EPA “Smoking gun” documents

Documents showing
EPA’s inadequate peer review
of the 2012-2013 nitrate report
and the cover up

July 2020
Prepared by Save Family Farming
Brief background:

EPA Region 10 issued a study in 2012 and revised in 2013 that blamed dairy farms for nitrate contamination of ground water in the Yakima Valley. The study was used to coerce farmers into enforcement agreements that have resulted in farms going out of business and caused multiple millions in losses to Washington dairy farms through related litigation.

The study was false as shown by every science expert who reviewed it as part of the public comment.

Experts pointed out the lack of peer review.

The study would never have been published as is or used for enforcement with an adequate peer review.

When challenged on the lack of adequate review staff covered up false statements and the failure with claims that it did not need to be reviewed as it was classified as “other.” An “influential” classification requires independent (outside the agency) review.

Internal records show it was considered “influential” and a staff attorney defended the peer review done as adequate for “influential”

EPA refused to provide records relating to its classification despite numerous requests. On April 30, after a lawsuit was filed against EPA, they finally produced the “smoking gun” emails.

EPA responded to the lawsuit claiming statute of limitations was exceeded despite withholding the essential documents.
The EPA Peer Review Plan produced prior to October 2011 proving EPA considered this “influential” science

<table>
<thead>
<tr>
<th><strong>Title:</strong></th>
<th>Relation between Nitrates in Water Wells and Potential Sources in the Lower Yakima Valley, Washington</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Purpose/Objective:</strong></td>
<td>Data report.</td>
</tr>
<tr>
<td><strong>Product Completion Date (Actual):</strong></td>
<td>09/27/2012</td>
</tr>
<tr>
<td><strong>OMB Category:</strong></td>
<td>Influential</td>
</tr>
</tbody>
</table>
| **Peer Review Leader:** | Michael Cox  
email: cox.michael@epa.gov |
| **External Peer Review Mechanism:** | Independent Experts |
| **Peer Review Expected to Begin:** | 2nd Quarter, Fiscal Year 2012 |
| **EPA's Fiscal Years run from October to September.**  
Quarters for Fiscal Year 2012:  
1st: October - December, 2011  
2nd: January - March, 2012  
3rd: April - June, 2012  
4th: July - September, 2012 |
| **Was a deferral to peer review invoked?** | No |
| **Will an alternative peer review process be employed?** | No |
| **Number of Peer Reviewers** | 4 to 10 |
| **Primary Disciplines needed in the review:** | Chemistry-Biogeochemistry |
| **Who will select the reviewers?** | EPA |
| **Will the public, including scientific or professional societies be asked to nominate peer reviewers?** | No |
| **Will public nominations be allowed through the Peer Review Agenda?** | No |
| **Will there be opportunity for public comment on the product?** | No |
Second page of peer review plan.
Note: no public comments or review despite OMB peer review bulletin highlighting the Importance and internal staff expressing Concerns about no public review conflicting With influential science peer review requirements.
March 2013 EPA published “Response” to overwhelming criticism of study. They clearly state study was categorized as “influential.”
In March 2013 EPA Response they claimed four reviewers “from federal agencies.” They knew that in November 2011 the USDA reviewer withdrew. Only one non-EPA reviewer of draft and no review of the final report which differed greatly from the draft (see next page).
Dr. David Tarkalson reviewed the draft, but when he saw the published report in 2012 he requested his name be reviewed as the draft missed key data and conclusions in the final.

In November 2018, EPA’s Eric Winiecki declared to the Regional Director that the peer review was “thorough and complete” and denied that Dr. Tarkalson gave a reason for removal of his name.
Email finally provided by EPA on April 30, 2020 after requests for these documents beginning late 2018. It shows EPA staff concerned about not meeting peer review requirements for influential science. It identifies that ordered classification as “other” when other documents show it as “influential”

Hello Sheila,

I guess if Jennifer said it's OK then it is OK. The only thing that bothers me is that (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.

Hi Ginna,
I forwarded Jennifer’s email to Joyce, along with the peer review comment and EPA’s response. Please let me or Joyce know if you have any concerns. Joyce would like to send this to Glenn P this morning.

Thanks, Sheila

Peer Review

Comment #49: Several commenters contended that the peer review conducted for the EPA 2012 Report was inadequate because: 1) EPA did not follow its own peer review guidance; 2) that the EPA 2012 Report was classified as “influential” by Office of Management and Budget (OMB) and required more extensive review; 3) EPA’s selection of peer reviewers was not transparent and all four peer reviewers were from federal agencies; 4) with the exception of one reviewer the comments received were brief and not adequately rigorous; and 5) one peer reviewer stated that the nitrate in many of the wells is most likely from a mix of sources which would be challenging to tease apart, probably requiring a much more extensive sampling campaign and more knowledge of well depth and screen lengths.

EPA’s response: 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. In addition, scientists from EPA’s Office and Research and Development and EPA Region 10 conducted internal peer review. EPA considered the peer reviewers’ comments on the EPA 2012 Report and revised the report in response to the comments. The independent peer review process helped EPA solidify its conclusions and clarify the limitations and uncertainties of the study.

Brief comments do not necessarily imply a lack of rigor; brief comments could have resulted from a rigorous review in which the reviewer found the EPA 2012 Report’s conclusions to be well supported by data. As noted in previous responses above, EPA’s conclusions do not
The “smoking gun.” MacDonald supported statements that the study was never “influential” but here shows she defended its review as appropriate for “influential” science. Her opinion that one independent review of the draft and no review of the much-altered final was sufficient is inexcusable.

Sheila Fleming, PE
Risk Evaluation Unit Manager
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Cell: 206-303-8126

From: MacDonald, Jennifer
Sent: Wednesday, March 13, 2013 10:04 PM
To: Fleming, Sheila; Cox, Michael
Subject: peer review

I think we did everything we should have done for an influential document

I think what we did was sufficient for an influential document. Here are some salient excerpts from the Peer review handbook.

B-26

II. Peer Review of Influential Scientific Information.

1. In General: To the extent permitted by law, each agency shall conduct a peer review on all influential scientific information that the agency intends to disseminate. Peer reviewers shall be charged with reviewing scientific and technical matters, leaving policy determinations for the agency. Reviewers shall be informed of applicable access, objectivity, reproducibility and other quality standards under the federal laws governing information access and quality.

2. Adequacy of Prior Peer Review: For information subject to this section of the Bulletin, agencies need not have further peer review conducted on information that has already been subjected to adequate peer review. In determining whether prior peer review is adequate, agencies shall give due consideration to the novelty and complexity of the science to be reviewed, the importance of the information to decision making, the extent of prior peer reviews, and the expected benefits and costs of additional review. Principal findings, conclusions and recommendations in official reports of the National Academy of Sciences are generally presumed to have been adequately peer reviewed.

3. Selection of Reviewers:

   a. Expertise and Balance: Peer reviewers shall be selected based on expertise, experience and skills, including specialists from multiple disciplines, as necessary. The group of reviewers shall be sufficiently broad and diverse to fairly represent the relevant scientific and technical perspectives and fields of knowledge. Agencies shall consider requesting that the public, including scientific and professional societies, nominate potential reviewers.

   b. Conflicts: The agency – or the entity selecting the peer reviewers – shall (i) ensure that those...
Trump appointed Regional Administrator Chris Hladick repeated false statements of staff by claiming the study had internal and external peer review and that it was always categorized as other. This despite being presented factual evidence of the “influential” categorization.
Why would he state it had internal and external peer review (needed for influential science) when the “other” category requires no peer review?

Another question: does a peer review count of the draft report When the final report contradicts the draft in conclusions, and adds major new sections missing from the draft?
Susan Bodine, Trump’s appointee to head EPA enforcement inexplicably repeats the false information of Region 10 staff and leadership.

As Regional Administrator Hladick noted in his letter to you on June 19, 2019, the agency followed its peer review policy when the Report was developed. The EPA conducted both internal and external peer reviews and accepted public comments on the draft Report. Consistent with the policy articulated in the 2006 Memorandum on Peer Review and Peer Involvement at EPA, the Report’s external peer review included scientists from the United States Geological Survey (USGS) and the U.S. Department of Agriculture; scientists from EPA’s Office of Research and Development and EPA Region 10 conducted the internal peer review. The EPA considered the peer reviewers’ comments on the EPA 2012 Report and revised the report in response to the comments.

In 2013, the EPA issued an administrative order on consent under Safe Drinking Water Act Section 1431 to protect public health in Yakima Valley. In this case, the EPA’s Section 1431 action was supported by a Valley Institute for Research and Education’s (VIRE) 2002 study; USGS ground water sampling that was conducted in 1992 and 2004; Washington State Department of Ecology sampling conducted as part of the Agricultural Chemical Pilot Study conducted in 1988; and the Washington State Department of Ecology.
Despite this promise, EPA Region 10 continues its punitive enforcement actions that threaten the future of Washington farms. The refusal to recognize the reports failings allows it to continue to be used by an environmental lawyer to extract millions in settlement fees from farmers based on a friendly federal judge who in court gave “deference” to the EPA.
Farmers appealed to the Department of Justice based on violations of federal law, but the matter was referred to the EPA's Office of Inspector General. The same office that found spending $500,000 of taxpayer money to lobby and promote lies about farmers was not a violation of federal law. We have heard nothing more.
Because of EPA’s and DOJ’s unwillingness to correct this wrong, dairy farmers filed suit.

CHALLENGING THE EPA

In 2012 the EPA issued a report, *Relation Between Nitrate in Water Wells and Potential Sources in the Lower Yakima Valley, Washington,* (“EPA Report”), analyzing nitrates in the ground water in the Lower Yakima Valley. The EPA Report purported to establish a causal connection between Yakima dairy farmers and high nitrate levels in drinking water in the Lower Yakima Valley. The EPA Report, however, was procedurally and substantively flawed. Despite these flaws, the EPA charged ahead to use the report to coerce Yakima dairy farmers into administrative consent decrees that have cost millions. Further, the EPA Report has served as the basis for private legal actions against dairy farmers.

Background—a Flawed Study

In 2008 the Yakima Herald-Republic published a series of newspaper articles about possible nitrate contamination in the ground water in the Lower Yakima Valley. Using the information in the articles to satisfy the statutory requirement of “receiving information,” the EPA initiated a series of “emergency actions” under the Safe Water Drinking Act.¹

The first emergency action was a targeted study to determine the causes of high level of nitrate contamination in the Lower Yakima Valley groundwater. The outcomes from the study were written into a Draft Report. While the Draft Report indicated that dairies “were likely contributing to the increased trend in total nitrogen and major ion concentrations,” the Draft Report concluded that “[t]he specific contribution from the dairies is difficult to determine because of the lack of information on water wells.”²

¹ The Safe Water Drinking Act (“SDWA”) allows the EPA administrator, after receiving information that a contaminant “may present an imminent and substantial endangerment” and that “appropriate State and local authorities have not acted,” to take actions “necessary in order to protect the health” of individuals. 42 U.S.C.A. § 300i.
² Draft Report at p. 70.
A portion of the Draft Report was shown to four “peer reviewers.” Of these reviewers, two worked for the EPA. This limited “peer review” failed to meet the EPA’s own criteria for categorization as an “Influential Study.” In fact, the final draft of the EPA Report was not edited by scientists at all, but rather by senior regional EPA officials.

The public and scientific community’s immediate response to the report was withering. The public comments filed against the EPA Report were overwhelmingly negative, highlighting the many procedural and substantive flaws of the study.

Beyond this, the numerous comments from government agencies and scientific experts noted flaws in the report, with none supporting the position that the EPA Report should serve as the basis for enforcement actions. Other water, engineering, geology, and soil experts disagreed with the EPA Report’s conclusion that the dairy farmers were the likely source of the nitrates.

**EPA Report Used Against Yakima Dairy Farmers**

Despite the flaws—and knowing about these flaws—the EPA:

1. misrepresented to the public that the EPA Report was an “Influential Study”; and
2. adopted the EPA Report as the basis for an administrative compliance action against dairy farmers, which resulted in the 2013 Administrative Order on Consent (“AOC”) and millions of dollars in compliance costs – and has caused some local Yakima family farms to close.

Because of the EPA’s wrongful actions, the dairy farmers were then sued by outside environmental groups, resulting in a May 2015 Consent Decree (“Consent Decree”).

**The Threat**

Despite its faulty science, the EPA Report still poses a potential litigation threat to dairy farmers and other agricultural industries that use animal fertilizer. Environmental groups continue to leverage the EPA Report’s purported findings as the basis for legal claims. Thus, future

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3 According to the federal government any information that has “a clear and substantial impact on important public policies or important private sector decisions” should be categorized as an Influential Study. Office of Management and Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Notice; Republication*, Federal Register, Vol. 67, No. 36 (2002); EPA, *Peer Review Handbook, 3rd Edition* (2006) at p. 30.
legal actions based on the EPA Report continue to threaten the livelihood of not just dairy farmers, but other agricultural operators.

**The Case—Challenge the EPA Report**

The good news is that the EPA Report and the AOC may be challenged in court by filing a petition for review in the Ninth Circuit Court of Appeals. We see three potential grounds on which to challenge the AOC and the EPA Report: (1) as arbitrary and capricious under the Administrative Procedures Act; (2) as an impermissible construction of the Safe Water Drinking Act; (3) and as a constitutional due process violation. If successful, the Court would invalidate the EPA Report and the AOC, which would set a precedent establishing that faulty science could not be used by the EPA to indiscriminately target agricultural industries.

**The Team**

Lynn Pinker Cox Hurst is a nationally recognized trial law firm focusing on complex, high-stakes litigation. LCPH has a dedicated team of lawyers with demonstrated excellence and successful results in appellate and trial litigation. LPCH is nationally known as a tough team who relishes the challenges of holding the government accountable through the legal system.
Kent Krabill represents plaintiffs and defendants in a wide range of complex commercial, energy, real estate, trade secret, and family trust disputes. He has successfully tried numerous jury and bench trials, conducted dozens of arbitrations and mediations, and handled multiple appeals.

Kent’s outstanding work has earned him the recognition and respect of his peers, having been selected as a Texas Rising Star by Thomson Reuters every year from 2010-2016. He is also active in Bar and community service activities, serves on the Board of the nonprofit Drops of Love, and has published scholarly articles, most recently “No More Weighting: One Person, One Vote Means One Person, One Vote,” published in the Spring 2012 edition of Texas Review of Law & Policy.

After graduating summa cum laude from the University of Texas at Arlington, Kent earned his J.D. magna cum laude from Pepperdine University School of Law, where he served as a Note and Comment Editor on the Pepperdine Law Review, a teaching assistant for Legal Research and Writing, and a member of the Honors Trial Team. Before joining Lynn Pinker Cox & Hurst, LLP, Kent practiced law for the international law firm Jones Day and served as law clerk to Chief Judge Edith H. Jones of the United States Court of Appeals for the Fifth Circuit.

Kent recently spent 10 days in Uganda with the Pepperdine School of Law Nootbaar Institute Global Justice Program Prison Project. During his time in Uganda, Kent represented Ugandan’s accused of such crimes as murder, rape, aggravated defilement, and aggravated robbery, and at the same time trained and equipped Ugandan defense attorneys, prosecutors, law students, and local judges to implement a more just, efficient and sustainable criminal justice system, particularly through the introduction of plea bargaining throughout the country. Hands-on training occurred in the local prisons as Kent and his team represented actual clients and engaged in the plea bargaining process. The program is based on the belief that an efficient and ethical justice system is the foundation for any true and lasting democracy.

Kent and his wife Michelle are the proud parents of a son and a daughter. In his free time, Kent enjoys grilling steaks with friends, playing guitar and getting away to Puerto Vallarta. He is also a big fan of NASCAR, the NBA and Bruce Springsteen.

**REPRESENTATIVE CASES**

- Obtained dismissal of a class action lawsuit against Southwest Airlines brought by passengers from Alabama to Texas who claimed the Dallas-based airline flew planes that violated federal “airworthiness directive” safety measures and who were seeking damages in excess of $1 billion in *Lopez et al. v. Southwest Airlines Co.*, Cause No. 3:09-cv-00137-O, in the United States District Court for the Northern District of Texas, Dallas Division, Dallas, Texas

- Defeated a temporary injunction request after a hearing in which the plaintiffs sought to obtain an implied easement in an effort to stop a $400 million mixed-use development between Uptown and Victory Park in *Triton 2414, LLC et al. v. Red Akard Place, LLC and the City of Dallas*, Cause No. DC-15-08981, in the 95th Judicial District Court, Dallas County, Texas
To see more of the Correspondence on this issue:
https://savefamilyfarming.org/blog/epa-nitrate-study-appeal-correspondence/