



August 14, 2018

Craig Gildroy
Planning Director
City of Chelan
P.O. Box No. 1669
135 E. Johnson Avenue,
Chelan, WA 98816

Re: City of Chelan SEPA Amendments and Inadvertent Discovery Plan, Amendments to Chelan Municipal Code 14.06.105 Flexible Thresholds for Categorical Exemptions/ Adoption of Inadvertent Discovery Plan CMC 15.25

Dear Mr. Gildroy:

As the nation's original and largest nonprofit environmental law organization, Earthjustice leverages our expertise and commitment to fight for justice and advance the promise of a healthy world for all. Please accept these comments on behalf of the Chelan Basin Conservancy and Futurewise. Chelan Basin Conservancy is a non-profit 501(c)(3) public charity dedicated to preserving the water quality of and public access to Lake Chelan. Futurewise works throughout Washington State to support land-use policies that encourage healthy, equitable, and opportunity-rich communities, and that protect our most valuable farmlands, forests, and water resources. Futurewise has members across Washington State including the City of Chelan.

Chelan Basin Conservancy and Futurewise are concerned about proposed amendments to the Chelan Municipal Code § 14.06.105, changing the thresholds for categorical exemptions from the State Environmental Policy Act ("SEPA") for new development because the proposed amendment may exempt construction of residential projects on land contaminated with hazardous levels of lead and arsenic. Among numerous well-known adverse human health

effects, lead is a neurotoxin particularly dangerous to child development and arsenic is a potent carcinogen. Legacy use of lead arsenate pesticides on orchards in the mid-twentieth century caused high concentrations of lead and arsenic in soils throughout western Washington, including on former orchard lands in the City of Chelan (“City”).¹ Concentrations of lead and arsenic on these properties often exceed the hazardous cleanup standard for residential land use of 250 parts per million (“ppm”) of lead and 20 ppm of arsenic in soils. Construction of homes and schools on these soils without requiring remediation will expose any person living or visiting that area to toxic levels of lead and arsenic.

A categorical exemption from SEPA may only exempt activities that will not have a significant impact on the environment. If an exempt activity includes a project with a potentially significant impact, the categorical exemption is over-inclusive on its face. A court may invalidate such an exemption. A project significantly impacts the environment if it creates environmental health hazards, such as exposure to toxic chemicals. The proposed ordinance could exempt construction projects of homes or schools occurring on lands contaminated with lead arsenate pesticides, and thus will pose a significant threat to public health by exposing future residents to hazardous levels of lead and arsenic in soils. The City can avoid this

¹ See **Exhibit A** (documenting soil-lead samples exceeding the toxicity threshold for lead on land proposed for residential development in the City of Chelan); **Exhibit B** (documenting arsenic contamination in Manson, WA, from lead arsenate pesticides); Tony Schick, et al., *Arsenic-laced Soil lingers Where Children Play in Washington State*, PBS News Hour, Nov. 4, 2015, <https://www.pbs.org/newshour/science/arsenic-laced-soil-lingers-where-children-play-in-washington>. Additionally, for a further discussion on the health impacts of lead and arsenic from lead arsenate pesticides, please refer to **Exhibit C**, a comment letter submitted by scientist Brian Patterson.

problem by changing the proposed ordinance to account for and create different standards for development on former orchard lands.

I. THE CITY'S PROPOSED ORDINANCE WILL HAVE A POTENTIALLY SIGNIFICANT IMPACT ON THE ENVIRONMENT BECAUSE IT MAY EXEMPT NEW CONSTRUCTION OF HOMES OR SCHOOLS ON LEAD AND ARSENIC CONTAMINATED SOILS.

The State Environmental Policy Act ("SEPA") was enacted to "[a]ssure for all people of Washington safe, [and] healthful . . . surroundings[.]" and to "[a]ttain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences[.]" RCW § 43.21C.020 (2)(b), (2)(c). In enacting SEPA, the legislature recognized the "fundamental and inalienable right" of each person "to a healthful environment[.]" *Id.* at § 43.21C.020(3).

Pursuant to SEPA, the lead agency must make a threshold determination within 90 days of submission of a completed application whether the proposed action is likely to have a probable significant adverse environmental impact. WAC § 197-11-330; *id.* § 197-11-310. A detailed environmental impact statement must be prepared for all proposals for legislation and other major actions significantly affecting the quality of the environment. RCW § 43.21C.031; *id.* §43.21C.030.

Categories of governmental actions that do not significantly affect the quality of the environment may be exempt by statute or agency rule-making. RCW §43.21C.110 (1)(a). These actions may not be granted subject to conditions or denied under SEPA. *Id.* Lead agencies need not make a threshold determination for categorically exempt actions. WAC § 197-11-310.

However, an agency or city promulgating a categorical exemption may not exempt from SEPA review actions likely to result in a significant adverse impact on the environment. Courts may review and invalidate categorical exemptions as facially overbroad for exempting major actions from SEPA review. *Dioxin/ Organochlorine Ctr. v. Pollution Control Hearings Bd.*, 131 Wash. 2d 345, 365 (1997). The plain language of SEPA § 43.21C.110, the statute authorizing the Department of Ecology to promulgate categorical exemptions, limits exemptions to actions not likely to significantly adversely impact the environment. Municipal authority to adopt SEPA exemption thresholds for new land use development projects pursuant to Washington Administrative Code § 197-11-305, is similarly limited.

The City's proposed ordinance changes the SEPA exemption threshold such that a substantially increased number of single-family residences or multi-family complexes can be constructed without SEPA review. The proposed ordinance increases the exemption for single-family residential dwellings from four to nine units, and multi-family townhomes from four units to sixty units. The proposed ordinance also increases the size of commercial development, including schools that will be exempt from SEPA review from 4,000 square-feet ("sqft") to 20,000 sqft. Thus, under the proposed ordinance an increased number of residential developments projects will be exempt from SEPA review.

Constructing multi-unit townhomes or single-family residences on former orchard land contaminated with hazardous levels of lead and arsenic is a major action that will significantly adversely impact the environment. One of the criteria considered in determining whether an action will significantly impact the environment is whether there are any "environmental health hazards" associated with the project including "exposure to toxic chemicals . . . or hazardous

waste[.]” WAC § 197-11-960. The City of Chelan includes within its jurisdiction land formerly used as orchards. This land is now being converted into residential developments. See **Exhibit A** (Objection letter to Holiday Hills development).

Former orchard lands contain soil highly contaminated with lead and arsenic, and test samples indicate contamination levels in excess of the hazardous waste cleanup level of 250 ppm for lead and 20 ppm for arsenic under the Model Toxics Control Act. WAC § 173-340-900, (Table 740-1); **Exhibit A** (describing test samples taken on former orchard land with lead concentrations in soil at hazardous levels). The cleanup standards for lead and arsenic set conservative estimates of the human health and environmental risks from hazardous contaminants to protect susceptible individuals, such as children, as well as the general population. Wash. Admin Code. § 173-340-702. The standard for lead is set to prevent highly toxic blood lead levels, and the standard for arsenic is to set to prevent toxic exposure through direct contact with the soil and for groundwater protection. WAC § 173-340-900, fn. (b), (j). Children, especially toddlers, have the highest risk for lead poisoning by ingesting lead in soil. King County, *Arsenic, Lead and Your Health*, <https://www.kingcounty.gov/depts/health/environmental-health/toxins-air-quality/arsenic-lead/tacoma-smelter-plume/arsenic-lead-health.aspx>. Effects to children include lowered IQ, reduced memory, and hearing problems. Pregnant women exposed to lead may have babies born prematurely and lowered birth weights. *Id.* Arsenic also has a long list of adverse health outcomes, including cancer, even when exposed to low doses. *Id.*

In addition, WAC 197-11-800(1)(c)(i) requires that before the SEPA categorical exemptions for minor new construction can be raised from the levels in WAC 197-11-800(1)(b)

up to the levels in WAC 197-11-800(1)(d), the county or city must prepare: “(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.” The elements of the environment include “[r]eleases or potential releases to the environment affecting public health, such as toxic or hazardous materials” WAC 197-11-444(2)(a)(iii).

State and federal regulations do not address the impacts of developing former orchards containing lead or arsenic pollution. So, WAC 197-11-800(1)(c)(i) requires the City of Chelan to have development regulations to identify and remediate proposed development sites on former orchard lands containing lead or arsenic pollution **before** the city can raised the SEPA categorical exemptions for minor new construction up to the levels in WAC 197-11-800(1)(d).

The City’s proposed ordinance is overbroad on its face because it is likely to exempt construction of new residences or schools on former orchard lands—an action that will significantly adversely impact environmental health of future residents without having development regulations to address these standards. In making the threshold determination, the lead agency need not find that the project will necessarily result in significant adverse impacts, but need only find that such impacts are probable. *Anderson v. Pierce County*, 86 Wash. App. 290, 301 (1997); WAC § 197-11-330. In determining significance, the lead agency weighs the severity of the impact with likelihood of occurrence. An impact may be significant even if occurrence is unlikely, but when the resulting impact would be severe. Tim Butler & Matthew King, *Threshold determination—Overview*, 24 Wash. Prac., Env’tl. L. & Practice § 17.12 (2d ed.

2018). Chronic lead poisoning in children and cancer are severe impacts, and even if exempting residential construction on former orchard lands is unlikely, a court will likely find the impact significant.²

II. THE CITY CAN AVOID VIOLATING SEPA BY CREATING DIFFERENTIAL STANDARDS FOR EXEMPTING CONSTRUCTION ON FORMER ORCHARD LANDS.

The Chelan Basin Conservancy is not concerned with raising the exemptions generally for residential developments, but rather particularly for developments that occur on former orchard lands. The City can resolve this problem by adopting development regulations requiring developers take proactive steps to determine lead and arsenic concentrations in soils prior to construction, when such development will occur on former orchard land. By using historical aerial photographs, such as the Department of Ecology did in the study included at **Exhibit B**, the City can determine the location of former orchard lands on which lead arsenate pesticides may have been applied. The Department of Ecology found a close correlation between historical orchard farms and high levels of arsenic concentrations in soils, indicative of historic use of lead arsenate pesticides. For these areas, the City could require that the developer test the soil for lead and arsenic concentrations. If such concentrations are lower than the MCTA standards for lead and arsenic, the development may qualify for an exemption. However, if test samples indicate hazardous levels of arsenic or lead, the development may not

² The City of Chelan has properly withdrawn the determination of non-significance. A Determination of Non-Significance is unlawful in light of the above-described potentially significant impacts to environmental health.

qualify for exemption. Developments that are not located on former orchard land may qualify for the exemption without testing.

In sum, the City may not move forward with a categorical exemption for new development on former orchard land due to the likelihood of exposing residents, including children and pregnant women, to unsafe levels of lead and arsenic. A categorical exemption that includes such human health risks does not comply with state law and is inconsistent with the City's obligation to protect some of its most vulnerable residents and visitors from a known severe public health hazard. We ask the City to immediately withdraw the proposed categorical exemption. We also ask that any future categorical exemption not apply to former orchard land unless comprehensive, site-specific testing demonstrates that lead and arsenic contamination is below levels of concern.

Thank you for your careful consideration of these matters.

Sincerely,

Jaimini Parekh
Amanda Goodin
*Attorneys for
Chelan Basin Conservancy
Futurewise*