

Jay Manning, Director
Washington State Department of Ecology
PO Box 47600
Olympia, Washington 98504-7600

July 20, 2005

Dear Director Manning,

Over the past year we have been made aware of several studies, a pesticides educational video, and an educational brochure that were allegedly compromised, withdrawn, or inevitably “put on hold” due to concerns raised by the regulated community. This practice has the potential to create a pattern where public funds are used to serve private interests at the expense of sound science, the public interest, and the environment. *Washington* PEER would like to bring this to your attention and request that you take action to ensure that Ecology’s programs have clear procedures to protect the scientific integrity, the availability, and the potential application of their studies to public interest matters.

A prime illustration of this disturbing pattern is the still unreleased study Ecology developed to assess the extent to which landfills may be contributing to the release of mercury into the environment.¹

I. Introduction

In 2002 the Washington State legislature targeted mercury as the first compound to be studied under the state’s persistent bioaccumulative toxins (PBTs) initiative. In order to assess whether or not landfills are a significant contributor of mercury releases to the environment, Ecology signed a contract with Frontier Geosciences, Inc to examine levels of total and dimethyl mercury in Washington State.² Total and dimethyl mercury are both considered to be PBTs and studies in other parts of the country have shown that under certain conditions, landfills can be a

¹ *Determination of Total Dimethyl Mercury in Raw Landfill Gas with Site Screening for Elemental Mercury at Eight Washington State Landfills for the Washington State Department of Ecology*, July 2003, Prestbo, Eric M. PhD., Lucas Hawkins, Deb Cussen, and Christabel Fowler - Frontier Geosciences Inc.

² Contract NO. C0300141 For Personal Services Between State Department of Ecology and Frontier Geosciences, Inc. Signed 2/7/2003. The contract was for a maximum of \$48,968 and resulted in the report *Determination of Total Dimethyl Mercury in Raw Landfill Gas with Site Screening for Elemental Mercury at Eight Washington State Landfills for the Washington State Department of Ecology*, July 2003, Prestbo, Eric M. PhD., Lucas Hawkins, Deb Cussen, and Christabel Fowler - Frontier Geosciences Inc.

significant source of methyl mercury (the most toxic form) because waste that contains mercury is transformed by bacteria into methyl mercury, and then released into the air.³

Washington PEER appreciates Ecology for including landfills in their examination of possible mercury sources, but we are concerned that the report detailing the extent of the problem has been languishing for almost two years. We realize that there are limitations to the study and Ecology did what it could with the limited funds. We don't dispute this or the reality that the state has failed to provide adequate resources to the PBT initiative. However, we are concerned that the study's release continues to be prolonged, it excluded sites whose owners/operators did not want the site to be sampled, and it made questionable promises of confidentiality.

II. Concerns

A. Ecology only included sites that volunteered to be in the study, even though the agency has the legal authority to test all sites. Thus sites that were identified as a priority for sampling were dropped from the study if permission was not granted to sample. For example, Georgia Pacific, Roosevelt Regional (Rabanco), Cedar Hills (King County) were initially the top three priority sites for testing. All were dropped from the study.

Ecology's Decision Record of September 25, 2002 states that "*The design of the landfill gas study should consider whether the goal is to look for the most likely candidates to have mercury emissions or whether it is to get an estimate of the potential emissions statewide. Managing public perception and concern over the data also needs to be considered. Active participation in the development of the plan will help assure solid waste considerations are included and potential outcomes affecting the program can be appropriately managed.*"⁴

This study was compromised by the failure to include sites where permission was not granted to conduct sampling. Viewed from another perspective, one could say the intent of the study was met (i.e. to get an estimate of potential emissions statewide and therefore sample a range) but the intent was somewhat flawed and constructed to justify sampling only at sites that agreed to be sampled.

B. Sites that were sampled as part of the study were offered advance review to find fatal flaws⁵ but appropriate committees or public interest groups with expertise in this arena were not.

We understand the need for project participants to review the report but it should not be exclusive. Other appropriate committees or representatives from public interest groups with expertise in this arena should have been offered an opportunity to review the report as well. For example, members of Ecology's *Mercury Chemical Action Plan Advisory Committee* were not provided an opportunity to review and comment on the draft report.

Part of Ecology's recent "Transformation" and partner approach with the regulated community appears – at times – to provide the regulated community an opportunity to shape studies, permits, and other agency actions to the exclusion of public interest groups. Ecology's "customer" is not

³ Lindberg, S.E. et al. 2001. Methylated mercury species in municipal waste landfills gas sampled in Florida, USA. *Atmospheric Environment* 35 (August):4011 and Raloff, Janet. Landfills Make Mercury More Toxic. *Science News*. July 7, 2001; Volume 160, No. 1.

⁴ SW &FAP Decision Record. September 25, 2002.

⁵ Mercury Testing at Landfills - Memo from Solid Waste and Financial Assistance Program Manager to landfills owner/operators participating in the study. May 15, 2003.

just the regulated community but it is also the citizens of Washington State who have an interest in – and a right to – a clean environment.

C. Ecology made questionable – and possibly illegal - agreements with the sites that were sampled. They agreed that review of the draft would be confined to two Ecology managers, they would maintain the confidentiality of all sites that were sampled⁶, and they would keep all the test information confidential for three years.⁷

This study was financed by public funds and serves the public interest by assessing to what extent landfills are a source of mercury contamination in the environment. It is our understanding that *Washington* PEER's records request stimulated an Attorney General review, which determined that the information in the study did not rise to the threshold defined by 43.21A.160 that would allow the state to shield the sampled sites from the public.⁸ Had Ecology initially consulted the Attorney General's Office regarding the conditions under which confidentiality can be granted, they may have designed a very different type of study.

D. Ecology spent over \$50,000 of public money to complete the study but – as of this writing - has failed to release it even though it was completed over two years ago.

Ecology has a responsibility to release the study to the public without further delay. Failing this, *Washington* PEER could release the study ourselves. We recognize that PBTs are a subject of great interest to the public and of great sensitivity to the regulated community. However, this dynamic should not jeopardize Ecology's investigative studies or their ultimate release.

III. Requests for Corrective Action

Washington PEER believes that the case example presented above illustrates a significant problem that needs to be addressed by the new administration. We ask that you take action to:

- 1) Create guidance that minimizes and clearly defines the circumstances under which studies conducted by, contracted by, or accepted by Ecology can exclude permitted or regulated sites that do not agree to be sampled. We believe that such guidance should clearly recognize and be consistent with the legal authority Ecology has to conduct sampling.
- 2) Assess and reduce the practice of providing selective advance review to the regulated community to the exclusion of other known committees, public interest groups, or government entities that have expertise in the arena or will be significantly affected by it and are also Ecology's "customers".
- 3) Provide clear guidance, with Attorney General input, that interprets RCW 43.21A.160 and other associated statutes and defines under what conditions it is legal for Ecology to assure and provide regulated entities the promise of confidentiality regarding the results of data collected at their site.

⁶ Ibid.

⁷ Fitzsimmons, Tom, Director Department of Ecology. June 3, 2003 letter to Mr. Westmoreland.

⁸ Personal communication from Cullen Stephenson, Solid Waste and Financial Assistance Program Manager to Lea Mitchell, *Washington* PEER Director in response to inquiry regarding on what basis confidentiality was granted.

In addition, we would ask that you release *Determination of Total Dimethyl Mercury in Raw Landfill Gas with Site Screening for Elemental Mercury at Eight Washington State Landfills for the Washington State Department of Ecology* to the public at the earliest possible date.

If you desire any further information about the nature of our concerns or our recommendations, please do not hesitate to contact me.

Sincerely,

TJ Johnson
Director, Washington PEER