



EPA Nitrate Report Fact Sheet
July 2020

**EPA withholds a “smoking gun” incriminating document,
then hides behind statute of limitations**

A recently revealed document shows how EPA covered up and lied about the failed science review of the 2012-2013 Yakima nitrate report. Rather than admitting failures of the Obama administration’s leadership, current EPA leaders are seeking to dismiss a lawsuit based on the statute of limitations, despite EPA’s refusal to provide the “smoking gun” document as requested by farmers a year earlier.

New Key Facts

1. The Washington State Dairy Federation and a dairy farm harmed by EPA actions filed a lawsuit in the Ninth Circuit Court in early 2020 to invalidate the 2012-2013 EPA Yakima nitrate report based on EPA’s failure to follow proper scientific and science peer review procedures and violation of due process rights of farmers.
2. The EPA provided a document on April 30, 2020 in response to a Freedom of Information Act (FOIA) request that showed EPA staff made false claims about the category of the science study and the peer review that was required. The document also provided clear evidence that prior statements made to farmers about the study’s peer review were knowingly false. This document was not provided to the dairy community despite a 2018 FOIA request for documents related to the nitrate study. Farmers also asked Region 10 staff and the Administrator specifically for documents relating to the categorization of the study and these requests were denied.
3. On June 2, 2020 the EPA responded to the 2020 litigation claiming that the action by farmers to invalidate the report exceeded the statute of limitations, despite the failure of the EPA to provide the needed documents according to federal law.

Background Facts

1. EPA conducted the study of nitrate sources in groundwater in the lower Yakima valley after an investigative series in the Yakima Herald and after a series of meetings with local anti-farm activists, starting in 2010.
2. The final report placed blame on current dairy operations for nitrate in groundwater above EPA limit of 10 parts per million.
3. Yakima Valley groundwater nitrate levels are consistent with most other farming areas across the nation where farming activities have been going on for generations. EPA's study showed tested water in groundwater wells was typically 20 years old or older—predating most current dairy operations.
4. Numerous science experts who reviewed the report as part of the public review process unanimously agreed the report was faulty and EPA could not justify its conclusions about sources of nitrate. More than one highly qualified reviewer considered the report “fraudulent” in that the study demonstrated an intention on the part of the EPA to create a case against dairies not based on legitimate data. Other agencies warned the EPA against using a faulty report for enforcement.
5. The report was then used as the basis to coerce four dairy farms into signing an agreement along with threats to take the farms to the Ninth Circuit Court with the report used as the basis for EPA action. One farm went out of business and the remaining farms struggle under financial and bureaucratic burdens that very few farms could endure.
6. The report was then used by environmental attorney Charlie Tebbutt through federal court action to impose additional very expensive and unjustified environmental measures on the farms that signed the EPA agreement. EPA reneged on its promise to the farms to defend them against citizen lawsuits.
7. A federal judge ruled that the Resource Conservation and Recovery Act (RCRA) applies to farm application of fertilizer despite the fact that Congress never intended that interpretation.
8. The false report continues to be a basis for lawsuits by attorney Tebbutt against dairy farmers in Washington, costing the dairy community tens of millions in legal and other related costs. The nitrate report continues to threaten the future of farming in Washington state and the nation as the activist attorney has made it clear he intends to see the RCRA ruling applied nationwide.

9. The unofficial science reviews by experts show that if the study had received a proper peer review as required by federal policy, it would not have been published as it was and could not have been used for damaging enforcement and litigation. This is why the peer review is the critical issue.
10. Federal policy by the Office of Management and Budget requires science studies categorized as “influential science” to be subjected to adequate peer review. Influential science is: “scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.”
11. A “Peer Review Plan” prepared by Michael Cox in EPA Region 10 states the study was categorized as “influential” and specifies 4 to 10 independent peer reviewers from the primary disciplines of Chemistry-Biogeochemistry. It also eliminated the public, scientific and professional societies from nominating or reviewing peer reviewers, and states that no public comment will be allowed on the product. The OMB Bulletin strongly suggests public involvement in “influential” science information.
12. In late 2011 the peer review was conducted on the draft report. Two of the reviewers were from the EPA including one from Region 10. One was from the US Geological Survey and another a highly qualified expert from the US Department of Agriculture. This already violated the requirement of 4 to 10 independent reviewers. The USGS reviewer noted many of the concerns about the data as the science experts who reviewed it independently outside of EPA’s review process. Dr. Tarkalson, the USDA reviewer, noted some important issues as well.
13. In 2012 the report was published. The draft report stated that no definitive conclusions could be drawn about the sources of nitrate, despite clear evidence of establishing a data collection methodology aimed at proving dairies were responsible. The final report was extensively edited and modified not by the science staff, but by the EPA Region 10 enforcement staff led by Edward Kowalski. This included Eric Winiecki and Jennifer MacDonald, an enforcement attorney. The final report drew definitive conclusions about current dairy operations as the primary source of nitrate contamination, contradicting the draft report’s conclusions about sources. In addition, the final report contained extensive critical data not included in the draft report sent for review.
14. When Dr. Tarkalson saw the published report and the vast difference between the draft and the final report he wrote to EPA on November 16, 2012 requesting his name be removed as a reviewer, explaining that the final report included critical data not included in the draft report.

15. EPA reissued the final report in 2013 noting that Dr. Tarkalson requested he be removed as a reviewer.
16. The draft report then had only one independent reviewer, not the 4 -10 specified in the peer review plan. There were no reviewers of the final report despite crucial differences in scientific data and conclusions from the draft report.
17. Until early 2018 farmers had little hope that justice could be done regarding the EPA nitrate report because the Obama appointee, Region 10 Administrator Dennis McLerran was also responsible for using \$550,000 of EPA (taxpayer) funds to fund the public attack and lobbying campaign against farmers called “What’s Upstream.”
18. In the summer of 2018, with the appointment of new Region 10 Administrator Christopher Hladick, farmers began to ask the new leadership to look into the difficulties with the nitrate report.
19. In November, 2018 seven farmers and farm leaders met with Hladick, Kowalski and other key staff at Region 10 offices in Seattle. Hladick was completely unaware of the science and peer review failures of the report. He asked Winiecki if the study had been peer reviewed. Winiecki answered: “thoroughly and completely.” When pointed out there was only one independent reviewer and the USDA reviewer had withdrawn, Winiecki responded that Dr. Tarkalson gave no reason for his withdrawal. The letter from Dr. Tarkalson explaining his reasons was then read aloud. Farmers noted two outright false statements made by Eric Winiecki in this meeting.
20. Mr. Hladick requested farmers meet with staff to discuss concerns. After numerous efforts to delay or avoid the meeting, Edward Kowalski, Jennifer MacDonald and five other EPA Region 10 staff met with several farm representatives in April, 2019. Kowalski defended the report and stated regarding the failed peer review that the EPA had categorized the study as “other” and not “influential” science information. Kowalski explained that the “other” categorization gave the EPA complete latitude in the peer review it conducted. This statement made by Mr. Kowalski was proven to be false by the recently revealed document. Jennifer MacDonald’s justification in the revealed document shows that in her failure to correct this false statement she was complicit with Kowalski in providing false information about the peer review category.
21. Farmers had two documents showing the study was categorized as “influential:” the Peer Review Plan by Michael Cox referenced in item 11 above and a document produced in 2013 by the EPA in response to overwhelming criticism of the report by every science expert who reviewed it. That document called “Response” intended to answer the strong criticisms about the study and inadequate peer review. It directly acknowledged the study was designated “influential.”

22. All efforts by farmers following the April meeting to secure documentation of when the “other” categorization was made and by whom were denied by Kowalski and Hladick. A letter from Hladick to Save Family Farming of June 19, 2019 supported the position of Kowalski stating: “the study was categorized as ‘Other’ when the project was first entered into the database on March 22, 2012 and never changed from that time.”
23. In December 2018, Jay Gordon of the Washington State Dairy Federation, submitted a comprehensive document request under the Freedom of Information Act. Over 6 months later, July 25, 2019, Edward Kowalski responded with a number of documents but noted the agency was withholding a number of documents based being “privileged draft, predecisional, or deliberative.” The key document showing the categorization of “other” and the defense of the “influential” peer review process by Jennifer MacDonald was withheld from this release. This, plus the refusal to provide documentation of responsibility for and date of the categorization as “other” may constitute a violation of federal law relating to release of public documents.
24. On April 30, 2020 the Dairy Federation, in response to a second FOIA request, received from the EPA internal emails that shed light on the categorization and internal defense of the peer review. This document answered the questions long sought by farmers about the peer review categorization.
25. An email of March 14, 2013 from Gina Grepo-Grove to Sheila Fleming, now Chief of Region 10’s Environmental Assessment Unit, expresses serious reservations about the defense of the peer review process made by Region 10 attorney Jennifer MacDonald. Her email states: “1) we did not include public participation which is a requirement for an ‘influential’ scientific product and (2) also, because it was classified as ‘Other’ in the Science Inventory in 2012 as you have instructed me to do, this work product was not reported to OMB for peer review for CY2012.”
26. Before stating her concerns she notes that Jennifer MacDonald has determined that the peer review process was OK. Grepo-Grove states: “I guess if Jennifer said it’s OK then it is OK.”
27. Crucial issues identified in this email: 1) It was Sheila Fleming who asked Grepo-Grove to submit the report as “other.” 2) the work was not submitted to the Office of Management and Budget as required by the Peer Review Plan 3) Jennifer MacDonald’s defense of the peer review was sufficient to overcome the facts obvious to other staff that the study failed to meet the peer review requirements for “influential” science information.
28. The EPA “Response” document responding to very strong criticism of the report and published in March 2013 included a response to the criticisms of the peer review. It stated: “Agency guidance provides several options for the peer review of documents

classified as “Influential” under the OMB work product criteria. Consistent with Agency Peer Review Guidance, EPA utilized an external peer review approach, which included scientists from USGS, and the U.S. Department of Agriculture.” This “explanation” includes several false statements given that “external” means external to the agency and at this time EPA knew that only one external reviewer could be included.

29. The newly released email includes an email from Jennifer MacDonald to EPA’s response that shows that it was MacDonald that either wrote or approved the false statement defending EPA’s peer review. She wrote to Sheila Fleming and Michael Cox: “I think we did everything we should have done for an influential document. I think what we did was sufficient for an influential document.”
30. Michael Cox was the EPA staff person who submitted the Peer Review Plan for OMB requiring 4-10 “independent” experts. There is no record of Mr. Cox expressing any concern over this clear violation of policy and defense of the violation.
31. MacDonald included in that email justifying their review the “salient excerpts” she determined justified her position. She did not include other “salient” guidance from the [OMB’s Peer Review Bulletin \(2004\)](#) regarding independence of experts: “Reviewers are generally not employed by the agency or office producing the document.”
32. The OMB Bulletin also makes clear that public involvement is an important element. EPA specifically eliminated public involvement in the selection or confirmation of peer reviewers and on the report itself. Only after significant political pressure was applied did the EPA open the study to public comment. For a period of approximately two years the comments including the unanimous and often severe scientific criticism were withheld from the public, and only restored with the change of administration in 2017.
33. A summary of false statements and cover up actions by EPA staff:
 - a. Eric Winiecki characterized the peer review as “thorough and complete” to his administrator and falsely stated that Dr. Tarkalson provided no reasons for his withdrawal as a peer reviewer.
 - b. Edward Kowalski stated that the study was categorized as “other” not influential despite clearly knowing the history including its defense of the review in the 2013 “Response” document.
 - c. Jennifer MacDonald stated the agency “did everything we should have done” regarding the peer review for an influential document. She was very aware of the policies and the Peer Review Plan and therefore defended this against the clear contrary facts, the OMB Bulletin policies and concerns expressed by staff of violations. Further, she was present in the April 2019 meeting with farmers when

Kowalski falsely stated the study was always “other” and never “influential.” Despite her defending its influential review, she said nothing to correct the statement.

- d. Christopher Hladick, Region 10 Administrator, either intentionally provided a false statement about the categorization in his June 19, 2019 letter to Save Family Farmers or failed to investigate the false statements provided by his senior staff despite having been presented overwhelming evidence of their false statements.
 - e. Edward Kowalski failed to provide the crucial March 13-14, 2013 internal emails as part of the December 28, 2018 FOIA request by the Dairy Federation.
34. Title 18, Section 1001 makes it a crime punishable by fines or imprisonment for federal officials to knowingly provide false information in the performance of their public service:

Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
(1)falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2)makes any materially false, fictitious, or fraudulent statement or representation; or (3)makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years

Why is this important?

- 1) Farmers continue to be harmed by the actions of public officials who are obligated to uphold the law and tell the truth while serving the public.
- 2) The focus of concern about the EPA nitrate study is on the failed peer review. Farmers and science experts are certain that a proper review would have prevented the EPA from publishing this false study and using it to unreasonably harm farmers and support environmental litigation that poses an ongoing existential threat to Washington’s dairy community and far beyond. Farmers want a valid scientific study and have asked EPA to allow the USDA to conduct such a study that will properly guide environmental action.
- 3) Government agency employees must be held accountable when they have violated the public trust, violated the law and caused great harm to citizens. The future of our democracy depends on it.
- 4) The EPA in Region 10 under the leadership of Dennis McLerran and now Christopher Hladick and the national EPA leadership, has lost the trust and confidence of farmers

across the region and far beyond. When citizens believe that agencies are operating without accountability and pursuing harmful agendas contrary to legitimate science, the social contract with these agencies needed to enforce our laws is greatly diminished. As Edmund Burke stated: “The essence of tyranny is the enforcement of stupid laws.”

- 5) The false report supported by fraudulent EPA actions and cover-ups, was the basis for a federal court applying the federal RCRA law to the application of fertilizer. This ruling must be reversed or all farmers face the harm caused by this false interpretation.