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Questions and Answers About Dairy Farmers’ Litigation Against the EPA

Q: What action are dairy farmers taking?

A: On February 6, 2020 the Washington State Dairy Federation and Cow Palace, an Eastern Washington dairy farm, filed a Petition for Review to the Ninth Circuit Appeals Court. This requests the Ninth Circuit Court review the Administrative Order on Consent signed by four dairy farmers on March 13, 2013 and the report “Relation Between Nitrate in Water Wells and Potential Sources in the Lower Yakima Valley” issued on September 27, 2012, and revised March 2013. The petition was filed by attorneys Kent Krabill and Chris Patton of the Dallas, Texas law firm of Lynn Pinker Cox & Hurst.

Q: Why are farmers taking this action?

A: The Administrative Order on Consent was imposed on the farmers based on the nitrate study completed by the EPA in 2012. That study was determined to contain serious deficiencies and potential misstatements by science experts from across the country who reviewed it as part of the public comment process. Some even went so far as to accuse the EPA of intentionally producing false data and conclusions. Other federal and state agencies also noted the study’s failures and warned the EPA not to use it as the basis for enforcement. EPA’s Region 10 leadership, however, proceeded to impose the Administrative Order on Consent (AOC) on four dairy farms based on the study. The AOC caused one farm to go out of business and has put two other farms on the edge of financial ruin. The one farm that proceeded to quickly comply with the terms of the AOC and the subsequent Consent Decree, has spent upwards of \$11 million to comply with the exceptionally burdensome and unnecessary requirements. Only other family

business operations have made it possible for the farm to continue operation. Very few dairy farms in Washington state or the nation could endure such enforcement.

Q: How have you addressed this with the EPA?

A: The Washington State Dairy Federation strongly expressed concerns about the report following its issuance. There was little to no response from then Region 10 Administrator Dennis McLerran. His antipathy to dairy farmers was demonstrated not only in this study but also by allowing over \$500,000 of EPA funds to be used in a public lobbying campaign making false claims about dairy pollution. The “What’s Upstream” campaign which he specifically supported was only halted when one third of the members of Congress complained to then EPA Director Gina McCarthy. When the new administration took office, the appointment of Christopher Hladick to replace Mr. McLerran offered farmers hope for a more productive discussion. This went on for several months before it became clear that Mr. Hladick would not overrule the staff’s insistence -- despite overwhelming evidence -- that the science was proper and an adequate peer review was completed. In the presence of seven members of the farming community, staff completely misrepresented the science, the peer review and the reasons why one independent peer reviewer retracted his review. Following the refusal of Mr. Hladick to address this issue or provide requested documents farmers turned to EPA headquarters staff. Phone conversations and letters along with a meeting with Rep. Dan Newhouse resulted in the removal of this issue from the purview of Region 10 and the statement that the study will no longer be used for enforcement. These did not result, however, in agreeing to the reasonable requests for a proper peer review and suspension or retraction of the study pending that review.

Q: What did you ask the EPA to do?

A: Farmers have always emphasized they are not afraid of science and they have proven they will do what is needed to correct pollution concerns when presented with verified facts. Farmers requested that the nitrate study be properly peer reviewed and that pending that review, it be retracted or suspended from enforcement. The nitrate report is also used as the basis for frequent citizen lawsuits against Washington dairy farmers by an Oregon-based environmental attorney. Retracting or suspending the report would remove this powerful tool used to extract settlements from dairy farmers. The threat posed by these lawsuits and the large fees paid to the attorney filing these “sue and settle”-style citizen lawsuits represents a dark cloud over the future of dairy farming in Washington state.

Q: What is the position of the EPA on the study now?

A: In a letter to Save Family Farming dated September 19, 2019, Susan Bodine, the Assistant Administrator for Enforcement and Compliance Assurance, continued to assert that a proper peer review was completed. The letter stated: “However, please be assured that the EPA is not using the 2013 report for further enforcement actions.” Despite this clear statement, EPA Region 10 continues to enforce the AOC with continuing harsh and punitive demands. Because EPA leaders have refused to retract or suspend the study and the AOC, dairy farmers have decided it was necessary to ask the Ninth Circuit Court to review the study and the Order.

Q: You refer to “dairy farmers.” Are these just Washington farmers?

A: No, the Washington State Dairy Federation and Save Family Farming have received strong support from the Idaho and Oregon dairy associations. The American Dairy Coalition and the National Milk Producers Federation have written to EPA Administrator Andrew Wheeler urging action on this. Washington state representative Dan Newhouse, Congressman from Central Washington, has also reached out to the EPA on several occasions to request action. This false EPA study and enforcement and litigation based on it represents a threat to the future of dairy farms across the nation. It sets a precedent for the abuse of power against non-dairy farms as well. If successful, this review will result in the proper use of science within the EPA and possibly other agencies as well.

Q: If the EPA states the peer review was proper, why are you insisting that it was not?

A: As part of preparing the study the EPA submitted a Peer Review Plan (link). It stated the study was “influential” according to the Office of Management of Budget’s policy for peer review of federal science studies. The plan also required 4 to 10 “independent experts.” Studies are influential scientific information when:

...“the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions. In the term 'influential scientific information,' the term 'influential' should be interpreted consistently with OMB's government-wide information quality guidelines^[1] and the information quality guidelines of the agency.”

In 2013, following severe criticism of the study and final report, EPA Region 10 staff published a “Response” document that included the statement that the study was categorized “influential.” However, in meetings held with EPA staff by farmers and farm representatives in late 2018 and early 2019, this same staff stated the study was not categorized as “influential” but “other.” This category gave EPA full discretion over the peer review and it appears on this basis they continue to claim a proper peer review. Despite repeated requests to provide documentation of the “other” categorization, the EPA has refused to provide it.

Q: Are you saying no peer review was conducted?

A: We are saying no peer review was done on the final report and that the final report is substantially very different from the draft report which received a very limited and inadequate peer review. The review of the draft report was provided by only two independent experts, one of whom withdrew his review after noting the very significant changes in the final report from what he reviewed. So there remains one independent reviewer of the draft report and none of the actual, published report on which the EPA based its enforcement.

The final report contained pages of conclusions that were not included in the draft report, and also contained crucial data not found in the draft report. Documents obtained through the Freedom of Information Act show that after the two independent reviews were completed on the draft, the Region 10 enforcement staff -- not the science team -- rewrote the report adding the conclusions. This is critical as the conclusions in the final report stated that the study showed dairy farms were the primary source of nitrate in Yakima area groundwater whereas the draft report stated that no certain conclusions about sources could be drawn from the study. Both independent reviewers had criticisms of the study as detailed in the draft report. These were similar to those of the science experts who critiqued the report as part of the public comment process. But the reviewer from the USDA’s Agricultural Research Service requested his name be removed as a reviewer noting the differences in data and conclusions from draft to final. This retraction was a reason for re-issuing the study in 2013 which was re-issued with the note that he requested his name be removed.

Q: Why are farmers convinced that if the peer review was done that the situation would be different today?

A: After publication, the study was reviewed by a number of highly respected science experts from private organizations, academia and government agencies. All found the

conclusions false and unreliable. If a proper peer review had been conducted, farmers believe the study and conclusions would have been modified and the use of it for enforcement and litigation would have been limited if not eliminated.

Q: What were the concerns about the study itself that the science experts noted?

A: Many of the experts wrote detailed analysis, some 40 pages or more. A complete record of the public comments including these [documents can be found here](#).

There were a wide variety of critiques. [We have supplied summaries and links to the actual documents here](#). These involved problems with EPA staff understanding the nitrogen cycle, the use of pharmaceuticals to prove the connection to dairy cows, the use of hydrogeology or aquifer flow, the siting of test wells, analysis of seepage from manure storage lagoons, the failure to consider contribution from other sources than dairy farms including on-site sewage systems, and the determination of the amount of nitrogen applied to crop fields. The last item provides a case in point. The data collection protocol specified that only fields where manure had been recently applied were to be selected for nitrogen testing, and that the technician was to use a spoon and take a sample down to one inch. This data was then used to determine nitrogen content in the soil. It is one of a number of egregious examples that have caused many experts to conclude that EPA conducted the “science” as an exercise not to determine the facts, but to establish a basis for the punitive enforcement that did indeed take place. Commenting on the study design, one expert said:

“...this industry standard approach [to research] was abandoned either very early in the scoping process, or it was not utilized at all. Instead it appears that the EPA settled very quickly on a single theory -- that current and recent dairy operations were the primary source of groundwater nitrates to the exclusion of any other source of significance.”

In concluding, this expert stated:

“EPA has decided that litigious pursuit of a handful of dairies, unsupported by sound science, driven by bias and politics, is more important than really identifying how to solve the problem of nitrates in groundwater.”

Q: Farmers have been overall strong supporters of President Trump. Does this legal action send a message of discontent with the President and his administration?

A: Farmers are convinced based on past action by the President that if he were aware of the abuse of science and authority by the EPA against farmers during the previous administration, he would require quick action to make things right. It has been a great disappointment to the dairy community across the nation, that current EPA leadership at the regional and national levels are not taking this situation seriously. The action of the President in the Waters of the US Rule to overturn federal government overreach using the Clean Water Act is an example of bringing good science to bear on public policies affecting farmers. We are hopeful that this action will bring the same substantive relief to farmers from the abuse and overreach of the EPA related to nitrate and groundwater.