orchard land.
- 4) No such local, state, or federal regulation existed in 2013 (or exists currently).
- 5) Therefore, SEPA regulations did not allow the increases to SEPA exemption thresholds contained in Resolution 2013-62, and later incorporated into Chelan County Code Chapter 13.04.080.
- 6) ***The current SEPA exemption thresholds in Chelan County Code Chapter 13.04.080 were not legally established and must be rescinded immediately.***

As a result, Chelan County should also determine the legal implications of using the SEPA exemption thresholds improperly established in Resolution 2013-62, and incorporated into Chelan County Code Chapter 13.04.060, since 2013.

To be clear, there is no indication that any of the actions taken by the County in improperly increasing the SEPA exemption thresholds were done to intentionally circumvent the SEPA process. It appears that the applicable SEPA requirements, especially as they pertain to contaminated soil on old orchard lands, were simply not understood by those involved.

### **Chelan County Contains Significant Quantities of Contaminated Old Orchard Land**

Within Chelan County, there are hundreds, if not thousands, of acres of land that were in orchard in the first half of the twentieth century (“old orchard land”), a period of time when lead arsenate was used as a pesticide. As has been documented by over 1,000 soil analyses at various locations, the vast majority of the surface soil on old orchard land in the Chelan Valley is contaminated with lead and arsenic at concentrations well above state thresholds for residential land use (up to more than eight times in some cases).<sup>1</sup> These health-based state thresholds are known as Method A cleanup concentrations and come from Washington’s Model Toxics Control Act regulations (WAC 173-340).

Presumably, similar lead and arsenic concentrations exist in surface soils on other old orchard lands throughout Chelan County.

*It is clear from historical testing that the vast majority of old orchard land within Chelan County is contaminated with lead and/or arsenic above Method A cleanup concentrations.*

### **SEPA Review Requires Mitigation of Contaminated Soil on Old Orchard Land**

Arsenic is well known to be a powerful carcinogen, and lead is well known to attack the central nervous system, particularly impacting the physical and mental growth of young and unborn children. SEPA regulations require that development projects subject to review (i.e., projects that are not exempt) must not cause a “probable significant adverse environmental impact”.

The Method A cleanup concentrations were developed by the Washington DOE as maximum soil concentrations for unrestricted land use, below which no unacceptable health impacts are expected. In the context of SEPA, these Method A cleanup concentrations represent an appropriate surrogate to define where a “probable significant adverse environmental impact” may occur, particularly for projects that would result in exposure of members of the public to contaminated on-site surface soil. As a result, there is significant precedence within the history of SEPA review to use the Method A cleanup levels to define maximum acceptable surface soil concentrations of lead and arsenic.

During SEPA review, when projects with surface soil concentrations of lead and/or arsenic exceed Method A cleanup levels, as is the case on most old orchard land within Chelan County, mitigation of exposure to these soils must be undertaken. Typical mitigation methods involve removal of the top layer of contaminated soil and replacement with clean topsoil, applying a hard cap, or other similar mitigation techniques. Several such model remedies are provided by the Washington DOE in the 2012 document entitled “*Tacoma Smelter Plume Model Remedies Guidance - Sampling and cleanup of arsenic and lead contaminated soils*”.

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<sup>1</sup> Sources of soil test data include a 2003 Department of Ecology report covering much of the Manson, Washington area; extensive soil testing conducted on behalf of the developer of the approved Farm residential development in Manson; soil testing conducted in 2018 by the Department of Ecology for the proposed Holiday Hills residential development in Chelan; and sampling conducted by the Department of Ecology on behalf of multiple property owners throughout the Chelan Valley in 2018 and early 2019.

A couple of current residential development projects on old orchard land in Chelan County have recently been approved with the requirement to mitigate surface soil contaminated with lead and arsenic above Method A cleanup concentrations. *As has been verified with the Washington DOE over the past year, and enacted by Chelan County, there is no longer any doubt that the ubiquitous surface soil lead and arsenic contamination found in old orchard lands must be mitigated for residential development projects subject to SEPA review.*

### **2013 Increase in SEPA Exemption Thresholds Violated SEPA Regulations**

In early 2013, the Washington DOE (through the state legislature) modified the SEPA regulations in WAC 197-11; after these modifications, the regulation allowing agencies to increase the SEPA exemption thresholds. In describing how to do so, WAC 197-11-800(1)(c) read, in part, as follows (emphasis added).

*At a minimum, the following process shall be met in order to raise the exempt levels.*

*(i) Documentation that the requirements for environmental analysis, protection and mitigation for impacts to elements of the environment (listed in WAC 197-11-444) have been adequately addressed for the development exempted. The requirements may be addressed in specific adopted development regulations, and applicable state and federal regulations.*

What the regulatory language above means is that in order for an agency (e.g., a county) to raise the SEPA exemption thresholds, it must demonstrate that for development that would be exempted after the change (that would not be exempt prior to the change), any “probable significant adverse environmental impact” must be mitigated through an existing development regulation or applicable state or federal regulation.

As discussed above in this letter, this would require that any development on old orchard land that would not have been exempted prior to the County’s approval of Resolution 2013-62, but would be exempted after approval of Resolution 2013-62, must still have a **regulatory requirement** to mitigate any surface soil with lead and/or arsenic contamination above Method A thresholds. ***However, in 2013 (and since then) no such regulatory requirement existed, and this significant public health issue was not addressed in the development of Resolution 2013-62.***

***As a result, the requirements of WAC 197-11-800(1)(c) were not met in 2013, and Resolution 2013-62 increased the SEPA exemption thresholds in violation of SEPA law.***

### **Resolution 2013-62 Should Have Gone Through SEPA Review**

Not only were the specific requirements of WAC 197-11-800(1)(c) not met, I would assert that the development of Resolution 2013-62 should have gone through the SEPA review process as a non-project action. This would have potentially involved completion of a SEPA Checklist, additional public notice, more complete consideration of public comments, and the requirement to issue a Determination of Nonsignificance (with or without mitigation measures).

Although WAC 197-11-800 in 2013 did provide an exemption for “Agency SEPA procedures”, these procedures were described in WAC 197-11-904 using language such that “Each agency is required by the act and this section to adopt its own rules and procedures for implementing SEPA.”, “State agencies shall adopt or amend their procedures within one hundred eighty days of the effective date of this chapter or subsequent revisions”, and “The adoption of agency procedures is procedural and shall be categorically exempt under this chapter (WAC 197-11-800(19))”

WAC 197-11-904 provides that the act of *adopting* SEPA procedures would be exempt (for example, the procedure of adopting the content of Resolution 2013-62 once finalized). But nothing in WAC 197-11-800 suggests that the process of increasing the SEPA exemption thresholds, which includes documentation of the appropriate justification for the increases in accordance with WAC 197-11-800(1)(c) and reviewing/responding to public and agency comments, would be exempt from SEPA review requirements.

In fact, when Snohomish County increased their SEPA exemption thresholds in 2015, they went through the proper SEPA review process, noting:

*“In order to satisfy SEPA requirements, the completion of an environmental checklist and the issuance of a threshold determination are expected to be completed on this non-project action...”*

Similarly, the City of Chelan attempted to increase their SEPA exemption thresholds in 2018 and treated it as an action subject to SEPA review.

***Based on this information, the development of Resolution 2013-62 violated the SEPA program requirement to review non-project actions in accordance with WAC 197-11 and Chelan County Code Chapter 13.04.***

### **Now What?**

It should be clear from the discussion above that the SEPA exemption thresholds in Chelan County Code Chapter 13.04.080 are not legally valid since SEPA regulations were not complied with when setting them. As a result, the Chelan County Community Development Department needs to immediately cease using them and determine what appropriate, legally-defensible exemption thresholds should be used going forward. Also, as noted above, Chelan County should determine the legal implications of using SEPA exemption thresholds improperly established during the period since 2013.

If the County wishes to revisit the issue of increasing the SEPA exemption thresholds, a County Resolution should first be proposed to modify the County Code to address potential soil contamination on old orchard land. Evaluation of such a Resolution would need to follow SEPA requirements in general and WAC 197-11-800(1)(c) in particular.

As noted above, the City of Chelan similarly attempted to increase their SEPA exemption thresholds in 2018. However, at the beginning of the public comment period, I immediately informed them that they were trying to do so in violation of the requirements of WAC 197-11-800(1)(c), since there was no existing regulatory requirement to address lead and/or arsenic soil contamination for projects on old orchard land that would be exempted after the threshold changes. They agreed with my comment and suspended their efforts.

Since then, the City of Chelan has been working with the Washington DOE to develop a City ordinance to address soil contamination on old orchard land. They have publicly provided a framework for this effort and released some draft ordinance language. Although it is still a work in progress, if this ordinance is properly crafted, it could eventually serve as the missing regulatory requirement that could allow the City to increase SEPA exemption thresholds as desired.

More importantly, the City of Chelan ordinance is designed to cover projects that are not currently subject to SEPA review. Given the real public health issues associated with development on old orchard land, I support the City's efforts to address this issue for *all* new development on old orchard land.

I strongly recommend that Chelan County coordinate with the City of Chelan to develop a similar broad regulatory requirement for all development on old orchard land, regardless of whether or not the County attempts to increase SEPA exemption thresholds in the future.

### **Summary**

As you indicated at the end of our November 15, 2018 meeting, you would not have time to address the SEPA issues discussed, including the issue of the 2013 increases in SEPA exemption thresholds, until after the new year (i.e. in 2019). I therefore thought this would be a good time to revisit the County's SEPA exemption thresholds. I would appreciate hearing from you how you intend to proceed with addressing this important issue as soon as possible.

Thank you for your time.

Respectfully,



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