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H.R. _____, THE FARM REGULATORY CERTAINTY ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

NOVEMBER 9, 2017

Serial No. 115–77

Printed for the use of the Committee on Energy and Commerce
energycommerce.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE
28–379 WASHINGTON : 2019

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[1] The attachments to Ms. Culpepper's statement can be found at: *https://docs.house.gov/meetings/if/if18/20171109/106603/hhrg-115-if18-wstate-culpepperj-20171109.pdf*..

[2] The attachments to Ms. Culpepper's answers can be found at: *https://docs.house.gov/meetings/if/if18/20171109/106603/hhrg-115-if18-wstate-culpepperj-20171109-sd006.pdf*.

[3] The attachments to Mr. Utesch's statement can be found at: *https://docs.house.gov/meetings/if/if18/20171109/106603/hhrg-115-if18-wstate-uteschl-20171109.pdf*.

[4] The attachments to Mr. Utesch's answers can be found at: *https://docs.house.gov/meetings/if/if18/20171109/106603/hhrg-115-if18-wstate-uteschl-20171109.pdf*.

H.R. ————, THE FARM REGULATORY CERTAINTY ACT

THURSDAY, NOVEMBER 9, 2017

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENVIRONMENT,
COMMITTEE ON ENERGY AND COMMERCE
Washington, DC.

The subcommittee met, pursuant to call, at 10:13 a.m., in room 2322, Rayburn House Office Building, Hon. John Shimkus (chairman of the subcommittee) presiding.

Present: Representatives Shimkus, McKinley, Blackburn, Harper, Flores, Hudson, Cramer, Carter, Tonko, Ruiz, Peters, McNerney, Pallone (ex officio).

Staff Present: Allie Bury, Legislative Clerk, Energy/Environment; Jordan Haverly, Policy Coordinator, Environment; A.T. Johnston, Senior Policy Advisor, Energy; Mary Martin, Chief Counsel, Energy/Environment; Alex Miller, Video Production Aide and Press Assistant; Tina Richards, Counsel, Environment; Dan Schneider, Press Secretary; Jacqueline Cohen, Minority Chief Environment Counsel; Rick Kessler, Minority Senior Advisor and Staff Director, Energy and Environment; Alexander Ratner, Minority Policy Analyst; and Catherine Zander, Minority Environment Fellow.

Mr. SHIMKUS. We are going to call this subcommittee to order. And in the interest of time, I am going to not do my opening statement, and I will submit that for the record.

[The prepared statement of Mr. Shimkus follows:]

PREPARED STATEMENT OF HON. JOHN SHIMKUS

The Subcommittee will now come to order.

I want to thank our witnesses for joining us today—especially my colleagues from Washington and California. The Discussion Draft that we are considering today is an outgrowth of Mr. Newhouse's bill, H.R. 848.

I want to mention that even though they were not able to send someone today to present testimony in person, the Environmental Protection Agency provided a written statement to be included in our hearing record. [I seek unanimous consent to enter EPA's statement into the record. So ordered]. The Agency has also agreed to taken written questions from Members for our hearing record.

I now recognize myself for 5 minutes for giving an opening statement.

Today, we consider the intersection of our environmental laws with modern agriculture. Agriculture plays a significant role in my District, as it does in many of our Districts. My District is the 17th largest Congressional district in the country in terms of farm operators and number of farms. Agriculture covers 7.5 million acres in my District. I know my colleagues began this effort because of some cases involving dairy farms, but this bill would also help hog farmers who are trying to do the right thing. My District can also lay claim to the largest pork producing county in Illinois—Clinton County—which has roughly 230,000 hogs.

The Resource Conservation and Recovery Act was enacted in 1976. Congress specifically addressed agricultural operations and clearly intended to include certain agricultural practices, but at the time Congress was focused on waste disposal practices that resulted in open dumping. In the legislative history of RCRA the Committee specifically noted that RCRA was not intended to apply to an agricultural operation that returns manure or crop residue to the soil as for fertilizer or soil conditioner because if it was reused, it was not discarded and therefore, not solid waste.

Likewise, in its regulations implementing RCRA, EPA also determined that manure and crop residue, if returned to the soil as fertilizer or soil conditioner, are not solid waste.

As a result, agricultural operations are not regulated under RCRA. Rather, they are typically regulated under the Clean Water Act, the Safe Drinking Water Act, or similar state regulatory programs.

Most farmers are good stewards of the soil—but not all. There are some who cut corners or do not store or apply manure in a way that complies with the appropriate agronomic practices or with applicable permits and regulations. In the case of agricultural operations that mishandle manure, the applicable regulatory process should be allowed to play out. The regulator governing the operation is responsible for the agricultural operation's compliance. The regulator should be able to work with the agricultural operation to bring them into compliance. The use of RCRA citizen suits as a hammer to force compliance should only be used as a last resort. If the operator is working with the regulator to come into compliance, then a RCRA citizen suit on top of whatever action is being taken by the state or federal government under the appropriate regulatory program, feels punitive.

The Discussion Draft is sponsored by Mr. Newhouse who has been diligently working on this issue for many years. The purpose of this bill is not to shield agricultural operations from RCRA citizen suits, but rather to ensure that if state or federal regulators are otherwise seeking compliance through civil, criminal, or administrative actions and the agricultural operation is trying to be a good actor by working with the regulator and has entered a consent agreement or order, then a RCRA citizen suit may not be initiated. If the state or EPA are not diligently taking action to obtain or ensure compliance, the bill does not preclude citizen suits.

I thank my colleagues for being here today to talk about their legislation and I thank our second panel which is comprised of someone who knows firsthand the impact of duplicative RCRA suits on dairy farms, an experienced environmental attorney who has handled a number of RCRA citizen suits as well as agricultural issues, an attorney who handles public justice and food safety issues, and a representative from an environmental stewardship organization.

With that, I yield back my time and now yield to my friend from New York, the Ranking Member of the Subcommittee, Mr. Tonko.

Mr. SHIMKUS. Congresswoman Blackburn, did you want a second or two to say something?

Mrs. BLACKBURN. I will submit mine for the record, and I thank you for the hearing.

Mr. SHIMKUS. Thank you.

And I yield back my time, and now turn to the ranking member, Mr. Tonko, from New York.

Mr. TONKO. Mr. Chair, I will yield back to you and submit my statement to the record.

[The prepared statement of Mr. Tonko follows:]

PREPARED STATEMENT OF HON. PAUL TONKO

Thank you, Mr. Chairman, and thank you to our colleagues Mr. Newhouse and Mr. Costa for being here to share their views on the Farm Regulatory Certainty Act.

I am sure Mr. Newhouse and Mr. Costa will want to brag about their states' agriculture, so I hope you will allow me a minute to talk up my home state.

Dairy is an important part of New York's agricultural output, and I am proud to represent a number dairy farms in the Capital Region. New York is home to around 5,500 dairy farms and produces the third most milk of any state.

I am also proud to be the grandson of a dairy farmer. In my youth, I spent many days working on my grandfather's farm in the Town of Florida, New York.

So I have great respect for dairy farmers, and I know they care about being good stewards of the environment.

The Resource Conservation and Recovery Act, commonly known as RCRA, was enacted in 1976 and governs the disposal of solid and hazardous waste, which can include manure and crop residue.

In my view, the discussion draft before us today doesn't pass the smell test. And while we may hear a few more bad jokes this morning, let me tell you, this is an incredibly serious issue.

The legislation would amend provisions of RCRA to block the availability of citizen suits in some cases involving manure and crop residue.

RCRA provides a mechanism for citizen suits when pollution has endangered public health and the environment and when EPA or state agencies are not effectively enforcing the law.

As we will hear from Ms. Culpepper on the second panel, RCRA's citizen suit provisions have in fact been used regarding manure.

However, citizen suits are already prohibited by the law if EPA or the state is taking action under RCRA or CERCLA.

RCRA, including the citizen suit provisions, does not apply when manure and crop residues are returned to the soil as fertilizers. But RCRA does cover agricultural waste.

It is clear from at least one recent court case that there is a point where manure has been applied to the soil in amounts far exceeding the agronomic rate, at which point, the exemption for manure as a fertilizer no long applies. It is being improperly disposed of as waste.

I want to stress the importance of preserving the opportunity for citizen suits when necessary.

Many of our nation's most important environmental laws, including RCRA, allow private citizens to bring suit in order to enforce the law.

We will hear testimony this morning that will make it clear that these suits are not frivolous. Communities support their local dairies—they work on these farms.

And people take these actions only as a last recourse when public health is put at risk.

I do not want to set a bad precedent of limiting citizen suits under environmental laws, and I believe that the legislation before us today is far too broad.

According to EPA's statement for the record, EPA believes that EPA and state actions against an agricultural operation under other statutory authorities—not just RCRA or CERCLA—could bar the types of citizen suits affected by this bill.

That means RCRA citizen suits would be prohibited if there is any pending action against an agricultural operation, even if it has no relationship to the RCRA violation.

Unfortunately, there are some bad actors in every industry. Some farms are breaking the law in how they manage manure, resulting in pollution of groundwater and putting Americans' health at risk.

Protecting people's drinking water, including protecting groundwater sources for private wells, must be a top priority, not just for this Committee, EPA, or State agencies, but for all Americans.

When EPA or a state fails to enforce the law, citizens must have the right to do something about it.

I have no doubt that most farmers want to do the right thing, but in the rare case where this does not happen, I am very hesitant to remove this last avenue for legal recourse.

I look forward to hearing from our colleagues and the other witnesses, and I yield back.

Mr. SHIMKUS. Thank you very much for that.

The full committee chairman is not here. The ranker of the full committee—they are downstairs. OK. So anyone else want to say something for, like, 1 second?

Seeing none, we want to welcome our colleagues here on this bill, and we would like to—what is the proper courtesy, the Republican or the older guy? Costa is much older.

So we will recognize Congressman Newhouse for 5 minutes for a statement on the bill.

STATEMENT OF THE HON. DAN NEWHOUSE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. NEWHOUSE. Good morning, Chairman Shimkus, Ranking Member Tonko, members of the committee. Thank you for the opportunity to testify before you this morning on this discussion draft of the Farm Regulatory and Certainty Act. And I also want to thank my good friend Mr. Costa who was the cosponsor of this bipartisan legislation.

So I represent hardworking farmers of central Washington State. And as a Member of Congress serving with you all in this body, I want to speak to you as a peer on specific issues that are currently faced by dairy and other livestock producers, not only in my community but in your communities, in districts all throughout this country.

So I am a third-generation farmer. I am a former director of the Washington State Agriculture Department. So I know how seriously the farmers take the responsibility of being good stewards.

Farming communities like mine in Yakima County face a multitude of challenges. It is one of the most highly regulated industries in our country. My constituents know all too well the kinds of challenges encountered when operating a family farm—I can speak from personal experience—from inconsistent regulations to severe labor shortfalls, weather, prices—all kinds of things that are out of your control.

But our farming communities need to know the rules of the road. They need and deserve as much certainty as they can have. That is why I am with you today.

So in 2013, in Washington State, a dairy was proactively working with the Environmental Protection Agency to address nutrient management issues on their farm. Up until this time, the dairy had operated under the stringent Washington State Nutrient Management Program through WSDA, which is a state-approved nutrient management plan. They had been doing this for nearly two decades. But in the face of strong EPA enforcement actions, the dairy entered into a tough consent decree with the EPA to ensure that the farm corrected problems and complied with applicable management requirements.

After entering into the agreement to develop these stronger environmental protections, a third party obtained documents between the EPA and the dairy. Ultimately, the dairy was subject to a citizen suit under the Resource Conservation and Recovery Act.

The goal of environmental rules should be to assist ag producers to improve nutrient management and reduce the environmental footprint, not to subject them to lawsuits that threaten to put them out of business. That is why I am here today to discuss this legislation.

This seeks to encourage farmers to be proactive stewards and create a climate to reinforce farmers' ability to trust that they, as they work with regulators, that their efforts to address stewardship issues will result in outcomes that benefit the environment and not result in exposing farmers who are working in good faith to comply with the law to third-party lawsuits creating kind of a double-jeopardy situation.

So this legislation is straightforward. It is limited in scope to the citizen suit provisions under the RCRA. Simply put, this legislation covers only the agricultural activities that are already exempt under EPA's regulations. This legislation would not prevent EPA from enforcing regulations under the Safe Water Drinking Act, the Clean Water Act, or any other applicable laws, nor would this legislation exempt livestock producers from any laws or any regulations intended to govern agricultural operations.

So I firmly believe that farmers have and must continue to lead the charge on good stewardship and conservation. The discussion draft before you today seeks to protect farmers who are trying to do the right thing by working with state or Federal agencies to address nutrient management issues.

And I want to thank you, Mr. Chairman, for holding this hearing, as well as the full committee chairman, Mr. Walden, and also for their staffs working with me on this legislation. I hope we can get this what I would call commonsense legislation signed into law.

Thank you very much, and I would yield back.

[The prepared statement of Mr. Newhouse follows:]

Testimony of The Honorable Dan Newhouse (WA-04)

Before the United States House of Representatives

Committee on Energy and Commerce Subcommittee on Environment

Testimony Discussion Draft H.R. __ the Farm Regulatory Certainty Act

November 9, 2017

Chairman Walden, Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee, thank you for the opportunity to testify before you today on the Discussion Draft, the *Farm Regulatory and Certainty Act*. I also want to thank Representative Costa, who introduced this bipartisan legislation with me.

I represent the hard-working farmers of Central Washington. As a Member of Congress serving with you in this body, I want to speak to you today as a peer on specific issues currently faced by dairy and other livestock producers not only in my community but in your districts throughout the country.

Today, the farming community is just two percent of the entire United States population, many of which are generational family farms. As a third-generation farmer myself and the former Washington State Department of Agriculture director, I know how seriously farmers take our responsibility to be good stewards.

In my home state of Washington, we have just over 400 dairy farms with nearly 270,000 milk-producing cows with each cow producing on average 24,000 pounds or 3,000 gallons of milk each year. By these numbers, Washington State ranks 10th nationally in total milk production.

In Yakima County, Washington, where I live, there are nearly 70 operational dairies making Yakima one of the ten largest dairy producing counties in the nation based on the 2012 USDA Census of Agriculture.

Farming communities, like mine in Yakima, face a multitude of challenges as one of the most highly regulated industries in our country. My constituents know all too well the kinds of challenges encountered when operating a family farm. From inconsistent regulations to severe labor shortfalls, our farming communities need to know the rules of the road. They need and deserve certainty.

Here is why I am with you today:

In 2013, a dairy in Washington State was proactively working with the Environmental Protection Agency (EPA) to address nutrient management issues on their farm. Up until this time, the dairy had operated under the stringent Washington State Nutrient Management Program with a state-approved nutrient management plan for nearly two decades. But in the face of strong EPA enforcement actions, the dairy entered into a tough consent decree with the EPA to ensure that the farm corrected problems and complied with applicable management requirements.

After entering into the agreement to develop stronger environmental protections, a third-party obtained documents between EPA and the dairy. Ultimately, the dairy was subject to a citizen suit under the Resource Conservation and Recovery Act (RCRA).

The goal of environmental rules should be to assist agricultural producers to improve nutrient management and reduce their environmental footprint, not to subject them to lawsuits that threaten to put them out of business. That is why I am here today to discuss this legislation.

This legislation seeks to encourage farmers to be proactive stewards and create a climate to reinforce farmers' ability to trust that as they work with regulators, their efforts to address stewardship issues will result in outcomes that benefit the environment—and not result in exposing farmers who are working in good faith to comply with the law to third-party suits that are a kind of "double-jeopardy."

The legislation is straightforward and limited in scope to the citizen suit provisions under RCRA. Simply put, this legislation covers only the agricultural activities that are already exempt under

EPA's RCRA regulations. This legislation would not prevent EPA from enforcing regulations under the Safe Water Drinking Act, the Clean Water Act, or any other applicable laws. Nor would this legislation exempt livestock producers from any laws or regulations intended to govern agricultural operations.

I firmly believe farmers have and must continue to lead the charge on good stewardship and conservation. The discussion draft before you today seeks to protect farmers who are trying to do the right thing by working with state or federal agencies to address nutrient management issues.

Thank you for holding this legislative hearing. I also want to thank Chairman Shimkus, full Committee Chairman Walden, and their staff for working with me on this legislation, and I hope we can get this common-sense legislation signed into law.

I yield back the balance of my time...

Mr. SHIMKUS. The gentleman yields back his time.

The chair now recognizes the Honorable Jim Costa, Member of Congress from the 16th District of California.

And you are recognized for 5 minutes.

STATEMENT OF THE HON. JIM COSTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. COSTA. Thank you very much, Chairman Shimkus and Ranking Member Tonko and members of this subcommittee, for giving us the opportunity to testify before you on an important issue affecting the food producers of America and, for me, those in California who I have the honor and privilege to represent.

I am a strong supporter of the Farm Regulatory Certainty Act introduced by Representative Dan Newhouse and myself. We have more than 60 cosponsors. It is a bipartisan piece of legislation. I want to thank Representative Newhouse for your work on this legislation and for asking me to be a part of this important effort.

This bill would prohibit third parties from engaging in legal actions against agricultural operations that are actively working with the Federal Environmental Protection Agency or a State regulator to improve the environmental compliance with whatever issue that they are dealing with, in essence, on their farm. We are talking about providing peace of mind to farmers and incentivizing good environmental stewardship.

Like Representative Newhouse, I am, too, a third-generation farmer. Growing up on my family's dairy farm taught me many redeemable skills, some that obviously could be more valuable than what we do here, but not the least of which was to care for and sustain the land that we farm. Today, obviously, I have that honor and privilege to represent those farmers, those dairy men and women, who make up the backbone of the San Joaquin Valley.

California, as many of you know, is the country's largest agricultural state. Last year it was over $45 billion at the farm gate, an abundance that includes over 400 commodities. We have been blessed with over a third of the Nation's vegetables, two thirds of the Nation's fruits and nuts. Let's go light on the latter part there. But we do produce 70 percent of the world's almonds and 50 percent of the world's pistachios, and the list goes on.

In 2016, the value of California's dairy production was over $6 billion, and the district I have the honor to represent is the third-largest producer of milk in the entire country. This is all achieved while complying under some of the most rigorous and environmental regulations in the world, not just what we have on the Federal level, but California, I might add, I think, sets the highest bar as it relates to a state regulatory environment.

For agriculture to be successful, then, for our local communities, the environment, obviously, we want it to be healthy and safe. That is why both surface and groundwater contamination is taken so seriously on our water in California.

Because farmers are reliant on the environment with which they farm, they are active in regional efforts in California to address nitrate and salinity issues that are occurring in various parts of California's Central Valley. The state Water Resources Control Board, the Central Valley Regional Water Quality Control Board, the envi-

ronmental communities, numerous municipalities, agricultural water districts, and many others are also engaged in the actions to protect this precious source, our water.

But California also has a long history of working with regulators to address environmental concerns. This legislation, as the author noted, would not change that relationship at all. The bill before us today, the Farm Regulatory Certainty Act, was developed out of fear that many producers in my state have with litigation brought upon them by third parties. And this isn't something that is anecdotal, but this is something that, unfortunately, happens with some regularity.

Similar to the situation in Representative Newhouse's state, dairymen and ranchers have found themselves in situations where complying with environmental regulations and acting in good faith place them in legal jeopardy, and that is just not right.

The Farm Regulatory Certainty Act will produce and foster a spirit of collaboration. We believe it incentivizes agriculture producers to comply with environmental laws and regulations. A farmer acting in good faith to improve their environmental stewardship should not be targeted by litigation while they are cooperatively working to fix the problems and improve their operations.

Let's realize that, for those of us who have grown up on a farm and are still farming, farmers depend upon their land for their livelihoods. They are good stewards of the environment. If it is not sustainable through one generation to the next generation, guess what? You can't live off that land. That is just the reality. It makes no sense to think that they would believe otherwise. Let us give them the certainty, therefore, necessary to comply with the regulations put in place by state and Federal authorities.

The commonsense legislation that you have before you would go a long ways to improve both the environment and allow farmers to continue to provide abundant, healthy, affordable food for our nation and for the world. Nobody does it better than the American farmer.

Less than 3 percent of our nation's population is directly involved in the production of food and fiber, and it is an amazing thing, so much so that I think the majority of Americans take it for granted. They think their food comes from a grocery store. It doesn't. It comes from the farms.

So thank you very much, and I will yield back.

[The prepared statement of Mr. Costa follows:]

Testimony of Congressman Jim Costa (CA-16)

Before the United States House of Representatives

Committee on Energy and Commerce Subcommittee on Environment

Testimony Discussion Draft H.R. __ the Farm Regulatory Certainty Act

November 9, 2017

Chairman Shimkus, Ranking Member Tonko, and Members of this Subcommittee, thank you for providing me the opportunity to testify today before you on an issue of particular importance to the food producers of California's San Joaquin Valley. I am a strong supporter of the *Farm Regulatory Certainty Act* introduced by Representative Dan Newhouse and myself, and supported by more than sixty bipartisan cosponsors. Thank you Representative Newhouse for your work on this bill and for asking me to join you in support of this important legislation.

This bill would prohibit third parties from engaging in legal actions against agricultural operations that are actively working with the federal Environmental Protection Agency or state regulator to improve their environmental compliance. We are talking about peace of mind for farmers, and incentivizing good environmental stewardship.

Like Representative Newhouse I too am a third generation farmer. Growing up on a dairy taught me many redeemable skills not least of which was how to care for and sustain the land on which we farmed. Today I serve the people of California's San Joaquin Valley as Ranking Member of the Committee on Agriculture Subcommittee on Livestock and Foreign Agriculture where I bring my background as a farmer to Congress.

California is the country's largest agricultural state. Last year the state produced approximately $45 billion in agricultural goods. Our abundance includes more than 400 commodities, over a third of the country's vegetables and two-thirds of the country's fruits and nuts. In 2016 the value of California's dairy production was over $6 billion and the district I have the honor to

represent is the third largest producer of milk in the entire country. This is all achieved while complying with some of the most rigorous environmental regulations in the world.

For agriculture to be successful our local communities and environment need to be healthy and safe. That is why the issue of both surface and groundwater contamination is taken so seriously in California. Because farmers are also reliant on the environment within which they farm they are active in a regional effort in California to address nitrate and salinity issues that are occurring in various parts of California's Central Valley. The State Water Resources Control Board, Central Valley Regional Water Quality Control Board, the environmental community, numerous municipalities, agricultural water districts and many others are engaged in actions to protect California's most precious resource.

California agriculture has a long history of working with regulators to address environmental concerns. This bill would not change that relationship.

The bill before us today, the *Farm Regulatory Certainty Act,* was developed out of a fear many producers in my state have of litigation brought upon them by third parties. Similar to the situation in Representative Newhouse's state, dairymen and ranchers have found themselves in situations where complying with environmental regulations and acting in good faith have placed them in legal jeopardy.

The *Farm Regulatory Certainty Act* will foster a spirit of collaboration that incentivizes agricultural producers to comply with environmental laws and regulations. A farmer acting in good faith to improve their environmental stewardship should not be targeted by litigation while they are working cooperatively to fix problems, and improve their operations. This bill will give peace of mind to producers who want to minimize contaminants but may fear negative repercussions stemming from their efforts.

Farmers depend on the land for their livelihoods. It is in their interest to be good stewards. Let us give them the certainty necessary to comply with the regulations put in place by state and federal authorities.

Thank you for inviting me to testify here today. I hope that I have been able to shed light on this issue from the perspective of a farmer and the farmers I represent. This common sense legislation would go a long way to both improve the environment and allow farmers to continue to provide abundant, healthy, and affordable food for our nation and the world.

Thank you and I yield back.

Mr. SHIMKUS. The gentleman yields back his time. We appreciate you coming.

The tradition for us is not to ask you questions. We can do that privately or on the floor. So we want to thank you.

We want to sit the second panel in respect to everybody's time. Thank you for coming.

Mr. SHIMKUS. And let's get the second panel up and placards placed.

So as we have our folks sitting, I will recognize each one of you for 5 minutes. Your full statement has been submitted for the record. And it is always a challenge to remind people to press the button, to make sure the microphone is on, and everything will work fine.

So with that, I want to turn to Mr. Dan Wood, executive director of the Washington State Dairy Federation.

Sir, you are recognized for 5 minutes.

STATEMENTS OF DAN WOOD, EXECUTIVE DIRECTOR, WASHINGTON STATE DAIRY FEDERATION; AMY ROMIG, PARTNER, PLEWS SHADLEY RACHER & BRAUN, LLP; JESSICA CULPEPPER, FOOD PROJECT ATTORNEY, PUBLIC JUSTICE; AND LYNN UTESCH, FOUNDER, KEWAUNEE CITIZENS ADVOCATING RESPONSIBLE ENVIRONMENTAL STEWARDSHIP

STATEMENT OF DAN WOOD

Mr. WOOD. Thank you. Chairman Shimkus, members of the committee, Ranking Member Tonko, thank you for the opportunity to testify. I am Dan Wood, Executive Director of the Washington State Dairy Federation.

The Washington State Dairy Federation is here in support of the matter before you introduced by Representative Newhouse and Representative Costa. We represent about 400 dairy families in Washington State. We are a member of the National Milk Producers Federation and the Western States Dairy Producers Association. Each are also in support of the bill.

Today I will cover the current degree of regulation of our dairy farms, illustrate how they have been placed in double jeopardy with the lawsuits, and tell you why the language in the bill before you will foster a more cooperative relationship with the state and Federal agencies that have authority for regulating the dairy farms.

Our dairy farmers strive to be good environmental stewards, as the Members of Congress just testified before you. They depend on the land and the water that is necessary for their farming.

Last year, the Washington State Department of Agriculture reported that we had a better than 92 percent compliance rate with our very rigorous State Dairy Nutrient Management Act with oversight by the Department of Agriculture. Our dairy farms are regulated by multiple layers of state and Federal agencies, including the Safe Drinking Water Act administered by the EPA.

If there is an error or allegation that is made with a state or Federal regulator, the farms should not face a citizen lawsuit if they are already working cooperatively with the state or Federal regulators in resolving that error or allegation.

Citizen lawsuits were intended to put citizens in place of the regulators if the regulators failed to do their jobs. These lawsuits were not intended to double down on penalties and costs or place farms in double jeopardy if they are already trying to do the right thing and work with the regulators. But that is exactly what happened in the Yakima Valley in southeastern Washington State 2 years ago.

Groundwater nitrates that have been high for more than 100 years, predating the dairies and much of agriculture that is in that area. Region 10 EPA issued a report assigning blame for those historically high groundwater nitrates to four dairy families.

That was in 2012. Rather than spend millions of dollars battling that out, the dairies voluntarily into a detailed and rigorous consent order with EPA, and those farms were told by EPA that the matter was resolved in dealing with that.

They had a lot of extra work to do, but they were told that resolved the matter. And despite that cooperation with the EPA, the citizen lawsuit under RCRA was then brought against those dairies, and they had to spend millions of dollars.

The smaller dairy family wasn't able to put up the millions of dollars for defense, and so they closed their dairy. And keep in mind that they had entered that EPA consent order, but it was the lawsuit that put them out of business.

RCRA, or the Resource Conservation Recovery Act, was never intended to apply to manure or crop residue returned to the soil as fertilizer or soil conditioner, and that is very clear in the Code of Federal Regulations that is currently on the books with the EPA.

The other three farms continued to struggle under the weight of the costs of compliance, but they are complying with the consent order. And remember, all of these farms had entered a consent order with the EPA before they were sued.

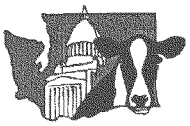
To help address the issue, Congressman Newhouse introduced the Farm Regulatory Certainty Act, which now has 65 bipartisan cosponsors in the House. Language in the bill would not have prevented the consent order, but rather the consent order was the under the Safe Drinking Water Act. It simply would prevent farmers from getting sued over the very same things that are dealt with, with the Federal and state regulators.

Importantly, the prohibition on RCRA citizen lawsuits only applies to the use of nutrients as laid out in the EPA regulations. It is not an across-the-board exemption, and it is merely intended to reinforce what is already codified both in law and regulation pertaining to the scope of RCRA.

If enacted, the legislation would preserve the ability to work with regulators, it would strengthen the certainty of doing that. And we would urge your support.

I would be glad to answer any questions.

[The prepared statement of Mr. Wood follows:]



Washington State Dairy Federation
TESTIMONY of Dan Wood, Executive Director
Washington State Dairy Federation
To the U.S. House Subcommittee on

Chairman Shimkus, Ranking Member Tonko, and members of the Subcommittee:

I'm Dan Wood, Executive Director of Washington State Dairy Federation, our state's trade association for dairy farm families. I appreciate the opportunity to testify before you today on the discussion draft of the Farm Regulatory Certainty Act (H.R. 848) authored by Representative Dan Newhouse (R-WA) and cosponsored by Representative Jim Costa (D-CA).

The Washington State Dairy Federation represents roughly 400 family farms across the state. Our organization is a member of the National Milk Producers Federation as well as the Western States Dairy Producers Association, both of which support the pending draft legislation.

Today I'll cover the current degree of regulation of dairy farms, illustrate how they have been put in double jeopardy, and tell you why the language in the bill before you will foster a more secure and cooperative relationship between dairy families and the state and federal agencies that provide oversight.

Dairy farmers strive to be good stewards of all resources, including environmental resources like the land and water that make it possible for them to farm.

The Washington State Department of Agriculture reported last year that we had a more than 92% compliance rate with our rigorous Dairy Nutrient Management Program.

Across the nation, dairy farmers are regulated by a multi-layered system of state agencies & laws, and federal agencies & laws, including the Safe Drinking Water Act administered by the EPA.

If there is an error or allegation being addressed with a state or federal regulator, then the farms should not face a citizen lawsuit if they are working in good faith with the regulatory agencies with authority over the respective laws.

Citizen lawsuits were intended to allow citizens to step into the role of the regulator when the government agency failed to fulfill its responsibilities. These lawsuits were not intended to double down on penalties and costs, or place farms in double jeopardy when they are already trying to solve a problem collaboratively and cooperatively.

But that is exactly what happened in the Yakima Valley in Washington State two years ago. Groundwater nitrates have been high in Yakima Valley for more than 100 years – predating the dairy farms and much of the agriculture there.

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Region 10 EPA issued a widely disputed report that assigned blamed to four dairy families. Rather than spend millions of dollars in court, the dairies voluntarily entered into a Consent Order.

The farms were told by EPA, and they reasonably expected, that the matter was resolved as long as they followed the consent order, which required the farms to adhere to rigorous environmental operating conditions, such as increasing soil testing and submitting more frequent, detailed reports on soil and water conditions to the EPA.

Despite the collaborative work being done by the farmers and the EPA under the Consent Order, activists sued these dairy families in court using the Resource Conservation and Recovery Act (RCRA). This lawsuit made it necessary for the farmers to spend millions of dollars defending themselves over the very same issues that were intended to be resolved in the Consent Order with EPA.

Importantly, RCRA was not intended to apply to manure or crop residue returned to the soil as fertilizers or soil conditioners. The EPA made this clear when it put forth regulations to implement RCRA after it was enacted (40 CFR 257.1).

The family with the smaller farm knew they had no hope of funding a defense, regardless of the outcome. Facing the possibility of crushing legal bills, they closed their dairy after receiving notice of the intent to sue.

The other farms continue to struggle under the weight of the lawsuit settlement from, which they entered into after they were no longer able to afford to defend themselves.

Remember, these farms had already entered into a consent decree with the EPA. They spent a great deal of time and money working with EPA. Then they were sued.

To help address this issue, Congressman Newhouse has introduced the Farm Regulatory Certainty Act, which now has 65 bipartisan cosponsors in the House.

Language in the bill would not prevent the Consent Order under the Safe Drinking Water Act. It would simply prevent farmers from facing RCRA citizen suits when they are already engaged in consent orders or other similar environmental actions by federal or state regulators.

Importantly, the prohibition on RCRA citizen suits *only* applies to the uses of nutrients as laid out in the EPA's regulations. This is NOT an across-the-board exemption, it is merely intended to reinforce what is already codified both in law and in regulation pertaining to the scope of RCRA.

Given the Yakima lawsuit, many dairy farmers around the country are understandably nervous that their positive efforts with regulators may be for naught if citizen suits will abound under other environmental statutes that were not intended to govern the activities in question regardless of the work being done.

If enacted, this legislation would preserve the ability of regulators to work with farmers just as EPA was doing in this case before the lawsuit, and it would give farmers renewed confidence that their efforts to be proactive environmental stewards will not harm them unintentionally.

Once again, this is a narrow, bipartisan bill that is intended to correct a targeted problem, not a bill intended to undermine environmental protections in any manner.

I appreciate the opportunity to testify before you today and I am happy to answer any questions you may have.

Language from CFR 257.1

§ 257.1 Scope and purpose.

... **(c)** These criteria apply to all solid waste disposal facilities and practices with the following exceptions:

(1) The criteria do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners.

Mr. SHIMKUS. Thank you very much, sir.

I would now like turn to Ms. Amy Romig, partner at Plews Shadley Racher & Braun.

Ms. ROMIG. Excellent job.

Mr. SHIMKUS. That is the only thing I do well.

So you are recognized for 5 minutes, and your full statement is in the record.

STATEMENT OF AMY ROMIG

Ms. ROMIG. Thank you. Chairman Shimkus, Ranking Member Tonko, and members of the subcommittee, thank you for allowing me to come talk to you today.

I am going to supplement Mr. Wood's testimony about the general regulatory regime faced by farmers. Under the Resource Conservation and Recovery Act, citizens can bring suits. RCRA jurisdiction is triggered whenever there is a solid waste, and solid waste is defined as garbage, refuse, or something that is discarded.

RCRA also recognizes that we don't need to send all of our trash and waste to landfills, that if things have value, we need to reuse it. RCRA balances this by encouraging recycling and reusing.

RCRA specifically recognizes that manure has value. It is exempted from the definition of solid waste and, thus, it is completely exempted from RCRA jurisdiction if it is agricultural waste, including manures and crop residues, that are returned to the soil as fertilizers and conditioners.

So you have two types of manure. You have manure that is going to be used as fertilizer that is completely exempted from RCRA jurisdiction, and you have manures that aren't going to be used as fertilizer that the case that Mr. Wood talked about found was under RCRA jurisdiction.

Now, why this is important today is, most importantly, farmers have been regulated, and they have been regulated since at least 1974 under the Clean Water Act. And, in fact, the most comprehensive confined animal feeding operation regulations that were recently passed by the EPA were promulgated under the Clean Water Act.

So farmers know that they have to comply with the Clean Water Act. They go and they look at these regulations. They don't even know how RCRA necessarily applies, because, as I talked about, they are not completely covered by RCRA, depending on how they use their manure.

And this makes sense, because if agricultural operations are going to cause harm, they are likely going to cause harm to the water, and that is why we look to our water regulations to protect the harm that farms might cause, if they are going to cause any.

If there is a problem with farms or these agricultural operations, the EPA or the state agencies are likely going to proceed under the Clean Water Act, and that makes sense because they have complete jurisdiction over all manure under the Clean Water Act. They don't have to engage in this really tricky, Is it RCRA manure or is it not RCRA manure?

Now, RCRA does have these citizen suit provisions, as we have discussed, and, in fact, so does the Clean Water Act, so does the Clean Air Act. Most of our environmental regulations do have cit-

izen suit provisions. And all of them have a key provision, that if you are working with an agency and if an agency is working with a regulated entity, then the citizen suits are prohibited.

But the catch and the technicality here is that in each of these statutes, especially RCRA, the citizen suits are only prohibited if the agency is proceeding under RCRA or CERCLA. And as I discussed, that is the Catch-22 here, that the agencies are likely going to bring these things under the Clean Water Act.

Now, it makes sense to prohibit these citizen suits, because, as our Supreme Court has said, we want citizen suits to supplement the overworked and underfunded agencies. They are not to supplant or substitute their judgment for those agencies, because these agencies, we recognize that they have the expertise and they are independent arbiters to look at how these agricultural operations are working.

The point is to prevent multiple and numerous lawsuits. It is to protect these regulated entities when they are working with the agencies the way they should. If you allow citizen suits to proceed while the agencies are still working, that can subject these hard-working businesses to inconsistent results. The agency can tell them they need to do one thing while the citizens could tell them they need to do something else, and that is not fair, to subject these farms to multiple inconsistent outcomes. And that is because we have a disconnect here that these farm operations usually are regulated under the Clean Water Act.

I am not saying that citizen suits don't have a place in our jurisprudence. In fact, I have represented citizens, and I have brought citizen suits. However, the jurisdiction and the mechanisms for these suits need to match the regulations that the entities are being regulated under. And I would like to finish my testimony with an example of why these citizen suits can be harmful.

I represented a particular entity that ran into some problems, and they had to get new permits. And the citizens challenged both of those permits in the agency. They had their chance to say: We don't like how things are being done.

IDEM, our environmental management agency in Indianapolis, brought a suit in civil court, and the citizens intervened in that suit. They had a chance to check over the agency's shoulder and say they weren't doing it right. They brought an independent state suit, and we prevailed in all of those actions. And then they brought a RCRA citizen suit, and that was the straw that broke the camel's back. It forced this industry to file bankruptcy.

I am asking the committee to protect businesses from this double jeopardy. Thank you.

[The prepared statement of Ms. Romig follows:]

Testimony of Amy E. Romig
Partner, PLEWS SHADLEY RACHER & BRAUN LLP,
Indianapolis and South Bend, Indiana

Before the House of Representatives Committee on Energy and Commerce, Subcommittee on Environment

Hearing on "H.R.__, Farm Regulatory Certainty Act."

Chairman Shimkus, Ranking Member Tonko, and Members of the Subcommittee, I am pleased to be invited to present my views on how the proposed amendments to the citizen suit provisions of the Resource Conservation and Recovery Act ("RCRA") can provide regulatory certainty to agricultural operations while continuing to protect America's lands and waters. Even with these proposed amendments, citizens will still have the opportunity to commence civil actions against those operations allegedly in violation of environmental laws; their options however would be tailored to the agricultural operations and governed by laws typically applicable to agricultural operations, rather than RCRA which is better suited to non-agricultural operations. I will also discuss how citizen suits are often only one form of redress available to neighbors and environmental groups and how continued duplicative actions can be harmful to American businesses such as agricultural operations that often operate on such low margins that unnecessary lawsuits could force such businesses out of operation.

I am a partner with the law firm of Plews Shadley Racher & Braun, LLP. I represent several private businesses, non-profit entities, and other private

stakeholders who are interested in the availability of citizen suits. I have represented entities defending citizen suits as well as citizens who have filed citizen suits to address environmental concerns. My firm and I have also represented agricultural organizations in many different capacities, including defending civil suits as well as administrative and enforcement actions involving environmental agencies. I have also represented neighbors of agricultural operations who have objected to how those operations are conducted. However, I am not presenting this testimony directly on my clients' behalf. Rather, my advice to the Subcommittee today is drawn from my seventeen years of work as an environmental litigator and compliance attorney and my overall desire to ensure that the RCRA citizen suit provisions are tailored to the types of operations typically governed by RCRA. I have personally witnessed the impact that RCRA citizen suits can have upon businesses – a level of impact that should only be allowed in carefully tailored circumstances where environmental agencies are not already dealing with the alleged noncompliance.

RCRA Jurisdiction

RCRA was enacted in 1976 and governs the disposal of solid and hazardous waste. "Disposal" is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water such that solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters,

including ground waters." 42 U.S.C. §6903(3), 40 CFR §206.10. A material is determined to be a solid waste under RCRA if it is "garbage, refuse....or other discarded material...from industrial, commercial, mining, and agricultural operations...." 42 U.S.C. §6903(27).

Despite the broad definition of solid waste which triggers jurisdiction under RCRA, Congress recognized when enacting RCRA that it is preferable to reuse materials and resources rather than treating them as wastes:

> The Congress finds with respect to materials that ---
> (1) millions of tons of recoverable materials which could be used are needlessly buried each year;
> (2) methods are available to separate usable materials from solid waste; and
> (3) the recovery and conservation of such material can reduce the dependence of the United States on foreign resources and reduce the deficit in the balance of payments.

42 U.S.C. §6901(c)(1). In balancing the interest between regulating solid wastes and encouraging reuse, EPA promulgated regulations specifically exempting from RCRA regulation those "agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners." 40 CFR §257.1(c)(1).

Determining what is a "solid waste" and therefore (and most importantly) triggering RCRA jurisdiction is not always simple as evidenced by the EPA's history in defining "solid waste." The EPA first promulgated a regulatory definition in 1985 which was nearly immediately challenged and the EPA has been refining and trying to improve the definition for thirty years, most recently revising the rule in 2015. Nearly all of the comments on the proposed definition of solid waste as well as the

litigation surrounding the definition have dealt with winnowing out true "disposal" from the beneficial use, reclamation, and recycling of materials which should be encouraged and which do not result in increased risk to human health or the environment.

Agricultural Operations

Agricultural operations are typically operated and governed under the Clean Water Act ("CWA"). Although agricultural operations happen on land, the environmental risk most associated with these operations is runoff pollution and impairment of water quality, including both surface and groundwater. The EPA has been regulating some agricultural operations since at least 1974 (promulgation of national effluent limitations guidelines and standards under the CWA for feedlots, 39 FR 5704; February 14, 1974). Even today the EPA continues to compile annual summaries and to determine the implementation of the Confined Animal Feeding Operations regulations under its National Pollutant Discharge Elimination System ("NPDES") – in other words, its water permits system under the CWA. From 1974 through today, the EPA continues to consider agricultural operations to be an industry regulated under the CWA by the EPA. The EPA and delegated-states programs review compliance and commence enforcement actions against agricultural operations under CWA authority; they do not look to RCRA to govern these operations.

Depending upon the size of the agricultural operation, the water permits and/or water regulations applicable to the operations require nutrient management plans. These plans take into account the nutrient need of crops, the available nutrients in soil, the nutrients available in manure and crop residues, as well as other conditions such as temperature and growing season. These different elements are balanced to estimate how much manure can be added to land in a way to provide a beneficial fertilization or soil conditioning while preventing migration of nutrients to surface or ground waters. The goal is to ensure that manure is not land applied in excess of agronomic rates or is not applied at times that would result in runoff of potential pollution.

Citizen Suits In General

Both RCRA and the CWA (in addition to nearly every other major environmental law) contain citizen suit provisions to allow private citizens to bring an action to enforce environmental laws. By allowing citizens to bring these suits, Congress has expanded the resources to fight environmental compliance issues because environmental agencies always have limited resources. Under the citizen suit provisions of both the CWA and RCRA, citizens must provide notice to the EPA Administrator, the state, and the alleged violator. 33 U.S.C. §1365(a)(1),(b)(1) (CWA); 42 U.S.C. §6972(b)(1)(A),(2)(A) (RCRA). The notice requirements have the primary purpose of informing the federal and state agencies of the alleged violations to allow those agencies to undertake their own enforcement. Furthermore, notice

also allows alleged violators to bring their operations into compliance and thus save all parties the time and expense of litigation.

After complying with the notice requirement, citizens can bring claims under both RCRA and the CWA only if the agencies are not diligently prosecuting an action against the alleged violator. 33 U.S.C. §1365(g)(6)(A)(ii) (CWA); 42 U.S.C. §6972(b)(2)(B),(C)(i) (RCRA). The prohibition on citizen suits when the agencies tasked with protecting the environment are taking action protects the primary enforcement authority of the agencies and protects regulated entities from defending repetitious lawsuits for the same violations. The Supreme Court has found that a "citizen suit is meant to supplement, not supplant, governmental action..." *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987). Courts have routinely enforced the diligent prosecution prohibition on citizen suits where the government has already intervened:

> The congressional intent in enacting these restrictions on private actions was to prevent multiple and numerous instances of litigation involving private citizens, the states and the federal government. Instead, Congress determined that the desired result of remedying the environmental hazard could be best handled by avoiding conflicting litigation and having either the Administrator of the EPA or the State bring the suit on behalf of the public. *Only when the federal and state governments fail to act to remedy the situation* or file suit in either State or federal courts due to inadequate public resources did Congress envision the need for private citizens to commence actions to correct environmental hazards.

McGregor v. Indus. Excess Landfill, Inc., 709 F.Supp. 1401, 1407 (N.D. Ohio 1987) (Emphasis added.) Moreover, in *Furrer v. Brown*, 62 F.3d 1092, 1097–98 (8th Cir. 1995), the court considered the underlying purpose of RCRA and determined that "notwithstanding the inclusion of this citizen suit provision in RCRA, the statute has provisions whose obvious goal it is to forestall citizen suits so that they become available *only as a last resort*." *Id.* at 1098 (emphasis added). Congress intended to allow citizen suits in order to encourage compliance with RCRA—but not when compliance was at hand. *Id.* "The legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Id.* (citing *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989)). In addition, the intent behind the citizen suit provisions is to avoid "duplication of effort." *Muniz v. Rexnord Corp.*, 2004 U.S. Dist. LEXIS 17939 (N.D. Ill. 2004) at 12.

Thus, as both legislative intent and courts have recognized, citizen suits should only be allowed when the environmental agencies charged with protecting the environment have failed to take action. This not only prevents excessive litigation – it prevents excessive remediation/redress. If both the government and citizen groups are allowed to litigate the same violations in different forums, the outcome from each action may differ. While the government may require demonstration that an operation use best management practices, a citizens group

may demand that the operations be subject to more strict requirements. Thus, a facility may be subject to differing standards if both actions are allowed to proceed.

The problem for agricultural operations arises in the literal language of the citizen suit provisions of RCRA. Under RCRA, a citizen suit can only proceed when an agency has not taken action *under RCRA or CERCLA*:

> No action may be commenced under…this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment---
>
> (i) has commenced and is diligently prosecuting an action under section 6973 *of this title* or under section 106 of [CERCLA]…

42 U.S.C. §6972(b)(1)(B). As discussed above, however, when compliance issues arise with agricultural operations the EPA or state environmental agencies bring their enforcement actions under the CWA, not under RCRA or CERCLA. This is because the agencies' rules regarding agricultural operations are promulgated under the CWA as well as the fact that under the regulations determining RCRA jurisdiction, "manures and crop residues, returned to the soil as fertilizers or soil conditioners" are exempted from RCRA jurisdiction. An agency simply isn't going to bring a RCRA enforcement action when it only has jurisdiction over wastes *not returned* to the soil as fertilizers; the agency instead will bring an enforcement action pursuant to the CWA under which jurisdiction and regulations are more clear-cut.

This mismatch – where there is arguably RCRA jurisdiction over certain wastes but not others and thus citizens can bring a suit under RCRA yet the agencies are pursuing facilities under the CWA for the same underlying conduct – results in precisely the duplication of efforts and excessive litigation that Congress was trying to avoid when drafting RCRA citizen suit provisions. This mismatch is the reason for the proposed RCRA amendments before you today.

Excessive Litigation is a Threat to Agricultural Operations

The testimony today involves the citizen suit provisions of RCRA but the litigation spawned by RCRA often does not occur in a vacuum. In my experience citizens and citizen groups do not only use RCRA to challenge agricultural operations. In the classic "Not In My Backyard" ("NIMBY") scenario, citizens groups have many resources to challenge operations that they do not like, even operations that have been in existence for many years, even generations.

It is not unusual for these groups to challenge every single zoning action and environmental permit involving these facilities. They frequently bring civil suits for nuisance, notwithstanding common law and statutory protections to prevent those "coming to the nuisance" from bringing suit. In many states, such as Indiana, these groups can intervene in the administrative and civil enforcement actions brought by agencies. Regardless of the merits of these cases it takes significant legal resources to dispose of these challenges. In one case in which I was counsel of record, a citizens group brought several administrative permit challenges against an

industrial facility, intervened in a state civil enforcement action, and brought their own state civil enforcement action. While my client successfully defended these actions, it was ultimately the RCRA citizen suit, brought in federal court, which added the straw that broke the camel's back. Although the suit was initially dismissed by the district court, the citizens' group appealed through the 7th Circuit. Overall the total litigation costs for that client exceeded hundreds of thousands of dollars, forcing the client into bankruptcy. The citizens group only prevailed when the facility had no money, could not hire counsel, and the citizens' group won with a default judgment.

While some citizens obviously have meritorious claims, Congress must recognize that these suits are expensive to defend regardless of the merits. This fact needs to be taken into account while balancing when enforcement should be left to the agencies with the expertise and when it should allow the citizens to act as "private attorneys general."

The Farm Regulatory Certainty Act will Provide Certainty to Agricultural Organizations

As discussed above, regulated entities should not be forced to defend themselves in multiple forums against multiple parties for the same alleged violations. By amending RCRA to prohibit citizen suits against an agricultural operation if the EPA or a state is already diligently prosecuting an action (whether or not under RCRA), or has entered a consent agreement related to manure or crop

residue that is to be returned to the soil, Congress will close the loophole through which agricultural operations are possibly subjected to enforcement actions by the government under the CWA but also citizen suits under RCRA. This not only protects agricultural operations from ruinously expensive litigation, particularly when their dollars could be better spent ensuring compliance, but it also protects such operations from potentially conflicting outcomes when the citizens demand a different outcome than that required by the regulating agencies. Closing this loophole also recognizes that we expect our environmental agencies, who are not swayed by local politics or other NIMBY concerns, to set policies and determine the most appropriate remedial measures. Passing this law does not prohibit or in any way limit the way agencies may enforce environmental requirements for agricultural organizations under the CWA, nor does it prohibit citizens' suits under the CWA when appropriate. This is one law which provides certainty and protection for the regulated community while also remaining protective of human health and the environment.

Conclusion

I urge the Committee to approve the Farm Regulatory Certainty Act because it protects agricultural organizations from excessive and possibly contradictory litigation, it recognizes government agencies as the first defense in environmental compliance and enforcement, and it does not impact protection of human health and the environment.

I appreciate the opportunity to testify and welcome any questions you may have.

Mr. SHIMKUS. I would like to thank you.

And now I would like to recognize Ms. Jessica Culpepper, Food Project attorney for Public Justice.

Ma'am, you are recognized for 5 minutes.

STATEMENT OF JESSICA CULPEPPER

Ms. CULPEPPER. Chairman and members of the subcommittee, I sincerely appreciate the opportunity today to discuss the draft bill offered by Mr. Newhouse.

As you just heard, Congress included a citizen enforcement provision when it passed the Resource Conservation and Recovery Act, which I will refer to as RCRA, in 1976 so that people could protect themselves when the government fails to fix the problem.

Four decades later, a community in Yakima, Washington, used RCRA to successfully protect their private drinking water from manure contamination after the state and Federal government actions and inactions failed them. And this bill now threatens to take away the rights of all citizens in those same circumstances.

So I am here today to outline why the purported reasons for passing this bill are redundant with RCRA. I am then going to tell you what this bill actually does and why it is so dangerous.

First, you have heard today that RCRA was never intended to cover fertilizer. We completely agree with that. Even without this bill passing, RCRA will never apply to farmers fertilizing their crops, because it is already exempted. RCRA only kicks in when massive operations are using their lands as a means of disposal and that manure ends up in your drinking water. And importantly, Congress specifically identified the disposal of animal waste as a problem RCRA was designed to address.

In the cases I helped litigate in Yakima, the operations were applying millions of gallons of manure to land that didn't need fertilizing. I have also seen frozen solid fields in the Midwest stacked 2 feet deep with manure.

Those bad actors are not regular farmers. Those operations use their fields as a means of disposal without regard for what their crops needed. And the manure disposal in Yakima poisoned rural communities' drinking water to the point that the neighborhood school had signs above the water fountains warning students that the water could make people sick.

So nothing in RCRA will interfere with farmers fertilizing their crops. What it stops is dumping your waste on a neighbor's property, in their air, and in their drinking water.

Second, you have heard today that RCRA enforcement could hurt small family farms. This is simply not true. Even without this bill at all, small farmers are not in jeopardy for citizen enforcement actions. This is simply because they lack the volume of manure required to generate the danger to public health that triggers RCRA.

If you think of a drinking water aquifer like a glass of water, a single drop of nitrate, it is not going to do anything. You will never notice it. But a handful of manure, that you are going to notice. It takes massive operations to trigger RCRA.

Third, even without this bill, there is no opportunity for double jeopardy. As you just heard, RCRA underscores this safeguard by stating explicitly: If there is a government action seeking the same

cleanup, then citizens cannot enforce the law. What is important is that the actions that were taken in Yakima weren't fixing the problem.

That is what this bill is not about. Now let me tell you what this bill is actually about. RCRA exists to allow the government and citizens to stop danger to public health in the environment in emergency situations. The bill dramatically weakens the citizens' ability to enforce RCRA in the case of agriculture. It is, in effect, creating a giant loophole in the law that will stop polluters from being held accountable for hurting their neighbors.

RCRA is a law of last resort. It is used only in the worst-case scenarios. But when it is used, RCRA is the only safeguard the citizens have to protect their private well water from contamination.

You heard about the Clean Water Act. The Clean Water Act does not apply to groundwater, so it is not going to fix the problem. The Safe Drinking Water Act does not apply to private wells. So if you are a rural American that relies on a private well for your drinking water, you cannot protect yourself under the Safe Drinking Water Act.

Citizen enforcement of those laws will not fix problems faced by rural Americans with dirty wells. If this bill were passed, it would leave these communities completely reliant on the government to save them.

What I want to leave here with you today is the purported reasons for this bill is a fix for a problem that doesn't exist. It doesn't take a legal scholar to know that there is something illegal when your water runs brown with manure.

RCRA, and only RCRA, was designed to help the local communities protect themselves to stop exactly those public health threats. Citizens must have the right and ability to protect themselves and enforce RCRA without constraints that would render that right meaningless.

Thank you.

[The prepared statement of Ms. Culpepper follows:]

H.R. ____, The Farm Regulatory Certainty Act of 2017
THE IMPORTANCE OF CITIZEN ENFORCEMENT TO PROTECT COMMUNITIES AND DRINKING WATER FROM AGRICULTURAL POLLUTION

Testimony of Jessica Culpepper, Food Project Attorney at Public Justice
U.S. House Subcommittee on the Environment
Hearing on the Discussion Draft
November 9, 2017

Summary

Without the Resource Conservation and Recovery Act's (RCRA) citizen enforcement provision, no existing law by itself allows private well owners to stop drinking water contamination by agricultural pollution. The Safe Drinking Water Act (SDWA) excludes private wells from regulation. The Clean Water Act only addresses impacts to surface water. RCRA supplements a number of other federal, state, and local laws that apply to agricultural waste management, but this system fits together like the gears of a clock that will not work unless citizens have the right to enforce them. Like the SDWA, but unlike the Clean Water Act, RCRA imposes no specific regulatory burden on agriculture. Rather, it provides a mechanism for citizen law enforcement where a polluter has endangered public health or the environment. But if this bill is passed, then *any* proceeding covering waste management would preclude rural Americans from enforcing the only law protecting their access to clean water.

While most farmers are dedicated members of their community and stewards of the land, there are some who ignore their own waste management plans and permits. Some irresponsible operators of concentrated animal feeding operations (CAFOs) have long been violating state and federal laws in how they manage their manure. Rural communities living near CAFOs have seen repeated instances where state and federal agencies did not effectively enforce laws designed to protect communities from the risks and pollution stemming from mismanaged waste owned by

CAFO operators. The results have been continued pollution, dangers to communities, and, for some, catastrophic loss of their drinking water.

RCRA citizen enforcement actions are lawsuits of last resort. As a member of the legal team who represented the community behind the only successful RCRA citizen enforcement action brought on behalf of a rural community against a CAFO, I can say that these actions are costly, time consuming, and extremely difficult to bring. Moreover, rural Americans do not want to take legal action against their neighbors. Because of these factors, citizen enforcement suits under RCRA only occur against the worst actors in the most egregious circumstances. But in that suit, citizen law enforcement obtained a cleanup of agricultural pollution where state agencies had not taken action, and the EPA had not taken enough action to solve the problem – the agency left hundreds of households without clean water and did not require mandatory changes that would stop further contamination of the drinking water aquifer.

In the lawsuit in Yakima Valley, Washington, the operators admitted, under oath, that they violated their own Nutrient Management Plans for years and used their fields as dumping grounds for millions of gallons of raw waste. They illegally disposed of waste in fields across the street from their neighbors. And the lawsuit worked where nothing else could. Hundreds of households who had no clean drinking water for years are now receiving critical clean water delivery, and the CAFOs have been forced to change their practices so that their production methods no longer contaminate their neighbors' drinking water. The only way this could have happened was citizen law enforcement under the Resource Conservation and Recovery Act. For this statute to serve the public purposes for which it was intended, the public – and not just state and federal government bureaucracies – must have the authority to protect themselves through citizen enforcement suits.

THE IMPORTANCE OF CITIZEN ENFORCEMENT TO PROTECT COMMUNITIES AND DRINKING WATER FROM AGRICULTURAL POLLUTION

Testimony of Jessica Culpepper, Food Project Attorney at Public Justice
U.S. House Subcommittee on the Environment
November 9, 2017

Here is the proposal: A CAFO produces millions of gallons of manure and urine containing toxic substances, including nitrates, bacteria, pathogens, arsenic, and selenium. We propose to dig unlined pits that we will not properly maintain on top of an aquifer, the local community's sole source of drinking water. The CAFO will dump the manure and facility wash water into these pits for storage. These millions of wet gallons of waste will sit there untreated, where the toxic substances in this waste will leach into the groundwater, which flows into the community's wells.

Now the CAFO will spray the remaining raw animal sewage from the unlined pits onto our land. They have a management plan that they are supposed to follow, but because the CAFO produced more manure than their crops actually need, they will ignore the requirements of that plan and apply millions of gallons more than what is necessary for crop growth onto our fields. The excess manure that is not used by the crops will also leach into the groundwater and flow into the community's wells. They will continue to do that for at least a decade, even when they receive information that dangerous nitrates are rising in the drinking water, and scientists and government agencies inform them that they are likely part of that problem.

Sounds like a good idea? That is exactly what the operators of the mega-dairies admitted to in the Yakima, Washington citizen enforcement action that led to Rep. Newhouse introducing the so-called Farm Regulatory Certainty Act. It should come as no surprise that these lagoons have failures and that some operators are going to ignore the laws and mismanage their manure. It does not take a prophet to predict that, because of these few, bad actors, environmental and public health crises will happen, it does not take a rocket scientist to determine that mismanaging

mass quantities of manure like this will pollute, and it does not take a legal scholar to figure out that when a person's tap water runs brown from manure, something about this is illegal.[1] And any concerned citizen can see that this is no way for agricultural waste to be handled in his or her community this age of complex engineering and agronomy plans which, if utilized properly, would prevent pollution from happening in the first place.

Yet, what we have seen across the nation is that even though some in this industry are breaking existing law in how they manage manure, and even though the manure is polluting groundwater and rivers with toxic contamination and even though there is the risk of catastrophic public health crises, the CAFOs and the state agencies that regulate them have not taken effective action to stop bad practices and protect local communities and clean water. In the *single* case brought against a CAFO, we obtained substantial clean up and convinced the CAFOs that they must change their waste management practices – but only when citizens had the right to take the future of their communities into their own hands, to bring their own enforcement action, and to thereby force the state and federal agencies and the CAFOs to face up to the harm that unlined manure storage over aquifers and massive land dumping is doing to local neighborhoods and our natural resources.

Forty-nine percent of the United States relies on groundwater for its drinking water. In the states represented by this subcommittee alone, 33 million people in California rely on groundwater;[2] 183,000 people in Colorado rely on private wells with another 1.1 million relying on groundwater in community systems;[3] 1.53 million people in Georgia rely on private wells with another 1.78 million

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[1] *See* Attachment A for news coverage of communities with brown tap water.
[2] https://www.waterboards.ca.gov/water_issues/programs/groundwater/gw_basics.shtml and see http://www.water.ca.gov/groundwater/gwinfo/index.cfm

[3] http://coloradogeologicalsurvey.org/water/groundwater/ and see http://www.ngwa.org/Documents/States/Use/co.pdf

relying on groundwater in community systems;[4] 5 million people in Illinois rely on groundwater; 446,000 people in Mississippi rely on private wells with another 2.9 relying on groundwater – almost the entire state population;[5] 2 million people in New York rely on private well water, while another 4.96 rely on groundwater in community systems;[6] 3.3 million people in North Carolina rely on private well water, while another 1.9 million rely on groundwater in community systems;[7] 26,500 people in North Dakota rely on private well water, while another 244,840 people rely on groundwater in community systems;[8] 1.8 million people in Ohio rely on private well water, while another 3.3 million rely on groundwater in community systems;[9] 225,000 people in Oregon rely on private well water, while another 789,000 people rely on groundwater in community systems;[10] 538,000 people in Tennessee rely on private well water, while another 1.49 million people rely on groundwater in community systems;[11] 2.23 million people in Texas rely on private well water, while another 6 million people rely on groundwater in community systems;[12] and 393,000 people in West Virginia rely on private well water, while another 309,600 rely on groundwater in community systems.[13]

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[4] http://coloradogeologicalsurvey.org/water/groundwater/; *see also* http://www.ngwa.org/Documents/States/Use/co.pdf

[5] http://www.ngwa.org/Documents/States/Use/ms.pdf

[6] http://www.ngwa.org/Documents/States/Use/ny.pdf

[7] http://www.ngwa.org/Documents/states/use/nc.pdf

[8] http://www.ngwa.org/Documents/States/Use/nd.pdf

[9] http://www.ngwa.org/Documents/States/Use/oh.pdf

[10] http://www.ngwa.org/Documents/States/Use/or.pdf; *see also* http://www.oregon.gov/oha/PH/HEALTHYENVIRONMENTS/DRINKINGWATER/SOURCEWATER/Pages/whppsum.aspx.

[11] http://www.ngwa.org/Documents/States/Use/tn.pdf

[12] see http://www.ngwa.org/Documents/States/Use/tx.pdf

[13] http://www.ngwa.org/Documents/States/Use/wv.pdf

These astounding numbers show the breadth of impact the this bill will have if these people's rights are taken away.

It is worth examining RCRA, what this Discussion Draft would do to it, and what the only successful citizen enforcement action against agriculture has accomplished when the state agencies did not act, and EPA did not act enough.

A. The Importance of RCRA's Citizen Enforcement Provisions

Congress enacted RCRA in 1976 to close "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes" and "to minimize the present and future threat to human health and the environment."[14] To understand how RCRA works with the agricultural community, it is important to understand that nothing about this law has regulatory impact. The case that brought about the Rep. Newhouse's proposed bill, and the underlying statute, is about law enforcement. So the so-called Farm Regulatory Certainty Act does not reduce regulatory burden at all. It simply shields industry from liability for creating conditions that threaten public health. What the bill changes is the section of RCRA that allows citizens to enforce RCRA's prohibition against any person causing or contributing to the creation of an imminent and substantial endangerment to human health or the environment. 42 U.S.C. § 6972(a)(1)(b).

I want to set the record straight on Rep. Newhouse's letter to request a hearing on this bill. Rep. Newhouse introduces three misconceptions about RCRA's citizen enforcement provisions and the what the bill purports to do in his letter. Namely, RCRA is already doing achieving of the purported purposes in the so-called Farm Regulatory Certainty Act. That is no

[14] H.R.Rep No. 1491, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S.C.C.A.N. 6238, 6241; 42 U.S.C. § 6902(b).

surprise because Congress was intentional when it set out to protect Americans' health from toxic waste, and reveals that this bill is not about reducing regulations, but about shielding the worst actors in this industry from accountability and shutting the courthouse doors on the most vulnerable in rural America.

First: RCRA citizen enforcement actions cannot be brought against a facility for the regular use of fertilizer to grow crops. Before you can bring a citizen enforcement action under RCRA, you need to have a solid waste and RCRA *already* exempts manure reused as fertilizer or soil conditioner from the definition of solid waste. It always has, and this bill does not change the fact that fertilizer used as such will never be a solid waste, and, because RCRA is only applicable to solid waste, the statute's provisions simply will not apply.

Rep. Newhouse stated in his letter requesting this hearing that Congress never intended for RCRA to govern agricultural nutrient management practices. This is simply not true, and what he fails to say is that RCRA does not apply to agriculture unless the practices being used lead to a disposal of waste that endangers public health. Congress most certainly intended to cover agricultural waste under RCRA. In the earliest versions of the law, agriculture was included in the Congressional findings as a source of waste of concern, and remains there to this day despite numerous amendments to the law. *See* P.L. 94-580 (Oct. 21, 1976) 90 STAT. 2797. The legislative history strongly suggests that agricultural waste, including manure, was considered, discussed, and was determined to be an important material regulated under RCRA. For example, in a House Report to amend RCRA, the explanation for the bill included agricultural waste in its definition of solid waste and explained the need to include it:

> Agriculture and animal wastes alone are 2 billion tons annually. So, millions of tons of solid waste are being spread as it were into our environment in the period of a year's time. Now, we can't sweep these into a corner and we can't find that quiet sanctuary and say that the problems will be taken care of in time.

Numerous statements by Congress identified the dangers caused by animal and agricultural wastes and the need for RCRA to address it as part of the statute.[15]

The court in the only citizen enforcement action to rule on this issue stated that the operators of the CAFO admitted that they ignored their own nutrient management plans and applied millions of gallons beyond what crops needed as fertilizer or soil conditioner. The massive amounts of excess manure that could not be used by the crops is what contaminated the drinking water. There is a line between fertilizer applications and dumping excess waste to dispose of it, and the court found that in that particular factual scenario, the CAFO was unquestionably past it.

Second: RCRA citizen enforcement actions would likely not be brought against small or medium sized family farms. Even if you are disposing of your manure rather than using it as fertilizer, RCRA *still* will not apply unless three very serious facts are present:

1. You have to dump such vast quantities of manure that it threatens to leave your property and gets into the water supply;

[15] Resource Recovery Act of 1969 (Part 1), Subcomm. on Air and Water Pollution of the Comm. on Public Works (March 4, 5, AND 13, 1970, March 31, 1970), 2 (Statement by Sen. Randolph) (Mr. President, our society generates 4.4 billion tons of solid waste annually. The principal sources are animal wastes, 1.7 billion tons; and agricultural wastes, 640 million tons... To avoid an escalation of the current unsatisfactory situation, we must institute a comprehensive national materials policy which closes the present cycle of resource extraction, use, and discard to include reuse as a fundamental premise.); Resource Recovery Act of 1969 (Part 5), Subcomm. on Air and Water Pollution of the Comm. on Public Works (March 4, 5, AND 13, 1970, March 31, 1970), 2513-14 (statement of Frank Stead, called by Sen. Muskie) (Ignored as a public responsibility, and handled with little thought of the public interest in resources, are the agricultural wastes such as animal manures, orchard crops, and field and row crops, which, in the San Francisco Bay area itself, constitute half of the total waste loading ....No public agency is in a position to either prevent the mingling into the waste stream of material such as plastics, which are extremely difficult to accommodate as recycleable resources, or to insure the inclusion in the system of those materials whose handling now causes severe environmental impairment. Included in this latter category, of course, are abandoned automobiles, digested sewage sludges, and agricultural wastes);

2. The contaminants that threaten to leave your property are at such a high level that they may contribute to the violation of the drinking water standards for that contaminant; and
3. The violation of those drinking water standards is happening or is imminent in a source of drinking water such that it could endanger public health.

Without all of these additional conditions, there is still no coverage by the statute – it does not apply. And even if they did apply, RCRA allows for a notice period of ninety days before litigation can be filed, which gives an owner a period of time to fix the problem before litigation starts. Moreover, these conditions occur only in the most egregious of circumstances simply because the sheer volume of disposed waste over time to create this kind of public health risk is not the accepted or normal practices for this, or any, industry. Finally, these law suits are incredibly challenging and extremely resource-intensive to bring. And because the only remedy available under RCRA is to fix the problem, and there are no money damages available, there is no incentive to bring them against a facility unless that action will stop a substantial threat to public health and the environment.

Third: RCRA citizen enforcement actions already cannot be brought where a state or federal agency is diligently pursuing a duplicate judicial or administrative enforcement action under RCRA or another law. 42 U.S.C. §§ 6972(b)(2)(B)-(C). This is called the RCRA's "anti-duplication" provision. RCRA also has an "anti-inconsistency" provision, which similarly prohibits the statute to be used in a way that creates inconsistent requirements with other laws. 42 U.S.C. § 6905(a). So RCRA *already* preempts lawsuits where a state or federal agency is addressing the issue through an enforcement action. What this Discussion Draft does is blow

those provisions open so that even unrelated proceedings will preclude citizens from enforcing RCRA against a polluter for contaminating their drinking water.

Finally, there is an easy way to make farmers more certain about their legal and regulatory compliance: agriculture must comply with RCRA just as it does any other law. In this case, complying with the law simply means that a CAFO must not mismanage its waste so egregiously that it creates an imminent and substantial endangerment to health or the environment. Compliance with other laws and regulations does not, and should not, shield an actor from liability under RCRA unless it is directly related to the cleanup, as is already prescribed in the anti-duplication provisions. In contrast, this Discussion Draft says that if you are speeding, and you get a ticket for that, then you can't be held liable for running a traffic light and crashing into someone else's car. And I want to emphasize that the crash must happen in addition to running the red light. Because it is not enough that an operator dump their waste to be held liable under RCRA; that manure must also threaten to get into the drinking water supply at a level endangers public health. We believe that it is reasonable to expect drivers to obey all traffic laws when on the road, just as we believe it is reasonable to expect an industry to obey all environmental and public health laws when operating a business that could potentially cause serious threats to public health.

B. Community Association for Restoration of the Environment v. Cow Palace, LLC

My characterization of why this bill is unnecessary is consistent with the only court to interpret animal manure to be a solid waste under RCRA: that the law allowed citizen enforcement leading to a cleanup that government law enforcement never sought.

Imagine you are one of the families that have lived in this community for generations, and now your sole source of household water has more than seven times the maximum limit for nitrate in

it.[16] And while nitrate is a nutrient found in manure needed by crops to grow, when it is in drinking water, it can cause "blue baby syndrome" in infants, a potentially fatal disorder that causes a type of asphyxiation.[17] Nitrate has also been linked to miscarriages and higher rates of birth defects, Type 1 diabetes in children when pregnant mothers consume it, and certain kinds of cancer. What makes nitrates even more dangerous is that you cannot see it, smell it, or taste it. Boiling the water only increases the levels, even though boiling water is the common safety rule taught to parents when making their infants' bottles. This happened to dozens of households that lived by the mega-dairies in Yakima, and this is just one of many ways that manure can make people sick when it gets into their drinking water. [18]

And as a community member, you know that there is groundwater testing information going back more than a decade showing groundwater contamination around these sites, including contaminated well water at the local elementary school. But as contamination increased, the dairy industry lobbied the state legislature to reduce the regulators charged with compliance.[19] The state agencies, though they know of the pollution problem, refused to or could not take effective action to require changes to these dangerous and polluting practices. After years of state

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[16] In fact, you do not have to imagine. Several letters from small farmers and families in these and other communities like theirs have been submitted as part of the record. More than anything I can say about this Discussion Draft, the weight of their stories, in their own words, about losing their only source of clean water and being ignored by state and federal regulators they seek out to help them fix the problem is a powerful testament to why this proposed bill should not progress.

[17] Nitrate contamination is also costly. A team of researchers led by the EPA, Attachment B, estimated in 2008 that agricultural nitrate may cost the nation $157 billion per year. Nitrate's direct damage to drinking water supplies was estimated at $19 billion.

[18] Attachment C, Johns Hopkins Center for a Livable Future, Letter to Members of the Dunn County Livestock Operations Study Group (outlining public health risks from CAFOs). The Center also submitted into the record a critical analysis of the public health impacts of Rep. Newhouse's bill.

[19] Leah Beth Ward, *Hidden Water, Dirty Wells*, Yakima Herald (July 30, 2009), www.yakima-herald.com/stories/2008/10/11/hidden-wells-dirty-water; *see also* News 21 Report, *Troubled Water*, http://troubledwater.news21.com/

inaction, the EPA stepped in and did a two-year study that determined the CAFOs as the most likely source of the drinking water contamination, leading to an enforcement action under their emergency powers under the SDWA. That action had two serious shortcomings: first, it only provided water provisions for one mile from the facilities even though the EPA study showed impacts from much further away. Second, the nutrient management changes were vague, often voluntary, and were insufficient to stop future contamination of the aquifer.[20]

It was only at that point that the community, after decades of trying to clean up their dirty water, decided to bring a citizen enforcement action for violations of RCRA. I was one of the attorneys representing them. The dairies made all the same arguments that are being made in support of this bill: that RCRA was never intended to apply to manure and that the EPA's consent decree under the SDWA was duplicative and addressed the problem.

The court, after reviewing hundreds of pages of evidence and in a 111-page written opinion,[21] determined that the CAFO violated RCRA. Specifically, the Court agreed with the industry that RCRA did not apply to fertilizer. The Court held that, according to the evidence and admissions made by the CAFO operator under oath, the way in which the CAFO was putting manure on the field was not fertilizer use, but rather a discarded material because it was "untethered to the [nutrient management plan] and made without regard to the fertilization needs of their crops." Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, 80 F. Supp. 3d 1180, 1221 (E.D. Wash. 2015). The court also held that the EPA's consent decree under the

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[20] US EPA Region 10 Administrative Order on Consent In the Matter of Yakima Valley Dairies, Docket No. SDWA-10-2013-0080, www3.epa.gov/region10/pdf/sites/yakimagw/consent_order_yakima_valley_dairies_march2013.pdf

[21] Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC, 80 F. Supp. 3d 1180 (E.D. Wash. 2015),

http://www.centerforfoodsafety.org/files/320--order-granting-in-part-msj-11415_78926.pdf

SDWA was not duplicative of the citizen enforcement action under RCRA because RCRA's provisions to ensure the safe treatment and disposal of waste was far broader than the limited reach of the EPA's emergency powers under the SDWA. Cmty. Ass'n for Restoration of the Env't, Inc. v. George & Margaret LLC, 954 F. Supp. 2d 1151, 1159–60 (E.D. Wash. 2013).

Through that enforcement action, the citizens around the dairies were able to get broader and more effective relief for their harms than was possible under the EPA consent decree. Specifically, the citizens obtained bottled water delivery for households three miles downstream from the CAFOs rather than the more limited boundaries set by the EPA. The community was also able to get reasonable but meaningful changes to the CAFOs' waste management system, including liners for their storage lagoons, limiting manure applications on land to only what the crops actually need, and careful monitoring of the groundwater flow from the CAFOs.

CONCLUSION

The record is absolutely clear. RCRA as it stands already achieves the purported purpose of the so-called Farm Regulatory Certainty Act, and the bill merely stands to shield an entire industry from liability. Without the citizens' right to enforce the law, local communities cannot count on state agencies to effectively protect them from illegal, polluting, and dangerous manure contamination. Local citizens must have the ability to enforce this law because it is their only tool to protect their sole source of drinking water. State agencies have been reluctant to take action for violations of manure management, and federal agencies have not taken the measures necessary to fix the problem in rural communities who have dirty water. If RCRA was designed to help local communities to be safe, to protect their economies, and to stop public health threats, citizens must have the right and ability to protect themselves and enforce it without constraints that would render that right meaningless.

[The attachments to Ms. Culpepper's statement can be found at: *https://docs.house.gov/meetings/if/if18/20171109/106603/hhrg-115-if18-wstate-culpepperj-20171109.pdf.]*

Mr. SHIMKUS. The chair thanks the gentlelady.

We will now turn to Mr. Lynn Utesch, founder of the Kewaunee Citizens Advocating Responsible Environmental Stewardship.

You are recognized for 5 minutes. Thanks for coming.

STATEMENT OF LYNN UTESCH

Mr. UTESCH. Thank you for allowing me to speak today.

I live in Kewaunee County, Wisconsin. I am a farmer. I started farming with my uncle on a dairy farm. I currently farm with my wife and my two youngest sons and raise beef on our 150 acres in Kewaunee County.

Kewaunee County has 15 dairy CAFOs. The groundwater in my community has been tested and shows that 34 percent of the wells tested are contaminated with E.coli and/or nitrates. In the town of Lincoln, it has been tested and shown that over 50 percent of the wells tested are contaminated.

USDA researchers have done extensive researching and found that there is salmonella, rotavirus, cryptosporidium, and other pathogens in our water. They have equated our water to that of a Third World country. Judge Jeffrey Bolt at a CAFO permit hearing said that water in the town of Lincoln is deplorable and that the State of Wisconsin has a massive regulatory failure.

The citizens that live with this water are afraid to drink their water, brush their teeth, take a shower, and even afraid to wash their grandchildren's scratches out with their water, because it may be so contaminated to make them sick.

Kewaunee County has three major rivers: the Ahnapee, the East Twin, and the Kewaunee rivers. They were former Class 1 trout streams. They now are on the impaired waters list. Our organization, along with Marquette University, has been testing the water and the sediment in those streams and rivers, and they have found MRSA and multiple antibiotic resistant bacteria in our waters. Why do you think that? Why should we care about that?

There was a young man that was visiting with his grandparents and was playing in one of those streams and had a cut on his knee. It wasn't soon after that that it became infected and, unfortunately, he contracted MRSA. This young child was then sent to have part of his kneecap removed and holes drilled in his leg to drain out the MRSA.

We live along Lake Michigan. Our beaches are filled with cladophora, which is an algae that grows because of excess nitrates and phosphorous. They were closed for 20 days in 2014. Our organization, along with several others, over 3 years ago petitioned the EPA under the Safe Drinking Water Act to invoke their emergency powers. We had DNR workgroups. And part of that, what came out of all of our work groups, was sent to the Governor's office, yet gutted after lobbying by the dairy industry.

In the State of Wisconsin there was a Legislative Audit Bureau report done and they found that over 94 percent of the time the Wisconsin DNR did not follow their own regulations.

The Farm Regulatory Certainty Act does not provide certainty. Today you have been told that this is going to hurt small farmers. The reality of this is that this is a polluter protection act.

As a farmer, we need to know that we are doing things sustainably. Unfortunately, there are those that do not, and they generate so much waste and put it on so little acreage that it is having a negative impact on people's groundwaters. As a small farmer, this act does not protect me.

I am asking you, requesting of you, please help my community. We need the government to do its job. When they don't, we need to be allowed, the citizens, to be able to do the enforcement for those agencies.

You have heard earlier that farmers are the most regulated industries. Unfortunately, they are. But they are also the least enforced. Please do not allow this bill to go forward.

Thank you.

[The prepared statement of Mr. Utesch follows:]

CITIZEN ENFORCEMENT IS ESSENTIAL TO PROTECT COMMUNITIES AND AMERICA'S DRINKING WATER FROM AGRICULTURAL POLLUTION, WHEN GOVERNMENT FAILS TO PROTECT US

Statement of Mr. Lynn Utesch, U.S. Navy Veteran, Owner of Guardians of the Field Farm LLC, and Co-Founder of Kewaunee Citizens Advocating Responsible Environmental Stewardship

U.S. House Subcommittee on the Environment and Commerce

November 7, 2017

Summary

As a dairyman and beef farmer, I am very familiar with the struggles farmers meet on a daily basis to make a living in today's food system. I am also familiar with the many federal and state and local laws and regulations that must be followed by agriculture, and the challenges farmers face to comply with these complex issues these laws address. I understand that some of these requirements have been passed over the years to ensure that bad practices do not endanger public health or the environment because, as every farmer well knows, manure and agricultural waste can cause serious pollution and public health threats if it is not properly managed. But these laws will not work unless citizens have the right to enforce them.

For us in Kewaunee County, Wisconsin, brown water events are not a question of "if", but a daily question of "when" and "where next". For over 13 years now, our community has had at least one infant admitted to the ICU poisoned with E. Coli, entire families including the family dog becoming poisoned after manure applications, and longtime residents moving to the city just so they can have clean water for their children.

My community has asked, over and over again, that state and federal agencies enforce laws designed to protect communities from the risks and pollution stemming from improperly managed agriculture; but over and over again, the governments have failed to protect us. They

lack the resources and the political will to take this animal agricultural industry on, and so communities like mine in Kewaunee County are left to deal with the mess, repetitively exposed to bad management practices that poison and pollute, even when that means we lack safe drinking water. So The Farm Regulatory Certainty Act is not giving me any certainty. If anything, it leaves me less certain of our community, and rural America's, ability to live in our communities safely.

This issue is close to my heart because I farm and live in Kewaunee County, which has some of the most contaminated drinking water in terms of nitrate and fecal bacteria in the state. A USDA researcher studying our water has said ours is the water of a Third World Country. Our county, and the town of Lincoln, are all on well water. In our county, cattle outnumber people five to one. This was not the case 10 years ago before the dairies became "industrial" size operations. Now, our drinking water literally runs brown with manure. A local County Supervisor is on his second well and still gets brown water when manure is applied just before a rain or snowmelt; and two years ago an older couple had to evacuate their home on the Christmas Holiday because the application fields surrounding their home caused manure to enter their well water. The contamination has been making people and calves sick in our community for years, and the majority of the problem comes from industrial animal agricultural operations. Approximately 34% of the wells tested in Kewaunee County are contaminated with E. Coli, nitrates, or both, and other contaminants. USDA has also recently found pathogenic E. Coli, salmonella, rotavirus, campylobacter, cryptosporidium, and giardia in our wells. When USDA found salmonella in the water near two schools, WDNR came out and tested only for E. Coli -- *the wrong* contaminant. Many community members no longer report brown water or contamination events to WDNR because the state provides no help. I worry that the effect of the

Farm Regulatory Certainty Act would allow agencies to sit on their hands, and for my community, and communities like ours, to have no recourse when we need it most.

This is about treating our neighbors respectfully and keeping those waters, that we all need, clean. As farmers, we do everything we can to make sure that we do not contribute to the problems that can be caused when waste is not well-managed. But there are folks out there who are more motivated by profit than concerned with people, and use bad practices. Many of these bad practices are not allowed by the law, but the already limited enforcement actions from the government means they get away with it, and that causes a real loss to rural American communities like mine. The Farm Regulatory Certainty Act would allow governments to do even *less* than they currently do, *and* take away our last avenue of legal recourse. Anyone who breaks the rules and hurts an entire community—especially children--should be held accountable for their actions. This can be painful because no one in a rural community wants to take their neighbor to court. We go to church together, and our kids go to school together, and we depend on one another in a way that is like nowhere else. But if someone pollutes the water our entire community relies on, and they refuse to change, and the government refuses to adequately fix the problem, this bill would destroy our last resort to protect our own drinking water.

Our Story of the Problem

I chose a life of farming. As a child, my extended family was in the dairy business. I began dairy farming in high school with my uncle until I served this great country in the Navy from 1981-1985, where I worked on cryptographic equipment and on submarines. As soon as I got home, I started working to save up money for my own farm. My wife and I bought our first farm on Washington Island in Door County, Wisconsin in 1993, and moved to a larger farm in Kewaunee County in 2004. We started with just three animals and grew into 85 head of

purebred Shorthorn beef on 150 acres that makes up Guardians of the Field Farm.[1] We raised our five children on our farm. Farming is not just a career choice, it is a way of life, and we have a passion for what we do. We love the land, this life, and our animals, which is why I am so concerned about the proposed bill by Rep. Dan Newhouse. Because, as agri*culture* turns into agri*business* in this County, the water in my county has become a danger to the people and the calves here.

At least 90 percent of nitrate inputs into groundwater come from artificial fertilizers and manure from farming operations, according to a WDNR Groundwater Coordinating Council 2015 report to the Legislature. A dairy farm with 2,500 cows produces as much waste as a city with around 411,000 residents. In Kewaunee County, there are 97,000 cows, heifers and calves, of which 45,500 are dairy cows. We have 15 mega-sized dairy farms in our county alone and concentrated animal feeding operations in our state are up by 400 percent from 2000. That means that the dairy cows *alone* produce as much waste as 7.48 million people, or more than the entire states Tennessee and West Virginia combined, only in the space of Fort Irwin. This is complicated in my region because our aquifer, which supplies all of our drinking water, moves through porous rock called karst, which allows any moisture from the surface, including liquid manure, to move quickly through the soil and into the aquifer, where it contaminates nearby wells. It happens so frequently it is almost predictable now. If one of the industrial dairy operations in our county applies manure before heavy rains or snowmelt, it washes directly into our community's wells and comes out of the tap brown and smelling like manure. I attached some pictures of my neighbor's water for you to see for yourself.[2]

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[1] See attached Pictures 1 and 2 of the Utesch farm.
[2] See attached Pictures 3 and 4 of brown water in Kewaunee County.

In Kewaunee County, we are all very familiar with the problems associated with animal manure in our water. Our county's three major rivers — the Ahnapee, East Twin, and Kewaunee — all violate state standards for phosphorus pollution and are on the EPA's impaired waters listing. In Wisconsin, one in five wells in heavily agricultural areas is now too polluted with nitrate for safe drinking, according to our Department of Agriculture. Soon after we moved to Kewaunee County, one of our community member's six-month old daughter was rushed to intensive care due to e-coli poisoning from their homestead's well water. One of our community members suffered chronic diarrhea for years before he knew he should get his well tested; once he started doing that, E. Coli showed up regularly in his water. Another community member is surrounded by manure fields; his first wife died of cancer and his second wife is now sick with the same cancer. His well has tested positive for salmonella and other contaminants. After the USDA studied wells in our county in the last few years, the parasite Crypto was found in 12 percent of the sampled wells, and bovine-specific rotavirus A was in 14 percent. The concentration of bovine-specific rotavirus A was extremely high, as compared to the concentration of human-specific ones. Other pathogens USDA found included E. coli, Salmonella and rotavirus C. We were told that the pathogens in the wells could lead to severe or life-threatening illness. Of the 12,200 people in my county using private wells, the scientists who did the study estimated that around 140 people and 1,700 calves a year are infected with Cryptosporidiosis from contaminated well water.

We have lost local businesses because of the polluted water. Our beautiful Lake Michigan beaches now stink and the water is filled with Cladaphora algae, caused by nutrient runoff. In 2014, our public beaches in Algoma were closed 20 of the 90 open days because of the algae and E. Coli. A local café and outdoor garden on Lake Michigan closed in 2017

because of water quality issues, and the stench from their lakeshore frontage. Also, our community's home and property values are plummeting. A home with 900' of lakefront recently sold at a major loss, and I have heard stories of offers on homes and property for only 50% of their value. Families that have owned property in our community for decades, and that have been farm families, are now moving away to the city in order to avoid the problems here.

When we lose our water, many of us have no recourse, and no way to get clean water. A new well costs about $10,000 - $15,000. Household treatment systems in our area run about $17,000 per home, and even a single faucet system costing $500 is too much for some of us. Several community members came together, and it took us 3 years, but we finally got a clean public water kiosk installed at the local high school. Now people in the community can access clean water; we have about 80-90 families that use it now. The kiosk remains the *only* community source of clean water for anyone with a contaminated well on an ongoing basis. But, our community is proud, and people do not want others knowing their water is dirty, so unfortunately a lot of people are ashamed to be seen using it. One of the local dairies tried to start a clean water program. But can you imagine going to a polluter and having to *beg* for clean water? Or allowing the polluter into your home, and giving them information about your family, just to access clean water? This is something most people in Kewaunee County will not do. Many people in the community work for the dairies as farm hands, crop haulers, combine drivers. These people are hostage to the situation. How can they speak out against the entity that provides their paycheck?

Witnessing the degradation of the water quality of local rivers and streams—and the high contamination rate of tested wells in Kewaunee County spurred my family into advocacy. In 2011, my wife and I, along with fellow residents in Kewaunee, established Kewaunee Citizens

Advocating Responsible Environmental Stewardship for concerned residents to have a voice in the local and statewide debate over the need for greater water protection and sustainable farming. It allows us to stand together and to try to hold the WDNR accountable when they refuse to do enough to hold the dairies accountable, or to clean up our drinking water. But even though concerned county residents can find support through the citizen action group, taking on the risks and costs of a lawsuit against the state government over pollution problems demands significantly more than most people are willing to take on. It is very difficult to spend your time, money and energy over a lawsuit. This is a very rural community. We do not want to be bad neighbors. We prefer to work with our community.

Our community has done a lot to try and stop the pollution in our water.[3] In 2015, we voted overwhelmingly to support an ordinance implementing commonsense manure management measures that would have the effect of protecting our water. These included restricting manure spreading in winter and early spring on fields with 20 feet or less of soil, which was the first time a Wisconsin county took such action. A local town recently passed a one-year moratorium on new operations coming in. And we are working on banning manure spray irrigation – large, tall sprinklers that fire manure across a field. But that has not been nearly enough to make dent in the problem. We need state agencies to take strong action to improve our conditions, but while they take some action, they will not do enough to stop the problem or require cleanup. In 2017, the WDNR quietly announced a well program, but the income requirements and testing requirements and procedural hurdles to qualify for the program make it a joke for the community to participate. USDA is conducting a study of the water, but the study only provides a snapshot; it is not tracing the pollution back to its source. My biggest concern is that under this bill, citizen enforcement would be stopped where there is a threat to

3 Attachment 5 (selected articles regarding Kewaunee County problems and efforts.

public health simply because an agency is taking *some* kind of action related to the facility's manure management, even if that action does not fix our problem or makes even less of an impact than we could do on our own. If this bill gets passed, a broader range of actions that an agency has taken will shut the courthouse doors in my community's face even though our water is still contaminated and the agency's actions do not stop the pollution or cleanup the mess.

Let me give you an example of some of the ways we have tried to work with the industry and the government to fix the problem. In 2014 a number of groups, including Kewaunee CARES, petitioned the EPA to simply *investigate* groundwater contamination in Kewaunee County, the maximum EPA was able to do under the Safe Drinking Water Act, but EPA took no meaningful action. EPA pushed the Wisconsin DNR to respond, and WDNR started workgroups to look at some of our issues. The workgroups were very inclusive; they were made up of dairy operation owners, manure haulers, agronomists, state officials, federal EPA officials, environmental advocates, local community member representatives, and town government officials. We worked together for 2 years and presented two proposals to change state regulations to try and fix the problem, all the while knowing that the water in our wells could hurt our families. Those proposals were consensus items, including industry agreement. But when the proposals got to the Governor, he refused to enact the full proposal. The parts of the proposal that did come through have never been implemented by the state. So the problem—that is our poisoned water-- was, and remains, unresolved. To date, not a drop of clean water has been provided despite all that work.

Now, we work with our county and township governments to try to make things better. Just last week, a local tax assessor recognized some devaluation for the homes located next to operations. Earlier this month, a town passed a one-year moratorium on new operations. But

those efforts have small impacts and may be short-lived. We are still fighting every day to get the necessary information to participate in public process on permits, and to get public health and environmental information. Sometimes information is provided at the very last minute, compromising our ability to use it effectively and to fully participate in public proceedings. While you can't make people test their water – and some people don't want to know what's in their drinking water because bad results can affect their property values – the cause for alarm here is very real. It is going to take action from the EPA to keep manure spreading, and the WDNR, in check. But we cannot get EPA or WDNR to do what needs to be done to put the health of people first. If we as a nation are leaving it up to the individual citizen to figure out if their wells are contaminated, and to bear the cost of obtaining clean water, then it is a shameful public policy to simultaneously take away our rights as citizens to bring legal action to get our clean water back.

[The attachments to Mr. Utesch's statement can be found at: *https://docs.house.gov/meetings/if/if18/20171109/106603/hhrg-115-if18-wstate-uteschl-20171109.pdf.]*

Mr. SHIMKUS. Thank you very much. We appreciate your testimony.

This is what we are going to do. To my colleagues, the votes have been called on the floor. I wanted to expedite it so everyone could be here for the testimony. A couple of us will be coming back to engage in questions.

But at least we were able to get all your statements in the record with both of my colleagues here.

So with that, I am going to recess the committee until after votes, and that may be about 20, 30 minutes.

[Recess.]

Mr. SHIMKUS. We will call the hearing back to order.

First of all, thank you for your patience.

And I know that some of you have been told to expect, since a lot of members are going to the airport, it is a fly-out day, not a lot to be here. I am sure there will be interest in submitting questions for the record. And if you get those and can get them back to us, I know there is a timeframe that we would like it in, but expeditiously, and we will include that as part of the record of the hearing.

So let me start by recognizing myself for 5 minutes and my question first to Ms. Romig.

Your written testimony explains that Resource Conservation and Recovery Act, RCRA, currently bars citizen suits if EPA is diligently prosecuting someone who is in violation of RCRA or CERCLA, and that because agricultural operations are not regulated under RCRA, allowing citizen suits against agricultural operations under RCRA would result in the duplication of efforts and excessive litigation that Congress was trying to avoid.

Doesn't the discussion draft impose the same restriction on citizen suits in order to allow EPA or the state to diligently prosecute the laws that do apply?

Ms. ROMIG. Absolutely. The discussion draft has absolutely no impact on what the agencies can or can't do. It also doesn't have the impacts that you heard earlier today on the citizens. It doesn't prevent them from all lawsuits, it doesn't prevent them from nuisance actions, trespass actions, property damage actions. The only thing that this discussion draft does is prevent them from bringing a RCRA action if they are already under an enforcement action from an agency under another statute.

And while we heard that citizen suits are the last resort, they aren't. They are usually the first resort, because they are one of the statutes that allow fee shifting where the winning citizens get to ask the farmers to pay for their lawsuits. So they will often resort to citizen suits well before they resort to any other type of lawsuits that are out there available by common law and by state law.

Mr. SHIMKUS. Thank you very much.

And just for full disclosure, a lot of people who follow us know our districts and how they are. So I have more pigs than people in my district. We have large operations. I am very proud of that, because it is jobs, and production agriculture feeds the world. And

you heard that from some of my colleagues in the opening statements.

But there is a balance. And I love hearings. I love the Congress. And this is our chance to ask questions and get stuff back, because there is truth somewhere in here and we are trying to figure out where that is.

Mr. Wood, and this is my written question here, and I represent a district with significant agriculture presence. I kind of said that. Can you explain why duplicative litigation is so detrimental to family farms?

Mr. WOOD. Sure. Thank you, Mr. Chair.

In 2013, the farms in the Yakima Valley entered into the consent order with EPA. In 2013, they were sued under RCRA on the very same issues that were addressed. They made a decision to work cooperatively with EPA. They dealt with lagoon testing, lagoon liners, soil testing, et cetera, et cetera. And all of those things under the Safe Drinking Water Act were considerations for doing the right thing. They were financial considerations. And then they turned around and were sued under the citizen suit anyway.

So the question now a lot of farmers are asking is: If I am facing the same situation, do I work with the agency and get sued or do I wait and see if I get sued? This will bring more certainty for working with the agencies.

Mr. SHIMKUS. The EPA region, is that Region 10?

Mr. WOOD. Region 10.

Mr. SHIMKUS. And where is the headquarters at of Region 10?

Mr. WOOD. That is in Seattle.

Mr. SHIMKUS. OK. Because I am in Region 5, and I know some regions are viewed by people who are on the business side as really tough.

Mr. WOOD. That would be Region 10.

Mr. SHIMKUS. I would put Region 5 up to the task also of being a very challenging one for folks. And I think that probably Wisconsin, I believe, is up in that region. Illinois, I know that for sure.

Back to Mr. Wood. How would the discussion draft sponsored by Mr. Newhouse help protect our farmers and other agricultural operations?

Mr. WOOD. Well, it gives them the protection. If they are under enforcement, whether it be a consent order or a penalty and any other oversights from a Federal or state agency, then they have that certainty.

These farms, these four farms were told that they had that certainty when they were working with EPA on the consent order: Enter into this rigorous agreement with us, we will provide the oversight, and the matters are resolved. That turned out to not be the case. They were dealing with them under the Safe Drinking Water Act, the very same issues came up with the RCRA lawsuit.

So they got sued over the same issues they were working with the agency to resolve. And so the certainty is not there. I have farmers telling me that if they are faced with a lawsuit today that they will just fold because of what happened. And these are large farms, these are small farms. They are saying that there is no certainty anymore.

Mr. SHIMKUS. And my time has expired.

I also have the largest wheat district, corn and beans, and the largest dairy counties in Clinton County, Illinois. So it's not near the size of some of the big areas, but we do have that.

So with that, I would like to yield to the ranking member of the subcommittee, Mr. Tonko, for 5 minutes.

Mr. TONKO. Thank you, Mr. Chair.

Sometimes we hear about citizen suits as a sort of bogeyman, but these suits can be valuable to actually enforcing the requirements that we passed into law and empowering ordinary people to protect themselves and their communities.

So, Mr. Utesch, I want to thank you for your testimony. This subcommittee has spent a lot of time thinking about how to ensure Americans have access to safe drinking water, and it is important to hear the perspective of rural communities that primarily rely on private wells. It really sounds like you have taken a lot of steps to work with farms, as well as the local and state governments, to try to address the given problem.

You mentioned a number of suits that have come about. Is that in the past as a situation or——

Mr. UTESCH. We have petitioned the EPA under the Safe Drinking Water Act, like I said, over 3 years ago. We also have petitioned the EPA, we have petitioned for corrective action, and, unfortunately, we have really seen minimal amount of action by the EPA to actually address those issues.

To put it in perspective, our community petitioned the EPA before Flint, Michigan, did and we have yet to see a response from them officially as to what they are going to go do. We have received no drinking water for our citizens from any government entity, other than our local high school working with citizens that provides clean water on an ongoing basis for the citizens in our community.

So even at the state level, we have done work with the Wisconsin Department of Natural Resources, and every time that we try to get some enactment to make things better for our citizens it is constantly being pushed back against by lobbying groups. So that is part of our issue, is that we are not getting the response from the government regulatory agencies to actually fix these issues.

Mr. TONKO. And can you give a few examples of what you have been doing to try to protect your community?

Mr. UTESCH. At the local level, mainly at the town and county level, we have towns in our community, the town of Lincoln has actually put in place a moratorium to not allow any further expansions of the CAFOs in their community. They currently have three. So 3 out of the 15 that are in Kewaunee County, that will affect them.

We have also put in place at the county level, we have enacted a winter spreading ordinance that makes it so that from March until April 15th that there is no application of liquid manure on 20 feet or less to bedrock.

The one thing that has been identified through all the research in our community is the spring runoff, the snowmelt, is one of the biggest issues for contaminating our groundwater, and that was something that was passed in our county. It had to go to a referendum to all the towns and it was passed by every single town in our county.

Mr. TONKO. Do you get paid to do this work?

Mr. UTESCH. No, I do not. This is all voluntary.

Mr. TONKO. What would it mean for a community that is dealing with problems like yours if we prohibited citizen enforcement of our waste laws?

Mr. UTESCH. One, I believe that we would not get our water fixed. While our community is not looking at pursuing this at this point in time, we want to work with those agencies, but I think without having this available, it makes it so that even the state and Federal agencies have to do the work.

So without that threat, I guess would be a good way to put it, of citizens taking this into their own hands, it doesn't make it so that the state and Federal agencies actually do do the work that they should be doing.

Mr. TONKO. And, Ms. Culpepper, how have you worked with communities trying to protect themselves from manure pollution?

Ms. CULPEPPER. Thank you for that question.

I work with communities nationwide. In fact, I also work with Lynn's community. And I have seen that these communities, despite what we heard earlier, that litigation is the absolute last thing that they want to do.

In rural communities, their children go to school together, they go to church together, they live next to each other. They don't have other people to depend on. And the last thing that they want to do is litigation.

But it is also incredibly frustrating for them when for decades they work with state and Federal agencies trying to get a solution to their problem and they don't.

In the Yakima lawsuits, when EPA stepped in under the Safe Drinking Water Act, the consent decree didn't fix their problem. And that was why, after two decades of trying to fix it, that they invited us to bring that lawsuit. And that lawsuit brought clean drinking water to a 3-mile radius around the dairies, dozens of households that had water seven times above the legal limit for nitrates suddenly getting access clean to water.

Allowing these citizens the chance to stand up for themselves and not rely on a government that is not showing up for them, or that is falling down on the job, or showing up with actions that don't fully fix the problem, is critical, particularly given the public health purpose of RCRA.

Mr. TONKO. Mr. Chair, I yield back.

Mr. SHIMKUS. The gentleman yields back.

The chair recognizes the gentleman from Georgia, Mr. Carter, for 5 minutes.

Mr. CARTER. Thank you, Mr. Chairman.

And thank all of you for being here. Obviously, this is something that is very important.

Mr. Wood, I want to start with you. It is pretty clear, at least to me, that congressional intent and that the EPA regulations, that manure was never intended to fall under this category within RCRA. And I am just wondering, prior to this Washington ruling, what were the regulatory requirements that dairy farmers had to follow for manure under the law?

Mr. WOOD. Thank you, Congressman.

The language in the Code of Federal Regulations is pretty clear, that RCRA is not to apply to livestock, manure, or to crop residues returned as fertilizer or soil conditioners.

I want to very quickly just mention some of the areas dealt with in the 2013 consent order. Lagoon testing and liners, soil testing, groundwater monitoring wells, detailed reports, composting stalls, testing pipes, and more were all dealt with in that consent order in 2013.

Was the citizen lawsuit the last resort? Absolutely not. It was filed in 2013 against the dairies. So arguing that it didn't resolve the problem I think is not supported by the timeline on this.

The dairy Nutrient Management Act governs our dairies, EPA, Department of Ecology, and more.

Mr. CARTER. In that lawsuit, as I understand it, the judge found that the farms' manure storage facilities weren't constructed to USDA's Natural Resource Conservation Service standards. Can you explain those standards to me? I am not really familiar with those. What does that mean?

Mr. WOOD. The NRCS standards deal with the proximity to groundwater, the shape, the size, the permeability. There was no record of compliance with NRCS standards, not because they didn't comply, but because they didn't receive NRCS funding.

And so some farms that build the storage lagoons on their own will not go to NRCS for matching funds. And so NRCS did not have a record of that.

Mr. CARTER. OK.

Ms. Romig, this case, this Washington case really opened up new legal pathways against farmers, and under a bill, as we said earlier, that was never intended for manure to be included. Have these citizen lawsuits, have they changed the way environmental regulations are enforced, in your opinion?

Ms. ROMIG. In my opinion, they are trying to enforce existing regulations. So they are not claiming that the regulations aren't sufficient. They are claiming that the agencies aren't doing so.

And in this lawsuit, I would like to point out, in Washington, that whether or not the district courts have jurisdiction is dependent upon whether or not something has been prosecuted. But in the Washington case, you had 111 pages and multiple experts just to determine whether it was manure regulated by RCRA or not. And that is not what is supposed to happen in the Federal courts. You are not supposed to have to have all of these experts just to determine whether the court should even act.

Mr. CARTER. OK. Then given this case may have been a case that—a situation, an example of where the citizen filing a case, filing a lawsuit was not necessary, and I will go ahead and say abused, have you seen cases where it was useful?

Ms. ROMIG. Yes. In fact, just even the process of starting a citizen suit is useful. You have to file notice with the agency that you think there is a problem, and that allows the agency to realize there is a problem and to step in. The notice is also useful because if you are the regulated entity, it gives you an opportunity to fix what they are complaining about before you have the lawsuit.

So the process is useful, but I think it can be pushed too far. And our courts have consistently held that when an agency is diligently

prosecuting, that they should be given the first crack at this. And then the regulated entities should receive comfort, if they are working with the agency, that they won't be subject to further litigation.

Mr. CARTER. So you have seen cases of abuse. You have seen cases also where it can be useful.

Ms. ROMIG. Absolutely. I have used them in cases to be useful.

Mr. CARTER. OK. Point well taken.

OK, Mr. Chairman, I yield back. Thank you.

Thank you all.

Mr. SHIMKUS. The gentleman yields back his time.

If it is OK with you all, it is highly irregular for us on a fly-out day to say we are going to go with one more round of questions. That means everybody gets 5 more minutes. And we would like to do that, if that is OK with you all, because this is, obviously, great testimony, both sides. We appreciate it and we understand the emotion of that.

So I think we just want to drill down a little bit more. And you have the chairman and the ranking member. And so let me begin.

So I want to go to Ms. Culpepper.

So here is the challenge that we have. We fight against the EPA all the time, and usually we Republicans don't always say nice things about them because we think they are very aggressive. They are so aggressive that they can close down businesses, they create economic harm, and all this stuff. And especially with the last administration, we were really tough on them. So it is hard for us to wrap our arms around the EPA not being vigilant. That is a hard bar for us to cross over.

So then we have this consent decree that we think—I am going to read some of these provisions—that we think is a pretty tough document. And then I think the issue is, when the parties agree to this, their stake in their livelihood and their faith of, "OK, we have got an agreement, we are going to comply with this agreement," and then the citizen suit is just another sledgehammer that has, as Mr. Wood said, and I don't have any reason to doubt him, that one of the operations went bankrupt or closed in this process.

So in the consent decree EPA had directed the dairies under the order to provide clean drinking water to all users in a 1-mile-down gradient. Is that true?

Ms. CULPEPPER. Yes, that is true.

Mr. SHIMKUS. OK.

Another part of the consent decree was that EPA instructed the dairies to install an extensive series of groundwater monitoring wells. Was that your understanding of that consent decree?

Ms. CULPEPPER. Yes.

Mr. SHIMKUS. EPA also required that dairies, told them to address the issues with manure lagoons, including lining the lagoons. We have had a lot of discussions about lining in this committee. Is that part of that consent decree?

Ms. CULPEPPER. My understanding is that they were to assess their lagoons and that if there were certain problems then they would need to line them.

Mr. SHIMKUS. OK.

The other part was the administration order required for dairies to follow procedures dictated by a professional agronomist to

achieve a specific nitrate level in the soil as part of the consent decree?

Ms. CULPEPPER. My understanding is that they were encouraged to take certain conservation measures, but that those measures were not mandatory to a level that would stop contamination.

Mr. SHIMKUS. OK. And that is why we have the hearings. I believe this, but I also have no reason to doubt your analysis of that.

And your written testimony states that in this case the state agency had not taken action and that EPA had not taken enough action to solve the problem. The way the citizen suit provisions work is that citizens are only allowed to step in when the agency has not done anything. You do not get to step in because you disagree with what the agency has done. Is that your understanding?

Ms. CULPEPPER. Yes, certainly.

Mr. SHIMKUS. So things were done, I guess that is the issue.

Ms. CULPEPPER. If I may respond.

Mr. SHIMKUS. Sure, of course.

Ms. CULPEPPER. Sure. Things were down under the Safe Drinking Water Act. And I think we can all agree here that mismanaged manure can have a multitude of different problems, right? One of them can be addressed by the Safe Drinking Water Act. But the Resource Conservation and Recovery Act, RCRA, it addresses a broader set of issues.

So the way that you handle your waste, the way that you dispose of your waste, the way that you store your waste, those are things that are handled only under RCRA. But moreover, it doesn't apply to private well users.

And so one of things that was a concern is that that 1-mile radius didn't reach all the people who had wells above the limits, right? And so when they brought action, we were able to get them that water.

And the other thing is that we were able to say: No, you have to line those lagoons, and you do have to limit, it is not voluntary, it is not assessment, you have to store, process and dispose of your waste in accordance with RCRA, which is different from the Safe Drinking Water Act.

Mr. SHIMKUS. OK. Thank you very much.

I only have 9 seconds left, so I will yield back my time and turn to Mr. Tonko for 5 minutes.

Mr. TONKO. Thank you.

Ms. Culpepper, according to EPA's statement for the record, EPA believes that EPA and State actions against an agricultural operation under other statutory authorities, not just RCRA or CERCLA, could bar the types of citizen suits affected by this bill. That means RCRA citizen suits would be prohibited if there is any pending action against an agricultural operation, even if it has no relationship to the RCRA violation.

Do you agree with EPA's reading of that language?

[The information appears at the conclusion of the hearing.]

Ms. CULPEPPER. Yes. Thank you for that question, because that really is essentially the problem, that the drafting of this bill creates a giant loophole in the citizen enforcement provision. Literally any kind of enforcement action or compliance action would prevent people protecting their drinking water.

So it could be they don't report where they shipped their manure last September and they are asking them to report that and fix that problem with their permit and suddenly you can't protect your drinking water. That is incredibly too broad to keep to the public health risk that RCRA was trying to prevent.

Mr. TONKO. Thank you. And with the Cow Palace case, did the community receive any money for bringing the suit?

Ms. CULPEPPER. Absolutely not. The only thing they did with that lawsuit was fix the problem.

Mr. TONKO. And in terms of what the community got out of it, it was just that, or was there any other activity that or resource that was provided them?

Ms. CULPEPPER. They got clean drinking water and they got the assurance that the future aquifer is not going to be contaminated anymore.

Mr. TONKO. So just to be clear, a citizen suit can be an expensive undertaking. Since no monetary damages are available, people can only get relief from the problem. There is not a financial incentive to bring these types of suits, unless the problem is serious and there are no other options available. Is that representative of the experiences you have had?

Ms. CULPEPPER. Yes. As one of the lawyers who brought the action, I can say that these lawsuits are incredibly resource intensive, both in terms of time, in paying the experts to do this work, to show that the public health crisis is actually caused by the people that we are suing, right?

But also, as you said, there is no financial incentive. So the only time you are going to bring these actions is, A, when there is a public health crisis and there are people like me who are out there dedicated to stopping these public health crises; and B, when it is so bad and the facility is so egregious that going after that facility, you know it is going to fix the problem. Otherwise people are not going to put millions of dollars and countless hours into trying to help a community for something that isn't going to fix it.

Mr. TONKO. So you have been involved in a number of these public health crises. What would it have meant for the communities you worked with if they had been blocked from going to court?

Ms. CULPEPPER. Well, I want to be clear that there has only been one of these lawsuits, and that is because it is only brought in the most egregious of circumstances.

So RCRA lawsuits against agricultural operations is a rare thing, right? Most—and I think that you would agree with this—most farmers are doing it right. And therefore RCRA is not going to apply to them. It is never going to cover a farmer fertilizing his crops. The only time that this is going to apply is when they are dumping it in your water supply or dumping it in a way that is making you unhealthy.

So for these communities, this truly is a law of last resort. It is when the Safe Drinking Water Act didn't work. It is when the Clean Water Act didn't work. It is when they have tried so hard to work with their state and Federal partners to fix the problem and there is nothing left to them.

I mentioned earlier that people in rural areas do not want to sue one another. It has to be so bad that they are willing to go those

lengths. And to take that away from them is literally taking their last tool away to protect their own private well water, which I think we all know millions of rural Americans rely on private well water.

Mr. TONKO. Thank you very much, all of you, as witnesses and for your responses.

And with that, Mr. Chair, I yield back.

Mr. SHIMKUS. The gentleman yields back his time. It sounds like we have a tough one here, Mr. Tonko. We are used to them, right?

Mr. TONKO. Yes, we are.

Mr. SHIMKUS. So before I adjourn, I need to ask unanimous consent that these letters be submitted for the record. There is a list of 11 of them.

Do I have to read them all or they are submitted here? Is that good enough? All right.

So without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. SHIMKUS. We want to thank you for coming. And we apologize for fly-out day. You never know, we could be here until 2, we could be out at 10.

I want to thank my colleagues in the minority because they really helped us expedite the process where most members, at least, got a chance to hear your opening statements and then allowing for a second round so we could drill down a little bit.

So with that, thank you for coming and stay tuned. And I adjourn the hearing.

[Whereupon, at 11:52 a.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF HON. FRANK PALLONE, JR.

Mr. Chairman, I strongly oppose the bill we are considering today. It would undermine environmental protection, protect polluters, and block citizens' access to the courts. I have no doubt that it would harm public health if adopted.

The bill is also completely unnecessary. We are likely to hear claims today that farmers are facing regulatory uncertainty, or overly burdensome regulations. And we may hear other claims that an overzealous court applied the requirements of the Resource Conservation and Recovery Act, or RCRA, beyond what Congress ever intended. These claims are simply not true. Farmers already enjoy a clear exemption from the requirements of RCRA, so long as they are acting appropriately. Manure that is applied as fertilizer is not waste, and is not covered by waste laws. However, when manure is dumped on land in amounts far beyond what the land can absorb, that is absolutely waste, and is exactly the type of dangerous disposal that RCRA was intended to prevent.

This bill responds to a specific RCRA case in Washington State concerning a concentrated animal feeding operation that did not act appropriately. They did not use their manure as fertilizer. Instead, they stored it in large, unlined lagoons, and dumped it on their fields in vast quantities. That dumping polluted groundwater and endangered public health. Why would we consider legislation that would reward these polluters?

Well, that is exactly what this bill does—it blocks citizen enforcement of our waste laws to reward polluters. This bill is among the last things this Committee should be considering. We could have used this hearing slot to conduct oversight of the Environmental Protection Agency's implementation of the Lautenberg Toxic Substances Control Act reform law we passed last Congress. We could have used it to look at EPA Administrator Scott Pruitt's questionable travel, questionable lobbying activities, or questionable use of Agency resources. We could have used it to look at the pressing issue of climate change and the implementation of the Paris Agreement by every country on earth other than the United States.

Instead, we are here today to discuss a bad bill that would undermine environmental protection and harm public health as a handout to polluters. It is dangerous, misguided, and, frankly, poorly drafted. The language is shockingly broad, and would block citizen suits anytime an agricultural operation is engaged in an administrative proceeding. That would be true even if the administrative proceeding is completely unrelated to the dangerous condition the citizens are trying to address. I sincerely hope this is merely a drafting error, and something the sponsors of the legislation will want to correct.

But even if that language is fixed, I will continue to strongly oppose this bill. We have a responsibility on this Committee to protect the victims of pollution, not the polluters. I yield back.

U.S. Environmental Protection Agency
Statement for the Record
Committee on Energy and Commerce
Subcommittee on Environment
United States House of Representatives

November 9, 2017

Farm Regulatory Certainty Act

Although the Administration does not have an official position on the Farm Regulatory Certainty Act, the EPA is providing the following summary of the bill, and background on the environmental law that it would amend, to assist the committee in considering this legislation. The stated intent of the bill is to amend the Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act, known as RCRA) to clarify the citizen suit provisions with respect to the use of manure or crop residue as a fertilizer or soil conditioner at an agricultural operation.

RCRA contains two different citizen suit provisions. Section 7002(a)(1)(**A**) provides for citizen suits to address alleged violations of RCRA requirements, including regulations, permits and orders. Section 7002(a)(1)(**B**) provides for suits to address "imminent and substantial endangerment" to human health or the environment.

The current citizen suit authority also specifies certain EPA or state actions that bar citizen suits from proceeding. For the imminent and substantial endangerment suits under section 7002(a)(1)(B), a citizen suit is generally barred if, as to the alleged endangerment, **EPA**:

- is diligently prosecuting an action under RCRA § 7003 or CERCLA § 106;
- is engaging in a removal action under CERCLA § 104;
- has incurred costs for remedial investigation under CERCLA § 104 and is diligently proceeding with a remedial action; or
- has obtained a court order or issued an administrative order under CERCLA § 106 or RCRA § 7003 under which a responsible party is diligently conducting investigation, removal or remedial activities.[1]

A citizen suit under section 7002(a)(1)(B) also is generally barred if, as to the alleged endangerment, **the state**:

- is diligently prosecuting a citizen suit under RCRA § 7002(a)(1)(B);
- is engaging in a removal action under CERCLA § 104; or
- has incurred costs for remedial investigation under CERCLA § 104 and is diligently proceeding with a remedial action.[2]

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[1] RCRA § 7002(b)(2)(B).
[2] RCRA § 7002(b)(2)(C).

This bill would add to these statutory bars. The new section would bar any "imminent and substantial endangerment" citizen suits pertaining to (1) manure or crop residues returned to the soil as fertilizer by an agricultural operation, or (2) storage of manure or crop residue for such use, when they contributed to the activities which may present an endangerment, in two situations. Suits would be barred if either EPA or the state:

- is diligently prosecuting a civil or criminal court action against such agricultural operation; or
- is diligently conducting an administrative proceeding against, or has entered into a consent agreement with, such agricultural operation.

Unlike the current statutory bars, the EPA or state actions that would bar a citizen suit under this bill are not limited to RCRA or CERCLA actions. Thus EPA and state actions under other statutory authorities could bar the types of citizen suits affected by this bill. Because states can bring RCRA citizen suits, the bill could also bar states from bringing action under section 7002 where EPA is already acting.

The bill does not bar citizen suits for regulatory violations arising from the covered activities. But the hazardous waste regulations under RCRA subtitle C exclude animal and crop waste from the definition of "hazardous waste" when they are "returned to the soils as fertilizers."[3] Similarly, EPA's solid waste regulations under RCRA subtitle D explicitly "do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners."[4] Thus there are unlikely to be many citizen suits filed under section 7002(a)(1)(A) alleging regulatory violations for the spreading of manure or crop residue for fertilizer at an agricultural operation.

The EPA appreciates the opportunity to provide this written statement on the Farm Regulatory Certainty Act. The agency stands ready to offer our technical assistance to the Committee.

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[3] 40 C.F.R. § 261.4(b)(2).
[4] 40 C.F.R. § 257.1(c)(1).

25079 Brush Creek Rd., Sweet Home, OR 97386
(541) 367-1105 · www.adaptiveseeds.com · seed@adaptiveseeds.com

Letter from Adaptive Seeds to be Considered before the Environmental Subcommittee,
Committee on Energy and Commerce,
U.S. House of Representatives
Hearing on the Discussion Draft of H.R. ____,
The Farm Regulatory Certainty Act of 2017
November 9, 2017

Dear Chairman Walden, Ranking Member Pallone, Subcommittee Chairman Shimkus, and Subcommittee Ranking Member Tonko:

Adaptive Seeds is writing to share our grave concern with The Farm Regulatory Certainty Act offered by Rep. Newhouse. As an Oregon farm-based seed company that stewards rare, diverse & resilient seed varieties for ecologically-minded farmers, gardeners, and seed savers, pollution from industrial agriculture is a critical issue for our business, our health, and our livelihood. We are deeply alarmed that the language in this draft bill would limit a citizen's ability to stop an agricultural facility that was mismanaging its waste so much that it endangers our community's health and our environment. Adaptive Seeds relies on our land, our air, and our water to do the work we do, just as all farmers in our community do. Which means that when one of us has poisoned our environment and will not fix the problem, Congress should not take farmer's access to the courts away to get them to change their practices.

Adaptive Seeds was established in 2009 by Andrew Still and Sarah Kleeger near Sweet Home, Oregon. Our farm has been Certified Organic by Oregon Tilth since early summer 2013, and all seeds

that have been grown at Adaptive Seeds are certified organic. We pride ourselves in our use of open pollinated cultivars, which encourages diversity and resilience. It is akin to open source software. Unlike hybrids, open pollinated varieties become adapted to the area in which they are grown and have been shown to outperform imported seed. This approach to production deeply roots us in the land here in Oregon, and requires clean, healthy soil, air, and water to thrive.

We are proud to be in a state with an agricultural landscape that is primarily comprised of small and mid-sized family farms and ranches, though we are aware that there is a shift in industrial production models in our rural communities. There are dozens of CAFOs where we live in rural Linn County, Oregon (population just over 120,000). Broilers are one of the top commodities produced here (6,000,000 birds produced in 2012) – the vast majority of these in CAFOs. Much of our county is within the boundaries of the Southern Willamette Valley Groundwater Management area, which was declared in 2004 after a study found that more than 20% of wells tested have moderate-to-high levels of Nitrate (study available at http://www.oregon.gov/deq/FilterDocs/gw-swvgwma-nitrates.pdf). Like many residents of Linn County, we depend on private well water for our household & irrigation needs. We also irrigate with surface water from the creek that runs through our property. Under these circumstances, the Farm Regulatory Certainty Act really hits home, and not in a good way. People in our community need to continue to be able to stand up to protect the water that we depend on for our livelihoods & our lives.

As farmers that are deeply connected to our community and our place, we are careful to ensure that small and mid-sized family farms continue to have say over our local agricultural economies and industry impacts to our shared resources. Part of our job is complying with laws and regulations to make sure that we meet the food needs of our communities, from seed to plate, without harming people or the environment in the process. We know that we meet those requirements and that most of our fellow farmers do the same. But there are exceptions to every rule, and there are currently no other ways than the Resource Conservation and Recovery Act's citizen suit provisions to force a bad actor to

go back and clean up the mess. We are up against a lot in our struggle to survive as small farmers in a food system that is increasingly corporate-controlled and industrialized, and we need every tool we can use to protect our resources and assets. We certainly do not want Congress closing off our access to the courts.

At Adaptive Seeds, we talk about our work of Bringing Biodiversity Back. Part of that, of course, is growing and stewarding seed and providing others with good seed stock for their own gardening and farming efforts. But seed work isn't only done in the field, and this is why we reach out to you today and ask you to maintain the language in this critical environmental law so that farmers like us can protect the resources we need to continue to thrive, and hold polluters accountable. Thank you for your consideration.

Sincerely,

Sarah Kleeger, Partner & Andrew Still, Partner

Adaptive Seeds, LLC
25079 Brush Creek Rd
Sweet Home, OR 97386

November 8, 2017

The Honorable Greg Walden
Chairman
Committee on Energy & Commerce
U.S. House of Representatives

The Honorable Frank Pallone
Ranking Member
Committee on Energy & Commerce
U.S. House of Representatives

The Honorable John Shimkus
Chairman
Committee on Energy & Commerce
Subcommittee on the Environment
U.S. House of Representatives

The Honorable Paul Tonko
Ranking Member
Committee on Energy & Commerce
Subcommittee on the Environment
U.S. House of Representatives

Dear Chairman Walden, Ranking Member Pallone, Chairman Shimkus, Ranking Member Tonko, and members of the Energy and Commerce Committee,

Over 1,400 farmers, ranchers, business owners, health experts, concerned and impacted communities, and public interest groups from across the country, write to voice firm opposition to the discussion draft of the "Farm Regulatory Certainty Act." This proposal is an unacceptable attack on access to the courts for rural communities harmed by toxic waste.

In America, we don't pick and choose who has access to our courts yet this proposal carves out rural communities from critical federal protections. Access to the courts provides the ability for individuals to vindicate their constitutional right to "petition the Government for a redress of grievances." Congress long ago recognized the federal government needs average citizens to be partners in enforcing America's laws, including civil rights laws, voting rights laws, environmental laws, and others. Citizen suit provisions, included in the Resource Conservation and Recovery Act (RCRA)—our federal solid and hazardous waste law—allow individuals from across the political and economic spectrum to enforce our laws, ensure government accountability, and prevent abuse. For nearly four decades, RCRA has protected human health and the environment from toxic pollution that fouls our drinking water, rivers, streams, air and soil when there is no other legal recourse.

The "Farm Regulatory Certainty Act" provides the agricultural industry with an unprecedented legal shield against responsibility when they contaminate the public's air, land and water, by curtailing the right to sue agricultural polluters that store or dispose of waste in a way that imminently and substantially endangers human health or the environment. It accomplishes this by creating a special provision for the agricultural industry that prohibits the filing of a citizen suit against an operation if an "administrative proceeding," civil action or criminal case is ongoing, without ensuring that the government's action will alleviate the harm.

A state agency, for example, could issue a notice of violation, letter, or order (without penalties), or even simply have a meeting, directing a polluter to take an action. In the presence of any such administrative act, which often involves negligible effort by a state agency and may never result in protection, a citizen suit to require compliance or cleanup could never go forward. Additionally, the civil and criminal case liability shield in this proposal would bar citizen suits without requiring that the government's legal action actually addresses the endangerment through an ongoing cleanup, as is currently required under RCRA.

This proposal is unnecessary. RCRA already contains numerous protections against frivolous, duplicative or unnecessary litigation, which have worked effectively for decades, and citizen suits under RCRA are already prohibited when EPA or the State are engaged in diligent prosecution that actually addresses the endangerment.

Agricultural operations, particularly Concentrated Animal Feeding Operations (CAFOs), are a substantial, unaddressed source of pollution across the country. For example, waterways in all 50 states are impacted by nutrient pollution – that is enormous amounts of nitrogen and phosphorus discharged to water that cause toxic algal blooms, create dead zones depleted of oxygen and life, shut down fisheries, cause fish kills, render drinking water unsafe, cause illness and death, and keep people from fishing, swimming and boating.

This alarming proposal will harm rural Americans, who are disproportionately reliant on private well water and also most likely to be located near large industrial agricultural facilities. There is currently no requirement for state or federal monitoring of private well water quality, even when residents lack the resources to perform regular monitoring themselves. One of the most severe problems associated with the mismanagement of agricultural waste is the presence of nitrate in drinking water aquifers, which cannot be seen, smelled, or tasted in drinking water. Nitrate is associated most seriously with harm to infants in the form of "blue baby syndrome," and is associated with higher levels of miscarriage, birth defects, and certain kinds of cancer. Nitrate is particularly dangerous for young children because boiling water to use for formula feeding, which parents are told to do, can actually increase the levels ingested and the danger to the child.

People in rural communities do not usually want to resort to slow, difficult, and costly litigation, they turn first to their state and local governments or EPA to ask for help. However, when those processes fail, rural communities need the courts as a last resort to protect their only source of clean drinking and domestic water.

Specifically, CAFO waste generation, storage and disposal have endangered human health and the environment by contaminating groundwater aquifers, releasing pathogenic bacteria into drinking water and recreational waters, increasing the risk of antibiotic resistance, and disposing of heavy metals from feed on lands that can build up and be released into watersheds:

- In the state of Washington, 60% of the population relies on groundwater for their drinking water supply, but several areas of the state with high concentrations of CAFOs have been found to have high levels of toxic nitrates in drinking water. Excessive waste application to land is common at CAFOs, and is estimated to contribute 66% of the nitrate contamination in the Sumas-Blaine aquifer and 58% of the nitrate contamination in the Lower Yakima Valley, which hosts the largest concentration of CAFOs in the state.
- In New York, in 2015 alone, there were over 40 documented cases of water contamination caused by CAFO waste. In March of 2017, one of the largest facilities in the state was responsible for two manure spills in the span of one week — one of the spills entered Cayuga Lake prompting the New York Department of Environmental Conservation to warn people against using or drinking water from the lake.
- In North Carolina, more than 6,500 swine, poultry and cattle CAFOs have contributed to pollution of air and water across the state, disproportionately impacting minority and low-income communities. Scientific studies have documented numerous health impacts from living near CAFOs in North Carolina, such as asthma and other respiratory disorders, exposure to antibiotic-resistant bacteria such as methicillin-resistant Staphylococcus aureus (MRSA), drinking water contaminated with nitrates, and emissions of hazardous gasses causing coughing, nausea, headaches, burning eyes and psychological effects.

- In Ohio, uncontrolled pollution from CAFOs is a significant source helping to fuel the massive toxic algal blooms in Lake Erie, which in 2014 forced the shutdown of Toledo's water supply. Grand Lake St. Marys, the sole source of drinking water for the town of Celina, is so polluted with toxic algae due to agricultural pollution that the Ohio Health Department has issued an advisory to avoid all contact with the lake. In 2015, a woman was hospitalized after coming into contact with the water while recreating.

The right of communities to protect their health and environment must be protected. We urge you to oppose the Farm Regulatory Certainty Act, as well as all similar bills that weaken federal protections from toxic waste and prevent public access to justice.

Respectfully,

NATIONAL ORGANIZATIONS:

Alliance for Justice
American Grassfed Association
American Rivers
Center for Biological Diversity
Center for Progressive Reform
Center on Race, Poverty & the Environment
Clean Water Action
Compassion in World Farming
Compassion Over Killing
Earthjustice
Environment America
Environmental Working Group
Farm and Ranch Freedom Alliance
Farm Forward
Farmworker Justice
Food & Water Watch
Friends of the Earth U.S.
GreenLatinos
Humane Society Legislative Fund
Inland Ocean Coalition
Institute for Agriculture and Trade Policy
ISED Solutions
League of Conservation Voters
League of United Latin American Citizens
Mercy for Animals
National Family Farm Coalition
Natural Resources Defense Council
Organic Consumers Association
Pesticide Action Network (PAN)
Public Justice
Rachel Carson Council
Sierra Club
Socially Responsible Agricultural Project
The Humane Society of the United States
The Moore Charitable Foundation
The Weston A. Price Foundation
Waterkeeper Alliance
WildEarth Guardians

ALABAMA

Concerned and/or Impacted Individuals:

Candice Hicks
Dell Brooke
Hannah McPeters
Jackie Heard
Jeanne Tucker
Shelley Summerford
William Moody

Organizations:

Alabama Rivers Alliance
Cahaba Riverkeeper
Coosa Riverkeeper
Tennessee Riverkeeper

ALASKA

Concerned and/or Impacted Individuals:
Lia Sanph
Lynn Wilbur

Farmers/Ranchers/Business Owners:
George Donart, Commercial Fisherman

ARIZONA

Concerned and/or Impacted Individuals:
Samantha Utesch
Myra Harris
Aida Cochran
Angela Renaud
Anonymous
Arthur C Endersen
Barbara Como
Beverly White
Blackson
Daniel Hurst
Daniel Mack
David Butler
David Turner
Dianne Douglas
Jack Reed
Jane Magee
Jessica Cary-Alvarez
Joan powers
Joseph Monaco
Juanita Colucci
June Blackson
Karen Benally
Kerry C. Kelso
Linda Butler
Lois Jordan
Lorna Proper
Mary Rainwater
Mary Stoll
Mike Butler
Mira Coluccio
Philip Diller
Rhonda Mack
Richard Renaud
Sharine Endersen
Steven Love
Sue Thomas
Linda Miller Kinman
Cynthia Conway
Mark Hayduke Grenard
Ernst Bauer
Linda Davis
Timothy Avilla
Edward & Lee Wardle
Lloyd Rogers
Leslie Saunders

Farmers/Ranchers/Business Owners:
Terri Nelson, Great American Construction
Jacqueline Avilla, Ranch Owner

Organizations:
Don't Waste Arizona
Save Tonopah Oppose Poultry Plants (STOPP)
Elected or appointed officials:
Paul Roetto, Governing Board President,
Saddle Mountain Unified School District

ARKANSAS:

Concerned and/or Impacted Individuals:
Alice Andrews
Amanda Cheatham-Hurd
Barry Haas
Donald Richardson
Lolly Tindol
Lynn Risser
Shelley Buonaiuto
Susan Gateley

Farmers/Ranchers/Business Owners:
Carol Bitting
Cynthia Parke, Parke family farm
Jean Larson, Shady Hill Farm

Organizations:
Arkansas Canoe Club
Buffalo River Watershed Alliance
Ozark River Stewards
White River Waterkeeper

CALIFORNIA

Concerned and/or Impacted Individuals:
Adriana Cervantes
Aixa Fielder
Amrit Khalsa
Andrea Bonnett
Anita Simons
Anna Ling
Ashleigh Marsh
Bonnie Bagwell
Cara Blaxton
Carol Horowitz
Cathleen O'connell
Charlotte Sines
Cherie Connick
Christina Dilko
Christopher Hendrickson
Clare Hooson
Claudia Morales
Dan And Paula Fogarty
Deirdre Brownell
Desiree Lopez
Donna Carr
Dr. Mha Atma S Khalsa
Elaine Livesey-Fassel
Elisse De Sio
Ernie Walters
Eugene Majerowicz
Evan Jane Kriss
Freda Hofland
Gail Lack
Gail Roberts
Graciela Huth
Haylee Oyler
Hillary Ostrow
Jacquelin M. Perry
James F Berkheimer
Jan Rose
Janis Hug
Jeff Miner
Jena Hallmark
Jesse Bahm
Jim Merin
Joan Squires
Joe Salazar
John Pasqua
Julie Ford
Kelly Lentz
Ladeana Satriano
Larry Lapuyade
Lisa Hamann
Lisa Robinson
Lorna Kriss
Lynne Preston
Marcia Noren
Marilyn Borchardt
Marion Reich
Martha Saavedra
Martin Friedman
Micah Mcintyre
Nina Diamante
Niria Alicia Garcia
Pamela Check
Rebecca Griswold
Rebecca Tripp
Richard Kauffman
Rob Beemer
Sam Butler
Sandra D.
Sandy Fox
Sarah Spinuzzi
Scott Boller
Sharon Crocker
Sigrid Ramos
Stephanie Romero
Steve Iverson
Steven Schlam
Susan Meserve
Ted Fishman
Timmarie Hamill
Virginia Arnold

Farmers/Ranchers/Business Owners:
Mara Zlotoff
Loretta Murphy, Drakes Bay Oyster Company
Brian Weissbuch, KW Botanicals Inc.

Organizations:
Azul
Comite Civico del Valle
Community Water Center
Impact Fund
Inland Empire Waterkeeper
Leadership Counsel for Justice and Accountability
Orange County Coastkeeper
San Diego Coastkeeper
San Francisco Baykeeper

COLORADO:

Concerned and/or Impacted Individuals:
Andi Saden
Andrea Wasserman
Carla Orlandi
Carol DeAntoni
Dale Ellis
David Mitchell
Dawn Hendry
Donna Bonetti
Dr. Richard Grossman
Ed D. Metal
Elaine Benvenuto
Gaia Schubert
Gayle Lieban
George Hartman
Jaye Anna Mundy
Kathleen Doyle
Kathryn Christian
Krista Gagnon
Margaret Shane
Mark Meeks
Martin Wolf
Raymond Schamel
Sharon Baker
Sonia ImMasche
Stacy Wagner
Stephanie Huntington
Susan Kelly Ambler
Terrie Petersen
Thomas Hutton
Travis Jardon
William Whitaker

Farmers/Ranchers/Business Owners:
Dr. Susan Raymond, Veterinarian/rancher
Dirk Kroger, Ash Tree Apiary LLC
Wayne Goin, Minion Hydrologic

Organizations:
Alamosa Riverkeeper

Elected or appointed officials:
Ralph D'Alessandro, Delta Conservation District

CONNECTICUT

Concerned and/or Impacted Individuals:
Annette Crozier
Maria Williams
Randi Saslow
S. Stirling Davenport

Organizations:
Park Watershed

DELAWARE

Concerned and/or Impacted Individuals:
Alfred Gratz
Amy Roe Ph.D.
Andrea Green
Anne Gratz
Anthony Petrillo
Carol Taylor
Carole Edgar
Cathie Nagy
Christopher Edginton
Chuck Schonder
Donna Smith
Doug Miller
Eva Klaess Barnett
Georgina Yelenovsky
Irene diaz
James Yelenovsky

Janet Terner
Jared Cornelia
Jeff Day
Jerry Lynch
Joanne Haynes
Joe Nagy
Joseph Smith
Ken Haynes
Leah Brooks
Lew Podolske
Linda Pawlyk
Loretta Copley
Margaret Keefe
maria payan
Maureen Z Dempster
Megan cain
Michael Lawton
Nancy Fifer
Nancy Willing
Patricia Williams
Patrick Gaffney
Rebecca Winant
Rhonda Anderson
Sarah Bucic
Sasha Mink
Stephen Zemanek
Thomas Murphy
Walter Novak
William Barnett
Yauheniya Zialenskaya

Farmers/Ranchers/Business Owners:
Norman Dempster, G & R Campground

DISTRICT OF COLUMBIA

Concerned and/or Impacted Individuals:
Shoshana Risman
Marty Irby

FLORIDA

Concerned and/or Impacted Individuals:
Aara Anderson
Abe Levy
Andra Heide
Bj Beavin
Casey Weiner
Cheryl Owen
Choky Alvarez
Danielle Logue
David Sinclair
Diane Eisenhower
Dr. Stocker
Fred Coppotelli
Harriet Lawrence
Janet Robinson
Jonathan Barnes
Kris Pagenkopf
Kristin Cathey
Liza Tamayo
Marcis Hoodwin
Margaret Fox
Matt Emmer
Mr Ken Bowman
Norva Achenbaugh
Pat Levy
Paula Morgan
Richard Rothstein
Robin Faraday
Susan Haines
Virginia Mendez
William Revesz

Farmers/Ranchers/Business Owners:
Diane Buxton, Geranium Lane Farm

Organizations:
Collier County Waterkeeper
Farmworker Association of Florida
Matanzas Riverkeeper
Suncoast Waterkeeper

GEORGIA

Concerned and/or Impacted Individuals:
Dale Caldwell
David Chambers
Jacqueline Robinson
Kaylee Major
Marco Pardi
Rebecca Roter

Sally Spelbring
Steve Schmidt
Tracy Trentadue

Farmers/Ranchers/Business Owners:
Eeryn Falk-Lubicich

Organizations:
Altamaha Riverkeeper

HAWAII

Concerned and/or Impacted Individuals:
Nomi Carmona

IDAHO

Concerned and/or Impacted Individuals:
Jane H. Middlesworth
Thomas Rogers

Organizations:
Kootenai Environmental Alliance
Snake River Waterkeeper

ILLINOIS

Concerned and/or Impacted Individuals:
Allison Fradkin
Amber Rose Miller
Amy Moon
Anne Speicher
Carol Jurczewski
Carol Lapetino
Christine Favilla
Cynthia Bonnet
Cynthia Fore
D. Butler
Danielle Ross
David Larsen
Donna Jaggard
Ernest L Frans
Frank Goudy
J. Beverly
Jamie Casolari
Janet Weber
Jeff Cowdrey
John Pearson
Joyce Carroll
Judith Cate
Judy Krach
Kimberly Backman
Lisa Powell
Matthew Wechsler
Megan Warren
Mike Downs
Nancy Faust
Nancy Neubeck
Pat Campbell
Patricia Pruitt
Phyllis Arist
Rebecca Rowe
Shane A Moon
Shawn Butler
Suzanne Case
Vicki Gerberich

Farmers/Ranchers/Business Owners:
Andrea Hazzard, Hazzard Free Farm

Organizations:
Illinois Citizens for Clean Air and Water
Bluestem Communications
Frontera Farmer Foundation
Illinois Council Trout Unlimited
Prairie Rivers Network

INDIANA

Concerned and/or Impacted Individuals:
Alfred Allina
Cohen Klein
Curtis Ramer
Dan Dinsmore
Danel Cox
Daniel Heckman
Danka Klein
Darell Robinson
Denise Heckman
Gordon Huey
Henry Mazzola
Jacqueline Weber

James L Schrimper
Jamie Jones
Jamie Young
Janet Prendergast
Jaralee Davison
Jason Hazelett
Jean Johannigman
Jennette Miller
Jim Leonard
Joel Sieplinga
John Marquis
John O'connell
Julia Lowe
Karen Deforest
Kate O'halloran
Kent Davison
Kevin Mccracken
Linda K Zimmerman
Linda Leonard
Lori Sanchez Ertel
Marcella Surra
Marvin Goble
Matt Radding
Max E. Zimmerman
Nancy Bruder
Neal Schrimshaw
Nina Rodocker
Paul Mills
Richard Atwell
Richard Goodwin
Rita Harness
Sara Dygert
Scott Brosman
Sherri Dugger
Shirley Inman
Stevi Kersh
Susan Knose
Susie Sexton
Terry D Hughes
Terry Goodwin
Tim Dygert
Tom Mee

Farmers/Ranchers/Business Owners:
Barbara Cox
Cary Zahm, ZimZahm Productions
Danelle Jentges
Douglas Driscoll, AD Media
Jamie Campbell Petty, Red Bark Farms
Jim Murney
Justin McBride, Second Breakfast Ranch
Justin Petty, Red Bark Farms
Karen Western, John Western & Family
Kent Reineking, Kent's Harbor, Inc.
Kevin Williams
Lisa Bough
Marjorie Miller, Miller Bees

Organizations:
Hoosier Environmental Council
Indiana Farmers Union

IOWA

Concerned and/or Impacted Individuals:
Andrew Plate
Angela Tedesco
Barry Miller
Blair Frank
Bob Sansgaard
Brenda Brink
Carol Olicker
Carole Simmons
Cherie Mortice
Cheryl Walsh
Christine Radford
Connie Larsen
Connie Suby
Dan Archip
Daryl Kothenbeutel
Diana Krystofiak
Diane Robertson
Diane Rosenberg
Edith Haenel
Effie Hall
Elizabeth Hill
Gordon Garrison
Jean Marsden
Jean Perri
Jeff Wells
Jennifer Vazquez
Jerry Avise-Rouse

Jessica Dillon
Jim Kessler
Joan Olive
John Clayton
John Ikerd
Judith Hainaut
Julie Duhn
Karen Joost
Karla Selby
Kenn Bowen
Kevin Iolbe
Linda Klimesh
Lois Larsen
Lorna Caulkins
Mandy McAllister
Margaret McDonnell
Marie Herring
Mark Edwards
Mark Suby
Mary Tarnoff
Michael Murphy
Milton Severe
Nancy Cadmus
Nikki Dietze
Norma Bosma
Patricia S. Timmens
Patrick Bosold
Patti Naylor
Peggy Nichols
R.J. Meyer
Regina Behmlander
Rich Sims
Robert Cadmus
Roberta Carpenter
Ronald J. Wyse
Sandy Moffett
Sheila Tran
Sig Barber
Sue Berkey
Sue Biederman
Susan Kolbe
Susan Schilling
Thomas Fierova
Timothy Dobe
Valerie Vetter
Vida Praitis

Farmers/Ranchers/Business Owners:
Ann Brau, Compass Plant CSA
Dale Martinson, Martinson Sodding LLC
Danny Brunsvold
Denyce Rusch, Breadtopia
Diane Benjamin
Dianne Prichard
Douglas Caulkins, Pleasant Grove Land Preservation
Erica Schultes
James Berge, Berge Farms LLC
Joyce Otto, Poweshiek CARES
L. Darrel Wrider, Wrider Whittington Farm
Laforest Sherman, Pinder Avenue Storage
Linda DeLaughter, Hoberg Harmony Farm
Lois Dovico, Dovico Hydroponics & Aquaponics & Dovico Gardens & Greenhouse
Margaret Ruddy
Marian Kuper, Keith A. Kuper Farm
Phyllis Sobek
Rita McDonald, Home Farm for 117 years
Robert Trembly, Heart's Desire Orchard
Sarah Lewis
Sarah Quinn, Quinn Legacy LLC

Organizations:
Iowa Citizens for Community Improvement
Iowa Citizens for Responsible Agriculture
Iowa Environmental Council
Jefferson County Farmers & Neighbors
Poweshiek CARES
Quad Cities Waterkeeper Inc.

KANSAS

Concerned and/or Impacted Individuals:
Becky Pruitt
Boyd A Davies Jr
Carol Abramovitz
Charlene Zink
Gwen Schmitz
Judy Morgan
Kimberly Ropp
Kris Roberts
Letitia Dace
Linda D. Vanderweide

Mary Pierce
Nickie Perry
Shelby Fatherley
Teresa Timmons
Richelle Walker
Scott Reynolds

Farmers/Ranchers/Business Owners:
Nancy Thellman, Juniper Hill Farm
Paul Krumm, Gyld Wynds

KENTUCKY

Concerned and/or Impacted Individuals:
Katie Ellis
Richard Murphy
Robin Blanton
Sandra Raupfer
Jennifer Edelen
Aloma Dew

Organizations:
Community Against Pig Pollution and Disease (CAPPAD)
Kentucky Waterways Alliance

LOUISIANA

Concerned and/or Impacted Individuals:
Jean Lappe

Organizations:
Atchafalaya Basinkeeper
Gulf Restoration Network

MAINE

Concerned and/or Impacted Individuals:
Carol Howell
Diane Hollister
Francesca Totty
Paul Saunder
Stephanie Rhodes

MARYLAND

Concerned and/or Impacted Individuals:
Adriana Delatorre
Andrea Delgado
Allen Seigel
Any Kincaid
Billy Weiland
Carl Benson
Chris Seymour
Christopher Cullen
Claire Fitch
Debbie Gousha
Dr. Chinside
Frederick F Stiehl
Heather Nottingham
Hope Clark
Ian Poisker
James Adcock
Joyce Robinson
Judy Quillin
Kim Quillin
Karen Hunter
Laurel Campbell
Lisa Crowe
Marina Feeser
Mary Phillips
Maureen Lagasse
Meya Law
Michael Greenberg
Napoleon Crowe
Patti Leonard
Paul Bishop
Robert Augustine
Ryan Murphy
Sara Huffman
Stephen Tuttle

Farmers/Ranchers/Business Owners:
Glen Webb, Centennial Farms

Organizations:
Assateague Coastal Trust
Gunpowder RIVERKEEEPER
Upper Potomac Riverkeeper
Waterkeepers Chesapeake

MASSACHUSETTS

Concerned and/or Impacted Individuals:
Ann Eastman
Brendan Cox
Dana Craig
Joan Doucette
Judith Embry
Laraine Snooks
Mary Coelho
Mary Dygert
Mary Gilbert
Maryanna Foskett
Tammy King
William S Holcombe

Organizations:
Animals Are Sentient Beings

MICHIGAN

Concerned and/or Impacted Individuals:
Alan Kommel
Anna Edwards
Barbara Lang
Beth Lincoln
Carol Timm
Carolyn Haack
Charles And Patricia Pavlik
Charles Pavlik Jr
Cindy Eby
Cindy Kirby
Daria Hyde
David C Jones
Deb Kallunki-Gotham
Elaine Wolf-Baker
Elise D. Garcia
Emily K-Paaternak
Emily Moerlins
Gary Rayburn
James Hannah
James Kelly
Jami Lowstuter
Janice Pavlik
Jennifer Bush
Jill Benn
John Kuschell
Karen Bush
Lynn Sandro
M. Leonard
Marguerite Clevenger
Melissa K. Haworth
Ralph Frey
Robert & Sylvia Xeras
Roxann Harrington
Roy Sexton
Sabrina Gross
Sister Kathy Nolan
Stevens Bartels
Susan Hunter
Susan Reithel
Susanne Spice
Thomas Bush
Thomas Wassmer
Timothy Lincoln
Tori Craig
Victoria Powell

Farmers/Ranchers/Business Owners:
George R Lastowski, Faithful Heart Farm
Katherine Melmoth, Recipe Gardens
Karla Souden, Souden Family Farm
Martha Burbeck, Beacon Springs Farm LLC

Organizations:
Environmentally Concerned Citizens of South Central Michigan
For Love of Water
Great Lakes Environmental Law Center
Healthy Pine River
Michigan Environmental Council
Michigan Land Trustees
Michigan League of Conservation Voters
Water You Fighting For

Elected or appointed officials:
Greg Mapes, Mayor, City of Alma
Roger Allman, Commissioner, City of Alma

MINNESOTA

Concerned and/or Impacted Individuals:
Ah-Li Monahan
Bonnie Harris
Dd Redman
Dia Redman
Elaine Wiegand
Janet A. Neihart
Jeni Gregory
Jim Clapp
John Viacrucis
Nan Corliss
Peggy Trom
Rebecca Deboer
Robert Wohlberg
Scott Slocum
Sonja Trom Eayrs

Farmers/Ranchers/Business Owners:
Evan Schmeling
Theresa Benda
John J. Finazzo Sr., Lipari Renewables, Inc.
Katherine Brozek, Hilltop Harvest Strawberry Farm

Organizations:
Dodge County Concerned Citizens
Minnesota River Valley Audubon Chapter

MISSISSIPPI:

Concerned and/or Impacted Individuals:
Dyan Gibson
Jonathan James

MISSOURI

Concerned and/or Impacted Individuals:
Angela Corson
Collette R. Jones
David Raich
Emily Towne
Erma Scott
Janet S. England
Joseph W. England
Leona Bochantin
Margaret Munch
Nancy Fricke
Raymond Fricke
Raymond Zahra
Shirley Kidwell

Farmers/Ranchers/Business Owners:
Amanda Good, A. Good Egg Company
Connie Key, Keyview Farms
James Leftwich, James Leftwich Farm
Jon & Sandra Wise, Wise Farms
Rolf Christen, Christen Farms LLC
Tammy Williams, Flat Creek Farm

Organizations:
Citizens Legal Environmental Action Network
Pettis County Citizens for Land Protection

MONTANA

Concerned and/or Impacted Individuals:
Audrey Jean Haight
Barbara Rusmore
Beverly Jackson
Jennifer Nitz
Ruth Angeletti

Organizations:
Upper Missouri Waterkeeper

NEBRASKA

Concerned and/or Impacted Individuals:
George Cunningham
Rachelle Hunt

Farmers/Ranchers/Business Owners:
Michelle Boden, Boden Family Farm

Organizations:
Nebraska Chapter - Sierra Club

NEVADA

Concerned and/or Impacted Individuals:
Chad Moore
Denise Martini
Douglas Moore
Faith Franck
Mike Seyfried
Patricia M. Baley
Sandra Moore
Susannah Gelbart

Organizations:
Bristlecone Alliance

NEW HAMPSHIRE

Concerned and/or Impacted Individuals:
Charissa Koulovatos
Erline Towner

NEW JERSEY

Concerned and/or Impacted Individuals:
Carl N. Oerke Jr.
Carolina Espinosa
Cheryl Dzubak
Diana J. Horen
Glenn Welsh
Helene Frakel
Joan Denver
Jodi-Beth Felton
Krunal Patel
Meredith Demarco
Michael Shakarjian
Millicent Sims
R. Vanstrien
Scott Soulia
Susan Nierenberg
Tom Harris

Organizations:
Hackensack Riverkeeper Inc.
NY/NJ Baykeeper

NEW MEXICO

Concerned and/or Impacted Individuals:
Bruce Donnell
Gaia Mika
John Tischhauser
Lesley Jorgensen
Logan Glasenapp
Maria Elena Bejarano
Monica Steensma
Susan Queen
Tony Greiner

Organizations:
Water-Culture Institute

NEW YORK

Concerned and/or Impacted Individuals:
Andrea Zinn
Andrew Cranston
Anita Brandariz
Betsy Mayo
Beverly Simone
Bridget McGuire
Carl Arnold
Carol Warren
Carole Forman
Cheryl Frank
Darian Mark
Diane Hofner
Dominic Melita
Donald Chu
Dorian Fulvio
Douglas Cooke
Edward Butler
Elaine Livingston
Elizabeth Watts
Erma Lewis
Esmee Einerson
Frans Imanuel
Gerard J. Curran
H Ellis Griffin
Herbert Coles
Irene Franck
Iris Rochkind

Jacquelyn Kallunki
James Mulder
James Sylver
Jeanmarie Chenette
Jerrilyn Johnson
Jk Kibler
Jodie Zupancic
John Keiser
John Neumeister
Jose Contreras
Joseph Wesker
Kara Shannon
Kathy Haverkamp
Leslie Cassidy
Leslie Just
Linda Byrne
Linda Gioia
Lisa Hunkler
Lydia Pyun
Lynne Teplin
Maia Raposo
Margaret Jensen
Marge Dakouzlian
Martha Reddout
Mary Buchanan
Michelle Hayward
Moraima Suarez
Nancy Staley
Pamylle Greinke
Patti Packer
Randi Gustafsson
Richard Stern
Robert Snyder
Robin Meadows
Robin Spiegelman
Sheryl Samuel
Sirena Green
Stephen Burns
Susan Carey
Timothy Dunn
Trevor Southlea
Wendy Fast
William Sharfman

Farmers/Ranchers/Business Owners:
Jeannie Irvine
Linda Yannone, Gardenella
Susan Quillio, Battenkill Culinary Servcies

Organizations:
Gas Free Seneca
North American Climate
Protect Orange County
Riverkeeper
Seneca Lake Guardian
Sisters of Charity
Swarna Hansa Foundation

NORTH CAROLINA

Concerned and/or Impacted Individuals:
Arthur Kohn
Bethany Stultz
Bryce Cracknell
Claire Wang
Dr. Kelly Doyle
Elsie Herring
Eric Zimdars
Erin Carrier
Fred Stanback
Hal Trufan
Helen Beets
Jamie Mitchell
Larry Cooper
Pammela Johnston
Sanyika Dillard
Stephen Beets
Sue Perry
Tom Leonard

Farmers/Ranchers/Business Owners:
Keith Lynch
Sheila Menendez, Hope Farms

Organizations:
Cape Fear River Watch
Catawba Riverkeeper Foundation
Coastal Carolina Riverwatch
Crystal Coast Waterkeeper
French Broad Riverkeeper MountainTrue

Green Riverkeeper MountainTrue
North Carolina Environmental Justice Network
Sound Rivers
White Oak-New Riverkeeper Alliance
Winyah Rivers
Yadkin Riverkeeper

NORTH DAKOTA

Concerned and/or Impacted Individuals:
Aaron Elshaug
Alice Urban
Bernie Howard
Bethany Elshaug
Bev Geller
Daril Rainesalo
Diane Holth
Eugene Howard
Jan Nelson
Karlan Follman
Kim Burnham
Leeann Long
Lisa Lauckner
Lois Steinhaus
Lynn C Wolff
Nancy Ferguson
Pamela Kjono
Peggy Gisi
Renae Elshaug
Robert Hendrickson
Roy Thompson
Sandra Kimmet
Sharon Harmel
Sheila Thompson
Steven Stevenson
Sue Fritz

Farmers/Ranchers/Business Owners:
Bonnie Erickson, Reel 'Em Inn Lodge
Gwen Fraase
Janelle Engstrom, Lake Region Concerned Citizens
Jesse Kenner
Lyle Johanson, Johanson Farm
Sheri Tuchscherer
Tanner Elshaug
Terry Engstrom, Engstrom Farms

Organizations:
South Agassiz Resource Council /Affiliate of Dakota Resource Council

OHIO

Concerned and/or Impacted Individuals:
Alice Dugar
Anthony Mehle
Carl S. Hines
Charles Wurster
George Marsh
James A Hepp
James Tesno
Jeffery Johnston
Jim Wentz
John Templin
Judith Walter
Judy Smucker
Julie Grote
Kathleen
Ken Vinciquerra
Kenneth Lawrence
Mathilda Navias
Michael Bean
Mj Raichyk
Peg Rotondo
Richard Reierson
Robert Sachs
Sharon Stork
Susan Lohwater
Ted E Webster
Theresa Mcgeady
Todd Cox
William Ringo

Farmers/Ranchers/Business Owners:
Lynn Fell, Fell Family Farms
Steve Klosterman, Klosterman Development Corp.

Organizations:
Lake Erie Waterkeeper Lake Erie Foundation
Ohio Environmental Council
Ohio Environmental Stewardship Alliance
Westfield Responsible Agricultural Project

Elected or appointed officials:
Tom Bullock, Lakewood City Council

OKLAHOMA

Concerned and/or Impacted Individuals:
Lydia Garvey
Madison Mayer

Farmers/Ranchers/Business Owners:
Dr. Steven Mackie, 98W Farm
Shari Morrison, Real-Ranch

Organizations:
BECAUSE

OREGON

Concerned and/or Impacted Individuals:
Diane Chavez
Elizabeth Slikas
Emma Newton
Gail Snyder
Jeffrey White
John Young
Kathryn Plitt
Martha Perez
Michael Weinerman
Nathan Klinger
Rachel Cordas
Renee Kersey
David Hermanns
Robin Miller
Susan Delles
Tarresa See

Farmers/Ranchers/Business Owners:
Carla Phillips, Phillips Family Farm
Dan Sherwood, Dan Sherwood Photography
David A Keller-Rode, Boundless Farmstead LLC
Dean Claeys, Blue Flower Family Farm
Frank Morton, Shoulder to Shoulder Farm
Hank Keogh and Jo Erikson, Avoca Seed
Jeanadele Wright, Jeanie's Jellies
Leslie Carter, Jo-Le Farms
Matthew Gordon, Cully Neighborhood Farm
Steve Fry, Dick-N-Don Inc.

Organizations:
Columbia River Estuary Action Team
Friends of Family Farmers
Oregon Environmental Council
Rogue Riverkeeper
Tualatin Riverkeepers

PENNSYLVANIA

Concerned and/or Impacted Individuals:
Alice Keppley
Bob Kanc
Bob Steininger
Cheryl Settember
Dale Broman
Deanne O'donnell
Denise Koons
Diane Calkins
Douglas Eveler
Elaine Pennington
Eleanor Weisman
Halia Vankirk
Isaac Thomas
Joe Wolfgang
John W. Parana
Jon Ayscue
Karlin Lamberto
Kayla Clayton
Kristen Markley
Laura Keppley
Matthew Moyer
Mychal Ozaeta
Nancy Dickson
Norma Horton
Patricia Risso
Paul Johnson
Raymond Kizina
Robert Rodgers
Sarah Heffner
Theresa Treasure

Farmers/Ranchers/Business Owners:
Eric Koperek, WorldAgricultureSolutions.com
Gary Walter
T. Lyle Ferderber, Frankferd Farms

Organizations:
Friends of Family Farms Montgomery Township
Juniata Valley Audubon
Kaltreider Restoration
Lower Susquehanna RIVERKEEPER Association
Mountain Watershed Association
Youghiogheny Riverkeeper

RHODE ISLAND

Concerned and/or Impacted Individuals:
Ellen Goodman

SOUTH CAROLINA

Concerned and/or Impacted Individuals:
K. Kern
Linda Parlo

Organizations:
Edisto Riverkeeper
Waccamaw Riverkeeper

SOUTH DAKOTA

Concerned and/or Impacted Individuals:
Caitlin Collier
Cathy Weiss
Daniel Dolejsi
Emily Radech
Estelle Johnson
Jane Grant
Janice Palmer
Janice Wahlers
Karen Englehart
Kathy Tyler
Kristi Mogen
Marilyn Huntley
Mike Widmark
Teryl Cruse

Farmers/Ranchers/Business Owners:
Paula Haiwick, Haiwick Heritage Ranch
Robbie Ray, Johnson Farms

Organizations:
Sierra Club of South Dakota

TENNESSEE

Concerned and/or Impacted Individuals:
Axel Ringe
Chris Drumright
Connie Dunn
Daniel Boone
Jean Cheveallier
Jesse Gore
Joyce Coombs
Linda Tift
Meredith Clebsch
Merima Alagic
Noah Vollhoffer
Sue Davis

Organizations:
Farms Not Arms
Harpeth Conservancy
Tennessee Scenic Rivers Association

TEXAS

Concerned and/or Impacted Individuals:
Addie Campaigne
Amanda Davis
Andrea Juarez
Barbara Hill
Brian Schill
Colton Harp
Cynthia Cook
Edward Hubennette
Elizabeth Odear
John Young
Kelly White
Kevin Anton
Leslie Spurling
Marianne Lynch
Michele May

Monica Lazo-Lopez

Farmers/Ranchers/Business Owners:
Joshua DeCamp, Agarita Farm

Organizations:
Environmental Stewardship, a Waterkeeper Alliance Affiliate

UTAH

Concerned and/or Impacted Individuals:
Gay Palmer Stern
Jessica Santore
Justin Grover

VERMONT

Concerned and/or Impacted Individuals:
Diana Bain
Ruah Swennerfelt

VIRGINIA

Concerned and/or Impacted Individuals:
Carlene Zach
Dorothy Beck
Elaine Becker
Ellen O'connor
Em Branson
Emilia Skoglund
Grace Holden
Hm Arnold
Lynne Rogers
Maryellen Ferratt Yoder
Ms Paulette Smith
Olivia Lowery
Pamela Townsend
Polly Lazaron
Robert Leggett
Stacie Hickman
Teresa Gladden
Todd Schindler
Triicia Schwarz

Farmers/Ranchers/Business Owners:
Kenneth Dufty, Windhorse Farm

Organizations:
Citizens for A Better Eastern Shore
Contract Poultry Growers Association of the Virginias
Potomac Riverkeeper
Potomac Riverkeeper Network
Protect Our Shores
Shenandoah Riverkeeper
Shore Wildlife Rehab

WASHINGTON

Concerned and/or Impacted Individuals:
Adina Parsley
Amelia Apfel
Beth O'brien
Bob Triggs
Bronwen Evans
Carol Mattox
David Arntson
Grace Padelford
Helen Curtis
Jennifer Purcell
Karen Erlander
Kristen Brickey
Mary Hunt
Mundi Hamilton
Peter Holcomb
Robin Chalfie
Sammy Low
Suzanne Hamer
Tyra Wallace
Vicky Gannon
Werner Bergman

Farmers/Ranchers/Business Owners:
Fritzi Cohen, Tabard Corporation/Moby Dick Corporation

Organizations:
Concerned Citizens of the Yakama Reservation
Puget Soundkeeper Alliance

RE Sources for Sustainable Communities
Spokane Riverkeeper

WEST VIRGINIA

Concerned and/or Impacted Individuals:
Hedda Haning
Jayme Bosley
Michael Klausing

Organizations:
Coal River Mountain Watch
OVEC-Ohio Valley Environmental Coalition
West Virginia Headwaters Waterkeeper

WISCONSIN

Concerned and/or Impacted Individuals:
Anita J. Martin
Anthony Belanger
Betty Koepsel
Bill Leichtnam
Brenda Vetter
Bridget Knapek
Bruce Dimick
Carol Hardin
Carol Johnson
Christine Yellowthunder
Deanna Vinson
Denise O'halloran
Donna Hann
Duane Hofmeister
Dyan Pasono
Ed Cohen
Elizabeth Lange
Elliott Long
Eric Godfrey
Gene Lemmenes
Glory Adams
Hildy Feen
James Anderson
Jane Weber
Janet Foust
John H. Kraemer
Judy Jolin
Katie Groves
Katy Aamodt
Kim Dupre
Kim Ward
Kitty Belanger
Kristy Jensch
Laura Wirkkala (Me)
Laurie Millane
Liisa Aus Norwegen
Lisa Shields
Lois Kallunki
Loma Huh
Lynn Ketchum
Lynn Shoemaker
Mark Smith
Martha Munger
Michael Mertes
Nancy Eggleston
Nancy Gathing
Pam Fischer
Patricia Finder-Stone
Paul Field
Ralph Novy
Rita Hale
Roger Adams
Steven Eatough
Sue Boehme
Sue Savage
Terry Woodward
Todd Knutson
William Hiller
William Larsen

Farmers/Ranchers/Business Owners:
David Ellringer, Kubb Farm
Gayle Gonsior, Morning View Farm
Genie Metoyer, Metoyer-Brown Farm
Jim Goodman, Northwood Organic Farm
Michelle Dewitt, Today's Realty Solutions

Organizations:
Crawford Stewardship Project
Family Farm Defenders
Farms Not Factories
Midwest Environmental Advocates
Milwaukee Riverkeeper
Religious Coalition for the Great Lakes

Sustain Rural Wisconsin Network

WYOMING

Concerned and/or Impacted Individuals:
Brian Richardson
Judith Wilson

Organizations:
Upper Green River Network

November 7, 2017

The Honorable Greg Walden
Chairman
Committee on Energy & Commerce
U.S. House of Representatives

The Honorable Frank Pallone
Ranking Member
Committee on Energy & Commerce
U.S. House of Representatives

The Honorable John Shimkus
Chairman
Committee on Energy & Commerce
Subcommittee on the Environment
U.S. House of Representatives

The Honorable Paul Tonko
Ranking Member
Committee on Energy & Commerce
Subcommittee on the Environment
U.S. House of Representatives

Dear Chairman Walden, Ranking Member Pallone, Chairman Shimkus and Ranking Member Tonko,

My name is Estela Garcia and a long time residence in Arvin, CA. Arvin is a community of around 20,000 population, most of the community is latino and farm workers.. Our water in Arvin has been contaminated with Nitrates for which the City has been working on cleaning up.. Our water I know we are surrounded by Dairies and agriculture which I feel contribute to the contamination of our water. The cow manure is used in the agriculture very heavily. We have so many dairies that have been unregulated for many years, with their ponds unlined and polluting our water.

I am afraid we could be risking our health if we drink the water. I do not want to see any of my family member or my community suffer because of these nitrates. I can not see some one get cancer, or deaths to infants because our water is contaminated with nitrates, or find out of health effects of blue baby syndrome.

Our water quality has not been in compliance with the EPA standards. For this reason, our water district had to ask for multimillion loans, which means that we the costumers will have to pay for them. Then I have to spend another $50.00 for bottle water. I am able to this for now, but I am sure there are many families, who are farmworkers, who can not afford to pay for the bottle water, so their only choice is to drink the City water that is contaminated. Our community like many around here in California have to pay high rates. We have had 8 consecutive years in total of high water rates and I know it is not going to stop there.

Our communities want to resolve these issues of contamination without having to sue. We have not been able to be successful to get the EPA and the State to clean up the nitrates in the water.

I ask you to take into account our situation we find our selves in Delano and if it's with in your power to help our communities to stop the contamination of nitrates on our water, we will be widely appreciated.

Sincerely

Estela Garcia.

Arvin, CA 92302

November 7, 2017

Dear Chairman Walden, Ranking Member Pallone, Chairman Shimkus and Ranking Member Tonko,

From 2009 to 2013 Dan Newhouse served as Director of the Washington State Department of Agriculture (WSDA). During his tenure the dairy industry flourished in south central Washington, especially in the Lower Yakima Valley where the congressman farms. During that time the Environmental Protection Agency began an investigation into serious pollution of the aquifer in this area, pollution directly related to a cluster of dairy farms that operated in clear violation of their mandated nutrient management plans.

Over sixty percent of domestic wells down gradient from this cluster of farms had nitrate pollution above the safe drinking water limit of 10 mg/L. One well had nitrates as high as 234 mg/L. These dairies had approved nutrient management plans and were inspected by Dan Newhouse's staff. One operation, a former dairy showcase with the largest manure digester in the state, applied as much as seven times the recommended amounts of manure on some fields. WSDA turned a blind eye. The Director of the WSDA Dairy Nutrient Management Program explained it this way: the dairies are required to have nutrient management plans but they are not required to follow them. And they did not.

Citizens have complained for years about polluted wells and foul air. Over 35% of all Washington milk cows, > 100,000, are maintained in a 271 square mile area in Yakima County. At the congressman's most recent town hall meeting in the impacted area dairies were at the top of citizen concerns. He continues to ignore our concerns. Agribusiness and dairy are the largest contributors to his war chest and he delivers, no matter the cost to the people who live in his own community.

We are not wealthy people. When we asked one of the Washington State Attorneys General what average citizens can do when a neighbor's careless farming practices pollute our wells, Attorney Phyllis Barney answered in a few words: "They can sue." Litigation is our only realistic recourse. Litigation is expensive and not something we do lightly. But federal, state and local governments have failed to address the pollution that results when concentrated animal feeding operation (CAFO) dairies believe they are above the law.

U.S. District Court Judge Thomas O. Rice was correct when he found that "Defendants' application, storage, and management of manure at Cow Palace Dairy violated RCRA's substantial and imminent endangerment and open dumping provisions."

We may be poor but we are not stupid. We know that Yakima County dairies are making us sick and we know that government leaders, such as Dan Newhouse, have crafted and continue to craft legislation that attempts to shield this industry from any accountability for their actions.

Please reject HR 848.

Sincerely,

Jean Mendoza

Jean Mendoza
Executive Director, Friends of Toppenish Creek

3142 Signal Peak Road
White Swan, WA 98952

November 7, 2017

The Honorable Greg Walden
Chairman
Committee on Energy & Commerce
U.S. House of Representatives

The Honorable Frank Pallone
Ranking Member
Committee on Energy & Commerce
U.S. House of Representatives

The Honorable John Shimkus
Chairman
Committee on Energy & Commerce
Subcommittee on the Environment
U.S. House of Representatives

The Honorable Paul Tonko
Ranking Member
Committee on Energy & Commerce
Subcommittee on the Environment
U.S. House of Representatives

Dear Chairman Walden, Ranking Member Pallone, Chairman Shimkus and Ranking Member Tonko,

My name is Gloria Herrera and a long time residence since 1970 in Delano, CA. Delano is a community of around 55,000 population, most of the community is latino and farm workers.. Our water in Delano has been contaminated with Nitrates for which the City has been working on cleaning up. I know we are surrounded by Dairies and agriculture which I feel contribute to the contamination of our water. The cow manure is used in the agriculture very heavily. We have so many dairies that have been unregulated for many years, with their ponds unlined and polluting our water.

I am afraid we could be risking our health if we drink the water. I do not want to see any of my family members or my community suffer because of these nitrates. I can not see some one get cancer, or deaths to infants because our water is contaminated with nitrates, or find out of health effects of blue baby syndrome.

So our cost is high, we pay the City of Delano $115 per month if you are a senior or $135 flat rate and tha is for water I can not drink. Then I have to spend another $50.00 for bottle water. I am able to this for now, but I am sure there are many families, who are farmworkers, who can not afford to pay for the bottle water, so their only choice is to drink the City water that is contaminated. Our community like many others around here in California have to pay high water rates. We have had 8 consecutive years in total of high water rate increases and I know it is not going to stop there.

Our communities want to resolve these issues of contamination without having to sue our communities. We have not been able to be successful to get the EPA and the State to clean up the nitrates in the water.

I ask you to take into account our situation we find our selves in Delano and if it's with in your powers to help our communities to stop the contamination of nitrates on our water, we will be widely appreciative. Please reject any bills or laws that would continue to put our health in jeopardy in contaminating our waters with nitrates.

Sincerely

Gloria V Herrera

Gloria Herrera
51 9th Ave
Delano, CA 9215

OPPOSE the FRC ACT: The so-called "Farm Regulatory Certainty Act"
(a.k.a. the "Freedom to Ruin Clean Drinking Water" Act)

Huge factory farms are located in rural areas where citizens often depend exclusively on private wells to supply them, and their families, with clean drinking water. These facilities, which house tens and even hundreds of thousands of animals adjacent to homes, schools and businesses, produce extraordinary amounts of waste. While most of these operations are good neighbors and manage waste appropriately, those that do not pose serious threats to public health, including contaminating water with nitrates and bacteria that lead to increased rates of infant deaths, birth defects, and cancer. Forty years ago, Congress passed the Resource Conservation and Recovery Act (RCRA) to ensure that all wastes, including animal wastes, do not endanger communities. When other environmental statutes provide no recourse, RCRA allows citizens threatened by an imminent and substantial danger to sue a polluter. If they win a lawsuit under RCRA, citizens do not receive money. Rather, the polluter is required to fix the problem.

This Discussion Draft:

- **Creates a loophole for even the worst actors**: As long as a facility is engaged in any sort of vague, undefined "administrative proceeding" for anything related to agricultural waste, no citizen can bring a RCRA enforcement action against it. For example, an industrial polluter facing a minor reporting violation could inflict wildly disproportionate (and unrelated) harm on a community without any accountability. That's like saying someone gets a free pass for a hit-and-run if she is currently contesting a speeding ticket.
- **Pulls a bait-and-switch:** The legislation's sponsors purport to be "clarifying," yet the language makes profound statutory changes designed to eliminate the legal rights of rural communities that are harmed by industrial pollution and have no other recourse to fix the problem.
- **Slams the courthouse doors in the faces of communities with no other options:** The actions targeted by this bill are last resort options used in only the most extreme cases when no other remedies are available. Without this option, communities are completely reliant on the government to fix the problem.

Setting the record straight: this bill would lower citizens' protections against industrial pollution.

- **Farmers do NOT face "double jeopardy" under RCRA and other laws.** RCRA *already* includes a "nonduplication provision," which ensures it fits together with other environmental statutes like puzzle pieces, without overlap.
- **RCRA already contains protections against frivolous, duplicative, or unnecessary litigation, which have worked effectively for decades.** Citizen suits under RCRA are prohibited when EPA or the State are engaged in diligent prosecution of the polluter.
- **RCRA does not apply where the Clean Water Act (CWA) applies.** The same pollution is generally not covered by both the CWA and RCRA. These statutes have always addressed different harms.
- **RCRA *already* exempts manure or crop residue that is going to be reused** (i.e. returned to the soil as fertilizer or soil conditioner). Only manure that is disposed of, rather than used, opens the door for RCRA violations.

Congress Must Protect the Resource Conservation and Recovery Act
So Citizens Can Protect Themselves

Contact: Valerie Baron, Natural Resources Defense Council (vbaron@nrdc.org) 202-717-8232
Jessica Culpepper, Public Justice (jculpepper@publicjustice.net) 202-797-8600

OPPOSE the FRC ACT: The so-called "Farm Regulatory Certainty Act"
(a.k.a. the "Freedom to Ruin Clean Drinking Water" Act)

Factory Farms

Factory farms—known technically as Concentrated Animal Feeding Operations (CAFOs)—are the largest animal agriculture operations. Each facility typically holds thousands, tens of thousands, or even hundreds of thousands of animals. The U.S. Environmental Protection Agency (EPA) estimates that there are approximately 20,000 CAFOs in the country, making up only a small percentage of the nation's farms.

Because CAFOs confine so many animals at once, they produce much more manure then can properly serve as a fertilizer in one place. **One herd of 11,000 dairy cows produces as much waste as a city of more than 1.8 million people—more than the population of Philadelphia.** While urban human waste undergoes treatment before it is discharged or applied to land, typically animal waste from CAFOs is never treated. Instead it is spread or sprayed on land, stored in large lagoons, or indiscriminately left in piles, allowing it to leach into water resources. This waste includes animal feces and bodily fluids and is laden with chemicals like nitrogen, pathogens, and veterinary pharmaceuticals including antibiotics.

The Cow Palace Dairy Case

The citizens of Yakima Valley, Washington battled five CAFOs that were contaminating drinking water with nitrates. For nearly 15 years, the citizens asked the EPA and state agencies to protect their drinking water. The largest of these dairy facilities, Cow Palace, confines 11,000 cows and produces more than 7 times the quantity of waste as the County's human population. In 2012, the EPA concluded that these dairies caused more than 60 percent of the nitrate pollution in the county's drinking water, but took no action. EPA entered into a consent decree with these facilities, but it was insufficient to protect drinking water; it did not solve the problem. Left with no other recourse, local group Community Association for Restoration of the Environment and the Center for Food Safety brought a lawsuit.

The court found that the dairies were not following the rules; they disregarded the very nutrient management plans designed to ensure they applied their manure properly as a fertilizer. In other words, rather than using manure as a benefit to the land and crops, the dairies were simply discarding millions of additional gallons of it that leached into groundwater. This resulted in groundwater that dangerously exceeded the EPA's nitrate limits. The court concluded the dairies were dumping waste into the environment and causing an imminent and substantial endangerment to public health, and the dairies agreed to settle the lawsuit. As a result, for the first time in 15 years, the community is guaranteed safe drinking water.

Contact: Valerie Baron, Natural Resources Defense Council (vbaron@nrdc.org) 202-717-8232
Jessica Culpepper, Public Justice (jculpepper@publicjustice.net) 202-797-8600

The Honorable Greg Walden
Chairman
Committee on Energy & Commerce
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2185 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Frank Pallone
Ranking Member
Committee on Energy & Commerce
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237 Cannon House Office Building
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The Honorable John Shimkus
Chairman
Committee on Energy & Commerce,
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U.S. House of Representatives
2217 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Paul Tonko
Ranking Member
Committee on Energy & Commerce, Subcommittee on the Environment
U.S. House of Representatives
2463 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Walden, Ranking Member Pallone, Subcommittee Chairman Shimkus, and Subcommittee Ranking Member Tonko:

I am the co-founder/Program Manager of the Rural Empowerment Association for Community Help (REACH) of Duplin County, North Carolina. REACH has been empowering the citizens of Duplin County since 2002.

Ranking second nationally in hog production, North Carolina faces unprecedented environmental devastation and health risks from factory farm waste. Over the decades, hog farms have become most concentrated in Eastern North Carolina, which is home to the ten counties with the highest density of swine in the country. A majority of rural African-Americans also reside in this part of the state. There is a documented, disproportionate impact on people of color from these factory farms. Earlier this year, the U.S. EPA Office of Environmental Justice raised concerns about the problems caused by these hog operations and expressed "grave concerns" about threats and intimidation against the minority residents who complained about these problems.

Many residents of Duplin County have relied on well water for their sole sources of drinking water. Water is essential to life, and we should all have access to clean drinking water. Communities living around these industrial farming operations must deal with a lot of problems – from asthma to the stench to contaminated water.

Access to clean drinking water for our families should not be at the whim of these operators. It is a basic human right. As a community who deals every day with the health and quality of life impacts of industrial animal agriculture, we stand in solidarity with other communities facing similar threats.

Any community should be allowed to demand that factory farms stop contaminating their drinking water. We are deeply troubled that the Discussion Draft seeks to eliminate the ability for communities to fight on their own behalf. Residents who rely on well water have no other place to turn for help.

Sincerely,
Devon J. Hall
Devon J. Hall, Sr.

From:Charles M Tebbutt P C 541 344 3516 11/06/2017 16:11 #124 P.001/002

CARE
Community Association for
Restoration
of the Environment

The Honorable Greg Walden
Chairman
Committee on Energy & Commerce
U.S. House of Representatives
2185 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Frank Pallone
Ranking Member
Committee on Energy & Commerce
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The Honorable John Shimkus
Chairman
Committee on Energy & Commerce,
Subcommittee on the Environment
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2217 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Paul Tonko
Ranking Member
Committee on Energy & Commerce, Subcommittee on the Environment
U.S. House of Representatives
2463 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Walden, Ranking Member Pallone, Subcommittee Chairman Shimkus, and Subcommittee Ranking Member Tonko:

I am 81 years young, have lived in the Yakima Valley of Washington for over 60 years, obtained my college degree while raising five children, taught school, and raised cherries and apples with my husband (now passed) for that whole time. The big dairies started moving into the Lower Yakima Valley in the late 1970's. They have since continued to expand, outstripping the ability of the land to handle the massive amounts of manure produced by the back end of the milk business. The big dairies use the land to get rid of their manure by overapplying to fields and putting their liquids in huge holes in the ground that leak to the groundwater we depend upon for life.

I am the president of Community Association for Restoration of the Environment (CARE) and have been since 1997. We have fought to protect our quality of life since before that time. We have about 80,00 dairy cows in a hundred square mile area. The federal and state agencies charged with protecting people and the environment have

failed us miserably. The only thing that has been effective in changing the dairies' practices over the years has been citizen enforcement of the Clean Water Act, and more recently, the Resource Conservation and Recovery Act (RCRA). Now that we have used RCRA as it was originally intended, our own Congressman Newhouse seeks to take away one of the few tools we have to protect ourselves from the onslaught of manure pollution.

Over the years the dairymen have threatened me personally, run me off the road for exercising my right to challenge their unlawful practices, pressured employers to fire family members of mine, and tried to make life even more miserable for those us who speak out against their atrocious behavior. I have testified in federal courts and before national commissions about these abuses. Through it all, our only successes have been through the federal environmental statutes. We have tried to sit down with the dairy industry over the years, but they have, until the recent RCRA enforcement successes, only dug in their heels further. The problem is far from solved.

We expect that you will hear testimony from the Washington State Dairy Federation about how RCRA is being misused by us poor little citizens. Well let me tell you: if you take away our most effective means of holding these massive concentrated animal feeding operations accountable for their irresponsible behavior, then we have no hope of ever recovering the quality of life we once enjoyed in this beautiful farmland and in the scores of similar rural communities I have visited over the past few decades.

I grew up on dairy farm in Missouri, so I know what a farm smells like. These CAFOs are industrial operations, not the farms that we once knew. It is unfair and un-American that they are able to dump their manure on the community, poison our drinking water, and go on as if nothing is wrong. Any other industry doing this would be told to stop and if they couldn't, they'd be shut down. Magically resolving that manure is not manure WILL NOT solve this problem and taking what little control the public has over this filthy problem will not improve the situation.

After all these years and all the evidence we the people have collected, we still have hope that the government will protect us from getting dumped on. Please don't dash any remaining hope we might still have by taking away one of the few opportunities we have to try to protect ourselves while the bureaucracy continues to willfully ignore us. Please kick this bill into the trash heap where it belongs and send a message that people still matter.

Respectfully Yours,

Helen Reddout

Helen Reddout

President, Community Association for Restoration of the Environment

From:Charles M Tebbutt P C 541 344 3516 11/06/2017 16:12 #124 P.002/002

Letter from The Guardians of Grand Lake St. Marys to be Considered before the Environmental Subcommittee, Committee on Energy and Commerce, U.S. House of Representatives Hearing on the Discussion Draft of H.R. ____, The Farm Regulatory Certainty Act of 2017 November 9, 2017

Dear Chairman Walden, Ranking Member Pallone, Subcommittee Chairman Shimkus, and Subcommittee Ranking Member Tonko:

The Guardians of Grand Lake St. Marys, Inc. (The Guardians) writes to share our grave concern with The Farm Regulatory Certainty Act offered by Rep. Newhouse. As an organization comprised of community members surrounding the most polluted lake in Ohio, Grand Lake St. Marys, which is the sole source of drinking water for the town of Celina, we are alarmed at the language in this bill. The text of the bill as it stands would strip our right to stand up for our drinking water and the source of tourism for our community simply because a government official is conducting any proceeding dealing with manure management. Effectively, we would lose our rights to stop polluters from further contaminating our lake over a reporting violation. We write to ask you not to slam the courthouse doors in our face.

The Guardians is registered with the Ohio Secretary of State as a not-for-profit organization. It was incorporated on March 11, 2013 for the purpose of educating the public of the actual level of microcystin in Grand Lake St. Marys; and to ensure that all parties with legal responsibility for protecting Grand Lake St. Marys and its tributaries are abiding by all federal and state environmental laws and regulations through legal, scientific, economic, political and educational actions. The Guardians are committed to lowering the level of pollution in Grand Lake St. Marys by reducing nutrients from point and nonpoint pollution. The Guardians

emphasis has been to identify mismanagement of the related watershed and push for a strong effort to clean-up Grand Lake St. Marys, which is one of the most polluted bodies of water in Ohio and is the only designated "distressed watershed" in Ohio. Grand Lake St. Marys is a public state park with historical significance.

One of our goals is to ensure that agriculture is complying with the law, and there are many facilities in the watershed where the state agencies are working with the facilities to comply with their permits that we monitor. Our community has never had to initiate a citizen suit against a bad actor, and we hope we never have to. However, under the language of this bill, those actions, no matter how minor or unrelated to a violation of the Resource Conversation and Recovery Act, would prevent us from ever being able to use this law to protect our lake, our drinking water, and our community from harm. And there is serious risk of harm in our community due to Harmful Algal Blooms.

Even though we are just regular community members that live around the lake, we have become experts in cyanobacteria, the blue-green algae that creates harmful algae blooms like the one that forced Toledo to warn its residents not to drink their water. Cyanobacteria release harmful toxins, including microcystin, which is the major problem in Grand Lake St. Mary. We regularly have levels of microcystin more than four times the safety threshold set by the World Health Organization.[1] Microcystin can cause serious liver toxicity, severe gastrointestinal distress, kidney toxicity, pneumonia, blistering on contact, and can lead to death. Currently, the Ohio Health Department has posted a "No Contact" advisory for the water in the lake.[2] In 2016, the levels of microcystin in the lake reached 180 ppb, even though sensitive populations like infants and pregnant women are in danger at levels as low as 0.3 ppb.

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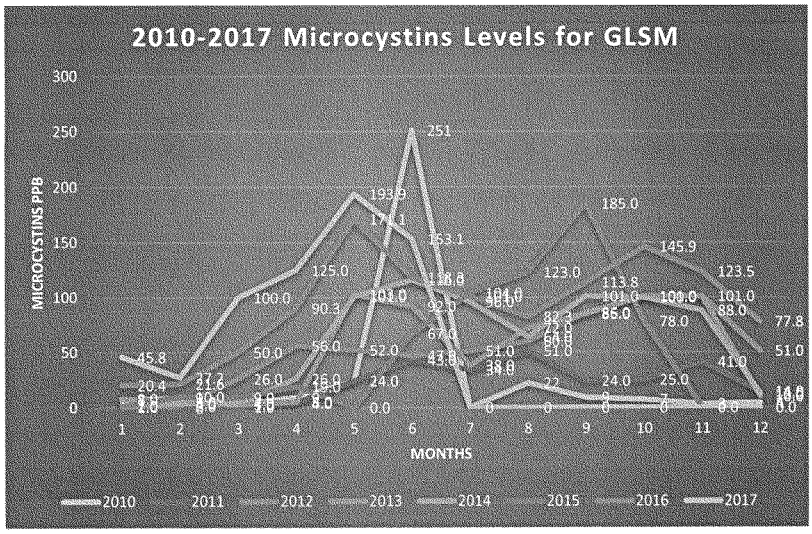
[1] NOAA - Great Lakes Environmental Research Laboratory, "Microcystin and Other Algal Toxin Guidelines" https://www.glerl.noaa.gov/res/HABs_and_Hypoxia/microcystinGuidelines.html
[2] Ohio Department of Health, BEACHGUARD Advisories, http://publicapps.odh.ohio.gov/beachguardpublic/



Members of the Guardians are residents on and surrounding the lake, or are regular tourists there. Members of the Guardians used to regularly use and enjoy the Grand Lake St. Marys, including boating, fishing, swimming, and watersports, but with the posting by the Ohio Department of Health to have "no contact with the water," our use is now very limited without endangering our lives. For example, in 2015, an Indiana woman got extremely sick when she fell off her jet-ski into the lake. Additionally, many in our community rely on Grand Lake St. Marys as their source of drinking water, which has been compromised heavily by agricultural pollution and has required millions of dollars of extra filtration that is still unable to filter all algae and pharmaceuticals from the drinking water.

Other members own or work for industries that benefitted from tourism to Grand Lake St. Marys. We have lost our investments, our businesses, and our livelihoods because of the loss of

tourism due to the pollution. Our summer tourism is a $150-million-a-year industry for the small towns and cities surrounding the lake.[3] However, because the pollution in the lake is so severe and the water is such a public health hazard, our annual sailing regatta has been cancelled, and the number of visitors coming are shrinking. Our property values are plummeting as a result.[4]

Over a decade ago, the lake was designated as a distressed watershed, and a 2007 EPA report called for reducing manure runoff from farms by 99 percent.[5] The citizens in Auglaize and Mercer counties have been waiting for nearly two decades for the State of Ohio to clean up Grand Lake St. Marys.

> "Daily Standard – April 26, 2017
> CELINA - City officials are planning a half-million-dollar expansion of the water treatment plant to improve quality and to prepare for any future treatment standards.... Plant superintendent Mike Sudman said the new process would treat for "remaining disinfection byproducts prior to the chlorine being added, any kind of minute pharmaceutical that could be remaining, algal toxins that could get through the carbon."
>
> "Currently these are things that we're not testing for but are on the radar ," Sudman said, adding the EPA will soon release a list of necessary tests."

For a decade, the State of Ohio has had the tool to clean up our lake with the "Total Maximum Daily Load" plan, which specifically spells out that approximately 90-100% of all phosphorous, nitrates and fecal coliform should be stopped from coming into GLSM if there is any hope of cleaning up the lake. However, the citizens of Auglaize and Mercer counties are still waiting for a serious cleanup effort that actually addresses the source of the pollution. Any true cleanup effort cannot ignore the agricultural contributors, which are a major source of our

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[3] Lake Improvement Association, Economic Impact of Grand Lake St. Marys, https://lakeimprovement.com/economy/

[4] The Ohio State University, Algal blooms cost Ohio homeowners $152 million over six years, https://news.osu.edu/news/2017/08/17/algaehouse/.

[5] Ohio EPA, Beaver Creek and Grand Lake St. Marts Watershed TMDL Report, http://epa.ohio.gov/portals/35/tmdl/GLSMfactsheet%20Final%20Oct07.pdf

problem. If there is a bad actor that is severely mismanaging manure, there is no more critical place than Grand Lake St. Marys to address the problem. If the government is not or cannot address a threat to our health, then the citizens around Grand Lake St. Marys deserve to know that they can take action to make their drinking water and recreational waters are safe. Given the serious public health crisis we are facing, and the failure of the government to properly address it, we are asking you not to shut the courthouse doors for our citizens to stop a polluter from contributing to the problems in our watershed.

Respectfully,

Kate Anderson

Kate Anderson, President
Guardians of Grand Lake St. Marys

The Johns Hopkins Center for a Livable Future
Bloomberg School of Public Health
615 North Wolfe Street, W7010
Baltimore, MD 21205

November 9, 2017

Environment Subcommittee
House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, D.C. 20515

Disclaimer: The opinions expressed herein are our own and do not necessarily reflect the views of The Johns Hopkins University.

RE: Farm Certainty Regulatory Act discussion draft

Dear Members of the House Environment Subcommittee,

We are researchers at The Johns Hopkins Center for a Livable Future, based at the Bloomberg School of Public Health in the Department of Environmental Health and Engineering. The Center engages in research, policy analysis, education, and other activities guided by an ecologic perspective that diet, food production, the environment, and public health are interwoven elements of a complex system. The Center also recognizes the prominent role that food animal production plays regarding a wide range of public health issues surrounding that system. We are writing to express our concerns regarding the discussion draft before you today based on House Resolution (HR) 848, the Farm Certainty Regulatory Act, which seeks to eliminate one of the only methods for public defense against the pollution of drinking water by agricultural activities such as the over application of animal waste and crop residue. We believe that HR 848, and any similar versions of it, would have serious implications for the health of rural citizens, many of whom rely on private wells for drinking and household use. [1,2] Passing HR 848 would severely limit the ability of citizens to protect and defend their water and health from groundwater pollution.

Over the last 60 years, food animal production has shifted from an extensive system of small and medium-sized farms to one characterized primarily by large-scale, industrial operations that concentrate large numbers of animals in small geographic areas. [3] This transition to large, high-density, confined animal feeding operations has resulted in the routine accumulation of large volumes of animal waste, often at rates far exceeding the capacity of nearby farmland to absorb it. [4] As a result, the excess waste produced by these operations is disposed of in a manner that can pollute surface and groundwater resources, and therefore represents a significant public health and ecological hazard. [4,5]

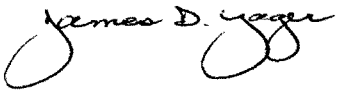
This excess waste can contain nitrates, antibiotic residues and other animal drugs, pathogens, and other hazards, [6-10] and studies have found that people can be exposed to these contaminants when they swim or engage in other recreational activities in water impacted by waste and by drinking the contaminated

water.[9-11] Contamination by pathogens can potentially cause a waterborne disease outbreak,[4] and studies have demonstrated that exposure to elevated levels of nitrates in drinking water is associated with adverse health effects, including cancer,[12-15] birth defects and other reproductive problems,[11,12,16,17] thyroid problems,[11,12] diabetes mellitus,[18-20] and methemoglobinemia (blue baby syndrome, a potentially fatal condition among infants).[11,21]

Citizen suits under the Resource Conservation and Recovery Act (RCRA) provide a much needed avenue for recourse against the pollution of private groundwater wells, especially since groundwater and private wells are not covered by existing federal regulation; the Safe Drinking Water Act does not apply to private wells,[22,23] the Environmental Protection Agency does not regulate private groundwater wells,[23,24] and the Clean Water Act only applies to navigable, or surface, waters.[25] HR 848 and similar draft legislation would, therefore, severely limit the ability of citizens to seek remediation for the pollution of their groundwater by agricultural waste.

Thank you for considering our concerns. We hope that our description of the public health risks posed by HR 848 and similar versions of the bill is helpful in your deliberation of this legislation. We welcome the opportunity to discuss this further and answer any questions you many have. Please contact us at (410) 502-7578 or by emailing Bob Martin, Director of the Food System Policy Program, at rmarti57@jhu.edu.

Sincerely,



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November 7, 2017

The Honorable Greg Walden
Chairman
Committee on Energy & Commerce
U.S. House of Representatives
2185 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Frank Pallone
Ranking Member
Committee on Energy & Commerce
U.S. House of Representatives
237 Cannon House Office Building
Washington, DC 20515

The Honorable John Shimkus
Chairman
Committee on Energy & Commerce,
Subcommittee on the Environment
U.S. House of Representatives
2217 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Paul Tonko
Ranking Member
Committee on Energy & Commerce, Subcommittee on the Environment
U.S. House of Representatives
2463 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Walden, Ranking Member Pallone, Subcommittee Chairman Shimkus, and Subcommittee Ranking Member Tonko:

We, the undersigned Washington State public interest groups, write today regarding H.R. 848, a proposed amendment to the Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*, otherwise known as the Resource Conservation and Recovery Act. The bill, sponsored by Rep. Newhouse (R-Wash.), would exclude from the definition of "solid waste" any "animal or crop waste, manure, or fertilizer or constituents derived from such animal or crop waste, manure, or fertilizer." It would also create a special provision for the agricultural industry that prohibits the filing of an enforcement suit against a polluting operation if an "administrative proceeding," civil action or criminal case is ongoing, without ensuring that the government's action will remediate the harm. If passed, the bill would create an unprecedented legal shield for industrialized agriculture to contaminate the public's air, land, and water. We urge you to take all appropriate action to ensure that this bill is defeated, for it puts Americans in danger and threatens to undermine one of our nation's greatest assets: clean, potable groundwater.

H.R. 848, sponsored by industrial agricultural special interests, is a direct reaction to the *Cow Palace* litigation, a set of successful citizen lawsuits brought against large dairy Concentrated Animal Feeding Operations, or CAFOs, in the Lower Yakima Valley of Washington. Residents living in the Valley have been forced to deal with nitrate-contaminated groundwater for decades. The extent of that contamination was brought to light in 2008, when a public elementary school in Outlook, WA tested above the federal "Maximum Contaminant Level" or "MCL" for nitrates.[1] While the children were provided bottled water as a temporary fix, the cause of the problem, industrial dairies, was ignored by both state and federal entities.

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[1] Leah Beth Ward, *Hidden Wells, Dirty Water*, available at https://www.centerforhealthjournalism.org/fellowships/projects/investigation-water-wells-rural-washinton.

In October 2008, the Yakima-Herald Republic published the results of its independent investigation into the Lower Yakima Valley's widespread nitrate contamination. The newspaper found that no regulatory agency understood the extent of the contamination or had evaluated which areas would be at risk of consuming water in excess of the nitrate MCL. Residents that were interviewed acknowledged that their wells had been found unsafe, but could not afford expensive, point-of-use reverse osmosis machines to clean their water. More troubling, journalists discovered "that broader efforts to scientifically identify and monitor groundwater pollution have been thwarted by the dairy and livestock industries – which in Yakima County account for an estimated 115,000 dairy cows and beef cattle living in concentrations as great as 8,000 per farm."[2] In fact, a dairy CAFO with just 2,500 mature dairy cows produces as much waste as a human population of *411,000* residents.[3] The key difference: human waste is treated in sophisticated waste treatment facilities, whereas cow manure is stored in unlined lagoons and dumped on fields as untreated waste.

As a result of the Yakima-Herald Republic's investigation, the United States Environmental Protection Agency ("EPA") finally took notice and, in 2010, began sampling groundwater from private wells throughout the Yakima Valley.[4] After three years of testing and analysis, the EPA issued a final report, finding that five large dairy facilities were a likely source of widespread nitrate contamination documented in groundwater found downgradient of the facilities.[5]

Shortly thereafter, the EPA entered into an agreed order with the dairies under the Safe Drinking Water Act. Local residents were incensed that the agreement did not require meaningful changes at the dairy facilities that would remediate the groundwater. Instead, residents viewed the agreement as a series of half-measures, effectively allowing nitrate contamination to continue to the detriment of the Valley residents that rely upon groundwater for drinking water. Consequently, organized residents retained attorneys and provided requisite pre-suit notice under the Resource Conservation and Recovery Act ("RCRA"), alleging that the five dairies had mishandled their manure in such a manner that caused or contributed to an imminent and substantial endangerment to human health and the environment. The state and federal governments had the opportunity to step in to take over the suits but did not.

On February 14, 2013, the Community Association for Restoration of the Environment, Inc. ("CARE") and the Center for Food Safety ("CFS") brought suit against each of the owners of the

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[2] *Id.*

[3] *Relation Between Nitrate in Water Wells and Potential Sources in the Lower Yakima Valley Report*, EPA-910-R-13-004, p. 31 n. 21. Available at https://www3.epa.gov/region10/pdf/sites/yakimagw/nitrate_in_water_wells_study_march2013.pdf.

[4] *See* EPA website, "Lower Yakima Valley Groundwater," available at <https://yosemite.epa.gov/r10/water.nsf/gwpu/lyakimag>

[5] *Relation Between Nitrate in Water Wells and Potential Sources in the Lower Yakima Valley Report*, EPA-910-R-13-004, available at https://www3.epa.gov/region10/pdf/sites/yakimagw/nitrate_in_water_wells_study_march2013.pdf.

dairy facilities. The crux of the lawsuits was that the dairy facilities had discarded their manure, eliminating its use as a crop fertilizer and transforming it into a "solid waste" under RCRA. To that end, the Plaintiffs established that the *Cow Palace Dairy*, one of the dairy defendants, had grossly over-applied manure to its crop fields, stored manure in lagoons that the defendant knew leaked and were in fact designed to leak, and composted manure on bare ground, allowing manure nutrients to leach into the soil and groundwater.[6]

The consequence of this mishandling of manure was the significant and widespread nitrate contamination of the underlying aquifer. The Court concluded that "[t]he undisputed facts are that residential wells downgradient of the Dairy exceed the maximum contaminant level, as established by the EPA," and that even if the Dairy were taking steps to "reduce" the risk of danger posed by consumption of water in excess of that maximum contaminant level, "the risk still remains to these residents," as well as to those in the flow path of the contamination from the Dairy site.[7]

After the Court found in the Plaintiffs' favor in the *Cow Palace Dairy* case, the remaining dairies entered into binding Consent Decrees. Those Decrees required the dairies to fund a Clean Drinking Water Program, which provides clean drinking water or installation of a reverse osmosis machine to residents within the dairies' contamination plume. They also required major structural and operational changes at the dairy facilities to ensure that manure would be stored in lagoons that do not leak, composted on areas that prevent leaching, and applied to fields in a manner that maximizes its function as a crop fertilizer while also protecting groundwater.[8]

The *Cow Palace* decision emphasizes the importance of the distinction Congress drew between wastes that are "returned" to the soil as fertilizer and wastes which are merely dumped onto fields as a method of disposal. As described in H.R. Rep. No. 94-1491(I), Congressional intent in passing RCRA was that "[a]gricultural wastes which *are returned to the soil as fertilizers or soil conditioners* are not considered discarded materials in the sense of this legislation." (emphasis added) (see also 1976 U.S.C.C.A.N. 6238, 6240). On the one hand, farmers who use the tools available to them to use animal wastes as fertilizer are not "discarding" their manure, but rather putting it to beneficial re-use. These are the farmers that Congress intended to protect from RCRA's requirements, as they are "returning" agricultural wastes to the soil for fertilization.

On the other hand, farmers who dump millions of gallons of manure onto their fields after receiving soil testing showing no agronomic need for additional fertilization – like Cow Palace Dairy, Bosma Dairies and George DeRuyter Dairies – do not beneficially recycle that manure. They discard it, because the crops cannot make use of the extra manure nutrients. The same is true for facilities that store manure in lagoons that leak (and are, in fact, designed to leak) and compost manure on bare ground. Those wasted nutrients – especially nitrate – move deeper and deeper into the soil, eventually polluting groundwater and rendering the aquifer unsuitable for

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[6] *Community Association for Restoration of the Environment, Inc. v. Cow Palace Dairy*, 80 F. Supp. 3d 1180 (E.D. Wash. 2015).
[7] *Id.* at 1128.
[8] *See, e.g.,* Cow Palace Dairy Consent Decree, available at http://www.yakimaherald.com/cow-palace-consent-decree/pdf_d0c6ab62-c16a-11e6-99ed-d7cbb50e6d62.html.

human consumption. Contrary to Representative Newhouse's statements, the legislative history shows congressional intent was not to insulate these bad actors from RCRA's requirements. Instead, as the Court recognized in the *Cow Palace Dairy* case, such farming operations must be held accountable for the pollution they cause.

And make no mistake: pollution from industrialized agriculture is not unique to the Lower Yakima Valley. The northwestern part of Washington State is also home to many dairy CAFOs and, unfortunately, similar environmental problems have arisen. Runoff and seepage from fields receiving excessive quantities of manure contain extremely high levels of bacteria, such as fecal coliform, that can cause shellfish bed and beach closures. For instance, between 2011 and 2014 there were 52 shellfish harvesting areas closures due to high levels of fecal coliform.[9] 180 acres of shellfish beds were closed from 1996-2006, costing the Lummi Nation an estimated $8 million in revenue.[10] More shellfish bed acres have since been closed, causing the loss of even more money and severely impacting traditional cultural practices as well. Passage of H.R. 848 will only exacerbate this problem further, as citizens will lose one of their last tools to fight against polluting, industrialized agricultural operations.

In sum, H.R. 848 subverts and distorts original Congressional intent. The existing version of RCRA already insulates farmers who correctly fertilize their crops with manure, while the Newhouse bill would improperly insulate those who improperly use their agricultural fields as a dumping ground for their unwanted waste. It takes away from citizens a critically important tool in the fight against pollution and puts hundreds of thousands of Americans, if not more, at risk of consuming polluted groundwater. And perhaps most importantly, RCRA already contains protections against frivolous, duplicative, or unnecessary litigation, which have worked effectively for decades, and suits under RCRA (already rare because of the extensive evidentiary burdens required to prove a case) are already prohibited when EPA or the State are engaged in diligent prosecution that actually addresses the endangerment.

We urge you to oppose the Farm Regulatory Certainty Act, as well as all similar bills that weaken federal protections from toxic waste and prevent public access to justice.

SIGNED THIS 8TH DAY OF NOVEMBER, 2017.

Helen Reddout, President *Community Association for Restoration of the Environment, Inc.*	Lauren Goldberg, Staff Attorney *Columbia Riverkeeper*
Chris Wilke, Executive Director *Puget Soundkeeper Alliance*	Lee First, North Sound Baykeeper *RE Sources for Sustainable Communities*
Joshua Tsavatewa, President *Friends of Toppenish Creek*	Stephanie Hillman, Northwest Campaign Representative *Sierra Club*

[9] Puget Sound Partnership, Samish Basin: Keeping Shellfish Beds Open (October 2014) at 1; Skagit County Public Works Department, Clean Water Skagit County 2013 Annual Report (2013) at 4.

[10] Northwest Treaty Tribes, Dairy Farm Pollution Costs Lummi Nation (January 16, 2015), at http://nwtreatytribes.org/dairy-farm-pollution-costs-lummi-nation/.

GREG WALDEN, OREGON
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FIFTEENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225-2927
Minority (202) 225-3641

December 21, 2017

Mr. Dan Wood
Executive Director
Washington State Dairy Federation
P.O. Box 1768
Elma, WA 98541

Dear Mr. Wood:

Thank you for appearing before the Subcommittee on Environment on November 9, 2017, to testify at the hearing entitled "H.R.___, Farm Regulatory Certainty Act."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on Friday, January 12, 2017. Your responses should be mailed to Allie Bury, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to Allie.Bury@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

John Shimkus
Chairman
Subcommittee on Environment

cc: The Honorable Paul Tonko, Ranking Member, Subcommittee on Environment

Attachment

Washington State Dairy Federation
P.O. Box 1768
Elma, WA. 98541

January 12, 2018

The Honorable Tim Walberg
U.S. Representative
Member, House Committee on Energy & Commerce
Subcommittee on Environment

RE: Written Question as Follow Up to Testimony on the Farm Regulatory Certainty Act.

Representative Walberg,

You asked the following question:

> "Your written testimony states that the language of the bill will foster a more secure and cooperative relationship between dairy families and their state and federal regulators. Can you explain why that is?"

I would use the agency interaction and lawsuit in the Yakima Valley as an example.

All four dairy families in the Yakima Valley (Washington State) case were the subject of a report and action by Region 10 EPA. They were discussing with EPA the potential of signing a Consent Order with EPA and were subsequently sued under the Resource Conservation and Recovery Act (RCRA).

All of the families had been negotiating with EPA over the details of the Consent Order, but one family did not sign because they closed their dairy operation after considering the legal and operational costs involved.

All four dairy families faced a form of double jeopardy, in that they were negotiating an agreement (the Consent Order) with the EPA and subsequently received notice of intent to sue from the activist organizations.

Three of the four families signed the consent order. The fourth family with the smallest of the farms decided to close their dairy and, as a result, did not sign the Consent Order.

In addition to losing their family business, they paid $40,000 in settlement to the litigants, emptied their lagoon, and conducted testing of soils.

There is a chilling effect of this story.

The families believed they were resolving the matter at hand. The Consent Order was intended to allow all of the parties to move forward together to make remarkably expensive technological and operational changes and avoid even greater expenses from legal action.

Instead, one farm family went out of business and three farm families had the great expenses of the Consent Order and the much greater expenses of the court case and settlement.

In the aftermath, many farm families across the nation have noted that the farms are struggling under these massive expenses and that the farms "paid twice to get there."

They ask if it is worth it to work cooperatively to settle a matter with the agencies if they will subsequently be sued over the very same matters by an activist lawsuit.

Getting hammered twice is a deterrent to cooperative approaches with the federal and state agencies.

This case remains a clear example of the problem dairies and other farms are facing. Even after the commencement of agency enforcement (negotiating the Consent Order) they faced a citizen lawsuit.

This form of double-jeopardy must end.

If farms are to face lawsuits in addition to working cooperatively with federal or state agencies, then there is no incentive to work with the agencies. We must make it possible to work cooperatively with regulatory agencies without facing additional actions over the same issues.

The draft language before the Subcommittee says that citizen lawsuits may not be filed when a state or federal agency has "commenced and is diligently prosecuting a civil or criminal action against such agricultural operation in a court of the United States or a State; or commenced and is diligently conducting a Federal or State administrative proceeding against, or entered into a consent agreement with, such agricultural operation to seek compliance with an applicable permit, standard, regulation, condition, requirement, prohibition, or order."

In the Yakima case, the EPA had commenced a proceeding against the four dairy families. The decision to close the smallest dairy was made ***after*** EPA had commenced action in this matter. The remaining farms have endured both the cost of the Consent Order ***and*** the costs of the lawsuit and settlement, which addressed virtually the same allegations and actions.

The citizen lawsuit provision under RCRA was intended to address situations where agencies are NOT acting on a matter.

The proposed bill language retains the citizen suit option for situations where action is not taken.

Where action is in progress, as was the case in the Yakima Valley, a citizen lawsuit would not be filed.

Many of the examples presented to you at the hearing were of repeated situations where state and federal agencies had failed to act. In those cases, the legislation would still allow for a citizen lawsuit.

This combination approach in the legislation should have the effect of encouraging cooperative actions between the regulatory agencies and farmers who may have an issue that requires resolution.

Thank you for your attention to this important legislation and thank you for your follow up question.

I urge your passage of the Farm Regulatory Certainty Act.

Sincerely,

[redacted]
Dan Wood, Executive Director
Washington State Dairy Federation
[redacted]

GREG WALDEN, OREGON
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FIFTEENTH CONGRESS

Congress of the United States
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2125 RAYBURN HOUSE OFFICE BUILDING
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Minority (202) 225-3641

December 21, 2017

Ms. Amy Romig
Partner
Plews Shadley Racher & Braun
1346 N. Delaware Street
Indianapolis, IN 46202

Dear Ms. Romig:

Thank you for appearing before the Subcommittee on Environment on November 9, 2017, to testify at the hearing entitled "H.R.___, Farm Regulatory Certainty Act."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

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Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

John Shimkus
Chairman
Subcommittee on Environment

cc: The Honorable Paul Tonko, Ranking Member, Subcommittee on Environment

Attachment

Amy E. Romig
Partner, PLEWS SHADLEY RACHER & BRAUN LLP,
Indianapolis and South Bend, Indiana

Before the House of Representatives Committee on Energy and Commerce, Subcommittee on Environment

Answer to Additional Questions Following Hearing on "H.R.___, Farm Regulatory Certainty Act"

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD

The Honorable John Shimkus

1. **Under RCRA, citizen suits may not be brought when EPA or a State is already pursuing an action to address the problem a citizen suit seeks to address. The discussion draft similarly precludes an action under RCRA if EPA or the State has initiated and is conducting a criminal, civil, or administrative action to address the conduct at issue – do you agree? Do you agree with the approach taken in the legislation and could you explain why or why not?**

Currently under RCRA, citizen suits may not be brought when the EPA or a State is already pursuing an action under RCRA or CERCLA, but that prohibition does not currently exist if the EPA or a State is pursuing an action under other statutes, even if they're seeking to address the same conduct. This is particularly problematic for agricultural operations where their conduct is generally governed by the Clean Water Act ("CWA") and the EPA or a State generally brings actions under that statute. The discussion draft seeks to make it clear that, even if the EPA or a State is not acting under RCRA or CERCLA, if the EPA or a State has initiated a criminal, civil, or administrative action to address the conduct at issue (regardless of the statute under which the action is brought), citizens would be prohibited from bringing a suit addressing that same conduct. I entirely support and agree with the approach taken by the legislation. When Congress enacted RCRA, it meant to give primary enforcement authority over the conduct governed by RCRA to the EPA and states. Only when the EPA and/or states fail to take action does RCRA authorize citizens to act as "Private Attorneys General" and allow them to use the force of

RCRA to bring a citizen suit. This policy is the impetus of 42 U.S.C. 6972(b)(2) -- we first allow the government agencies to enforce RCRA and then, if they are not, we allow citizens that opportunity. This policy has two important reasons:

(1) EPA and the State Environmental Agencies have the expertise to determine the most appropriate environmental responses, we do not allow citizens to undermine that expertise and second-guess those agencies; and
(2) Facilities and regulated entities are more willing to work with the EPA and State Environmental Agencies to come into compliance if they know they are limiting their liability. If citizens are allowed to bring suit after the agencies have done so, facilities will be unwilling to work with the EPA and the environmental agencies for fear that they may be admitting liability (and even possibly encouraging subsequent citizen suits) and that they may face further litigation expense and risk from citizens.

The current legislation accomplishes the initial goals included in the RCRA Citizen Suit provision by recognizing that in today's regulatory scheme the same conduct may be regulated by more than one statute.

2. **EPA stated in their written testimony on the bill that "unlike the current statutory bars, the EPA or state actions that would bar a citizen suit under this bill are not limited to RCRA or CERCLA actions." Do you agree with this assessment? Do you think it is appropriate?**

I agree with the EPA's assessment that the purpose of the current discussion draft is to bar citizen suits even when the government action is not limited to RCRA or CERCLA. As discussed above, this change is appropriate to accomplish the original intent of the RCRA citizen suit provision – the same conduct by a regulated entity should not be subject to enforcement by both the EPA and by citizen groups.

The Honorable Tim Walberg

1. **Ms. Romig, your written testimony provides a good explanation of how citizen suit provisions are intended to work and why it is important that the regulating agency is able to do what it needs to bring the regulated entity into compliance. You state that citizen suits should be a "last resort" – can you explain why that is?**

As discussed above in response to Representative Shimkus' question, Congress meant to vest the EPA and State Environmental Agencies with primary enforcement responsibility under RCRA, with citizen suits only allowed to be brought when the agencies have not taken action. The Supreme Court agreed, finding that a "citizen suit is meant to supplement, not supplant, governmental action..." *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987).

From a practical standpoint, if Congress allowed citizen suits to go forward regardless of whether an agency is taking action, the agency's ability to influence facilities and work with them to reach compliance will be greatly diminished. A facility will be reluctant to settle with a government agency if it knows that any settlement position could weaken its litigation position in a concurrent or subsequent citizen suit. Likewise, it will not settle with a government agency when it is concerned that a citizen suit may subject it to conflicting requirements.

a. **Would the Discussion Draft help EPA or State regulators work with agricultural operations to ensure that they are doing the right thing with respect to manure management?**

The Discussion Draft would help the EPA and State regulators work with agricultural operations to do the right thing with manure management. The Discussion Draft protects agricultural operations from duplicative and expensive litigation and works the way RCRA was originally intended to work – that regulated entities should be subject to enforcement by the government or by citizens, but not both. Knowing that they're protected from duplicative suits, Agricultural Operations are more likely to work with the agencies to make sure they're complying with manure management practices that are protective of the environment. Given that the EPA and State Agencies are tasked with protecting

the environment – they will choose environmental protective enforcement actions and thus their ability to proceed with the regulated entities will also be protective of citizens.

GREG WALDEN, OREGON
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FIFTEENTH CONGRESS

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Majority (202) 225-2927
Minority (202) 225-3641

December 21, 2017

Ms. Jessica Culpepper,
Food Project Attorney
1620 L Street, N.W.; Suite 630
Washington, DC 20036

Dear Ms. Culpepper:

Thank you for appearing before the Subcommittee on Environment on November 9, 2017, to testify at the hearing entitled "H.R.___, Farm Regulatory Certainty Act."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

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Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

John Shimkus
Chairman
Subcommittee on Environment

cc: The Honorable Paul Tonko, Ranking Member, Subcommittee on Environment

Attachment

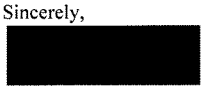
January 19, 2018

Hon. John Shimkus
Chair, Subcommittee on Environment
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Chairman Shimkus,

Thank you for the opportunity to testify at the hearing entitled "H.R.____. Farm Regulatory Certainty Act" on Thursday, November 9, 2017. Per your request, please find attached my response to your questions for the record.

Sincerely,



Jessica Culpepper
Food Project Attorney
Public Justice

Enclosures

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QUESTIONS FOR THE RECORD

JESSICA CULPEPPER
PUBLIC JUSTICE

Responses to questions from the Honorable John Shimkus:

1. **Question: Does the Resource Conservation and Recovery Act (RCRA) contain a fee-shifting provision?**

The Resource Conservation and Recovery Act contains a discretionary provision in the law that allows a court to recompense attorneys for reasonable costs and fees incurred during litigation. RCRA is no different in this regard than any other bedrock environmental statute. Congress has long recognized the importance of allowing the public to bring legal action against bad actors for violations of environmental laws to protect their property rights and their community from contamination when the government falls down on the job.[1] Indeed, the very purpose of enacting citizen suit provisions is to ensure that individuals are not reliant on the Government alone to enforce the statute. "The plaintiff is the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority." *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 418 (1978). This provision is a mechanism to effectuate this policy.

There are limits on these provisions. A party is only able to recover fees and costs if they prevail in these extremely difficult cases, so a plaintiff could never recover costs for a frivolous lawsuit. Even then, because recovery is discretionary, it is up to the judge to review the request for recovery and will only award "reasonably" incurred costs and time.

As the only relief available under RCRA is injunctive relief to stop the cause of the contamination (meaning that a plaintiff cannot recover money from the polluter), without these provisions that cover litigation costs and time, many rural Americans, including the neighbors in the *Cow Palace* lawsuit, could not otherwise protect their drinking water. There are two reasons for this. First, contingency fees, meaning a sum of money that a lawyer receives if a case is won, are not possible in injunctive relief-only cases. Second, bringing a private action to protect the public health and environment from violations of these laws require experts to gather and analyze complex scientific data. The costs associated with experts and data-gathering and compensating a lawyer for the time to bring such complex litigation under these laws – often years of work – would exceed the financial capability of most private citizens.

[1] When considering amendments to the Clean Air Act nearly fifty years ago, Congress found that government enforcement of the nation's environmental laws was "restrained," and thus urged Courts to "recognize that in bringing legitimate actions under this section citizens would be performing a public service." S. Rep. No. 91-1196, at 36.

RCRA's provisions for the award of costs and fees for prevailing in a citizen suit are found in section 42 U.S.C. § 6972(e). It states as follows:

> (e) Costs
> The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title, *may* award costs of litigation (including *reasonable* attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. (emphasis added)

2. **Question: For the case *Community Association for the Restoration of the Environment, Inc. v. Cow Palace, LLC* how much was awarded to Plaintiffs in (a) attorneys' fees, (b) expert witness fees, and (c) costs?**

Community Association for the Restoration of the Environment v. Cow Palace LLC was one of three interrelated cases that were litigated simultaneously against the four dairy Concentrated Animal Feeding Operations responsible for contaminating the surrounding community's drinking water. After the court granted the plaintiffs' motion for summary judgment in the *Cow Palace* case, all three cases settled in a global settlement. As part of that settlement, the defendants from the other two cases stipulated "that they will be jointly and severally liable for any award of fees and costs ordered by the Court." *See* Case No. 2:13-CV-3019, ECF No. 251. Because of this stipulation, the court did not separate the fees and costs award by case, but rather jointly addressed the fees and costs incurred on all three cases. Submitting detailed time records, the plaintiffs requested $3,587,615.50 in attorneys' and experts' fees and $542,088.60 in costs incurred during the course of the three-year litigation against all four dairies, but the court awarded $2,683,193.80 in attorneys' and experts' fees and $444,374.86 in costs. In its Order on Fees, the court "strongly encourage[d] the parties to come to a stipulated resolution" about the remaining expenses and fees that had arisen since the close of the case, and the parties did so without further litigation. *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, No. 13-CV-3016-TOR, *57, 2016 WL 3582754 (E.D. Wash. Jan. 12, 2016).

The court's order on fees came after two years of intensive investigative work and thousands of pages of briefing resulting in the Court "grant[ing] Plaintiffs' motion on the core RCRA liability issues," *i.e.*, concluding the dairies were responsible for the drinking water contamination. *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, No. 13-CV-3016-TOR, 2016 WL 3582754, at *1 (E.D. Wash. Jan. 12, 2016) ("As was their right, Defendants fought Plaintiffs at every turn"). In a 58-page opinion explaining why it had chosen to award fees and costs, the Court reviewed the hours spent by the attorneys in *Cow Palace* in great detail, finding that Plaintiffs' counsel were reasonable in their time spent, and that the plaintiffs – who bore the burden of proving the case and therefore would be expected to have spent more hours than the defendants – had actually worked 1,000 fewer hours than defense counsel.

In response to the Court's direction to resolve all remaining fees and costs outside of what was done in the Court's Order, the parties to the case came to an agreement about fees and costs in total, reducing the amount awarded by the court and allowing the different dairies to pay as they were able. In the parties' agreement on fees and costs filed with the court, they did not separate out attorneys' fees, expert witness fees, and costs in their agreement. In the stipulation filed in court by all parties, Cow Palace agreed to pay $800,000 to plaintiffs, which covered all categories listed; that is, attorneys' fees, expert witness fees, and costs.

3. **Question: How much did your organization, Public Justice, receive in attorneys' fees?**

In the combined Yakima dairies litigation, Public Justice devoted almost 1500 hours and spent considerable resources exposing violations of the law against the four dairy Concentrated Animal Feeding Operations, including the *Cow Palace* case. In the course of investigation, development, litigation, and resolution of the three cases, Public Justice incurred over $530,000 in billed attorney time and more than $25,000 in litigation expenses. Public Justice sought to recover $453,319.50 in fees and $10,927.80 in costs in total, which includes *Cow Palace*. *See Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, No. 13-CV-3016-TOR, ECF 411 at 23. The Court found that Public Justice's hours were "adequately documented" and costs were "adequately detailed" and "fully compensable as reasonable." ECF 453 at 34, 54. After the parties' fees and costs settlement, Public Justice received $404,419.02 in fees and recovered the $10,927.80 in costs, which was paid jointly by all four dairies as part of the settlement. This realized the goal of the fees and costs provision because a community that would not otherwise be able to bring a citizen suit was able to obtain clean drinking water and stop the contamination of their wells.

4. **Question: Did any of the Plaintiffs' attorneys initiate any other RCRA citizen suits (against other defendants) after the conclusion of *Community Association for the Restoration of the Environment, Inc. v. Cow Palace, LLC*?**
    a. **Please identify all cases initiated by any of Plaintiffs' attorneys subsequent to the decision in *Community Association for the Restoration of the Environment, Inc. v. Cow Palace, LLC*.**

To my best knowledge and after contacting each firm that represented the plaintiffs in the *Cow Palace* case, only one RCRA citizen suit was initiated against an agricultural entity subsequent to the *Cow Palace* case. This response is limited to RCRA citizen suits against agricultural entities:

> *Blackwood et al. v. N&M Dairy et al.*, No. 5:14-cv-00395-JGB-SP (E.D. Cal.), which settled outside of court.

Community Association for the Restoration of the Environment v. Cow Palace LLC remains the only case where a court determined that the mismanagement of animal manure violated RCRA. The fact that so few RCRA cases have been brought against agricultural entities

is not surprising, given that proving a violation of RCRA's imminent and substantial endangerment provision takes considerable time, cost, and effort, and is therefore reserved for only for the rare times that massive contamination causing critical health threats has not been solved by local, state, and federal government actions. The difficult jurisdictional requirements to bring a RCRA suit also reduce the likelihood of citizen suits.

First, no small or medium-sized farm could meet RCRA's jurisdictional requirement, and would never be subject to RCRA's citizen suit provisions. In order for a citizen to bring a lawsuit for RCRA violations, the entity responsible for the pollution must be discarding their waste. RCRA already exempts any manure used as fertilizer for crops because a recycled waste (i.e., manure used as fertilizer) is not considered to be a "solid waste" subject to RCRA's jurisdiction. So RCRA will never stop a farmer from using their manure to grow crops and make healthy soil. And even if there is a solid waste (meaning the manure was not used as fertilizer and was instead dumped out), it must be in such a great quantity that it causes or contributes to a substantial and imminent endangerment off the bounds of their property. This means that only the largest operations that have mismanaged manure for so long that it has endangered people or the environment surrounding them are subject to these lawsuits.

Second, RCRA's jurisdictional requirements provide several ways to stop these lawsuits early and prevent costly litigation. For example, RCRA's citizen-suit provision, like those in other environmental statutes, requires a 90-day notice period before filing a lawsuit. This notice period is designed to give the polluter notice and time to fix the problem before they are subject to a lawsuit, and is also designed to give the government the chance to file its own action and supplant the citizen suit. And because RCRA only allows for injunctive relief to stop the endangerment, if the polluter simply fixes the problem, it stops the lawsuit immediately under the judicial doctrine of "mootness" because it solves the controversy at issue. As most farmers and industrial agriculture operators are good neighbors, they respond to problems they have caused by fixing them, thus negating a potential citizen's ability to bring the citizen suit. These lawsuits are limited to bad actors that refuse to address serious problems caused by their operations.

It is worth briefly documenting some of the behavior of the Yakima dairies at issue in *Cow Palace* to show the Committee why the lawsuits were necessary – these dairies refused not only during the notice period, but over a span of decades – to comply with the law. They were extreme examples of bad actors, and a state agency that refused to force them to meaningfully change their behavior. This is not the norm, and is exactly when citizen suits are needed.

- Records gathered from the local agency showed letters from the agency to one of the dairies stating "Your lack of response to our previous attempts to contact you by visit, letter, phone, and finally delivery of a cease-and-desist order by the sheriff has resulted in our recommendation of an additional penalty.... We would much rather have seen you spend that money on wastewater control facilities than to have to recommend a penalty." But even this did not fix the problem, and three years later, the dairy was caught digging

a ditch that unlawfully allowed "a discharge of black manure solids-laden water" to run off the property. The dairy was described by the agency as "uncooperative." All the while, the agency would, on occasion send fines that were only occasionally paid, without any meaningful enforcement action.

- In the 1990s, the dairies were reported by the community for unlawful behavior, involving dumping raw animal sewage through a drainage pipe into irrigation ditches that dumped into the local streams, spraying manure on frozen ground, overapplying manure on sprayfields, allowing lagoons to overflow, and deliberately dumping manure into canals.
- In 1993, numerous illegal manure discharges were observed by the community members and the local agency that did not result in enforcement action.
- In response to their reports, between 1995 and 1997, the state agency fined two of the dairies that were the subject of the RCRA litigation for "substantial water quality violations," but did not stop the continuing unlawful behavior.

These actions, and the dairies' refusal to change their waste management practices over the course of decades, led to the drinking water contamination and RCRA violations.

5. **Question: The Administrative Order on Consent between the Environmental Protection Agency (EPA) and the dairies that were defendants in Cow Palace was signed in March 2013. The complaint in the RCRA citizen suit was filed February 4, 2013. EPA was working with the defendant dairies to help them come into compliance with the applicable statutes and regulations. Why did Plaintiffs not allow the process between EPA and the dairies to play out before initiating a citizen suit?**

Without this suit, the primary objective of the plaintiffs – to secure clean, safe drinking water for over 100 families, and to ensure modifications to eliminate future contamination – would not have been realized. CARE, the plaintiff, attempted to work with the EPA during the Administrative Order on Consent ("AOC") process. Before the final Order was signed, for example, it was distributed to the public for comment. When CARE approached the EPA to discuss grave concerns with the draft AOC, namely that it did not cover the full radius in which impacted homes could receive replacement drinking water, the agency brushed aside CARE's complaints. Additionally, CARE expressed that the AOC failed to require double-lined lagoons and a nutrient management budget that would result in lower levels of soil contamination – both of which were established as major causes to the aquifer contamination. CARE also pointed out that the AOC did not address contamination from cow pens and compost areas or require any changes to those practices to reduce leaching into the aquifer, the community's sole source of drinking water. In the face of such deficiencies, and EPA's refusal to address them in the AOC, CARE had no choice but to use the citizen suit provisions of RCRA – provisions that Congress specifically intended to be used in such situations.

Importantly, CARE filed suit before the final Administrative Order on Consent was signed in hopes that the lawsuit would spur the parties to the AOC, the EPA and the dairies, to reconsider and correct the deficiencies in the Order so that it would address the serious public health risk to the community. If they had, the court would have automatically dismissed the plaintiffs' lawsuits against the dairies under the doctrine of "mootness" (that is, that there would have been no relief the plaintiffs could have gotten under a RCRA suit that was not already addressed by the Administrative Order on Consent). The Defendants actually claimed that the lawsuit should be dismissed because of the AOC. The only reason Plaintiffs' lawsuit was allowed to go forward was because the Court noted that there were very real differences between what was sought by the community members and what was required under the signed final Order. The outcome in the case was instrumental for the community because it accomplished ends the AOC did not achieve— over 100 families have so far been provided clean, safe drinking water, and major operational and structural modifications are being made at the facilities to ensure future contamination is eliminated.

Finally, it is worth correcting the record that it was in response to the EPA's Order, not the RCRA citizen suits, that one of the mega-dairies in the Valley went out of business. At the hearing, Mr. Wood falsely stated that one of the CAFOs went out of business because of the citizen enforcement action. Hearing at 21:56-22:09. Mr. Gordon, Mr. Wood's colleague at the Washington State Dairy Federation, stated otherwise in the Yakima Herald.[2] Mr. Gordon stated the facility went out of business because they did not want to comply with the EPA requirements under the Safe Drinking Water Act AOC.

6. **Question: Your testimony is that a citizen suit under RCRA is "last resort" - what other proceedings (under any other state or federal law) did your organization or any of the other Plaintiffs, initiate or conduct regarding the dairies at issue in *Community Association for the Restoration of the Environment, Inc. v. Cow Palace, LLC?***

There are two important clarifications to the phrase "last resort" as it refers to RCRA citizen suits. First, I was not limiting that phrase to "proceedings" initiated by the community. Rather importantly, I include community attempts to work with the polluter to try and get them to change the offending practice, and community attempts to get the local, state, or federal government to act on their behalf to stop the bad actors from continuing to harm the community. Second, to the extent that we *are* discussing "proceedings," the phrase "last resort" refers to the fact that there were (and remain) no other reasonably viable legal causes of action the Plaintiffs and their affected members could take at the time the *Cow Palace* lawsuit was initiated.

[2] Courtney, R. Yakima Herald. *Opposing sides argue positions in groundwater pollution case* (Jun. 13, 2013), available at
http://www.yakimaherald.com/news/local/opposing-sides-argue-positions-in-groundwater-pollutioncase/article_5030c644-9938-52fd-b51c-17f0da7f0810.html

In case of *Cow Palace*, the community of farmers, orchardists, farmworkers, and multi-generation residents had been trying for two decades to protect their well water from the dairies who were acting far outside acceptable norms. CARE, specifically, worked for decades to address CAFO pollution in Washington State, prior to bringing the Yakima groundwater litigation. In the 1990s, members of the community in the Yakima Valley began to document and report when the dairies violated the law, but while the local agencies would occasionally fine the dairies, they took no enforcement action to force the facilities to change their practices. Instead, CARE's work led to anonymous threats, CARE's members being driven off the road, and other aggressive behavior.

It was not just the community residents who were frustrated with the state agency's failure to fix the problem. Public records show that the manager of the Sunnyside Valley Irrigation District sent a letter to the state agency about the dairies allowing waste from their lagoons to run into the canal. "The impact has been enormous," he wrote. "We have complaints from water users...These are not isolated complaints. The above situation is frustrating because it is typical of the experience the District has had with dairy waste problems for the last several years." He added "We have a number of water users who would be most willing to testify in court, contact area legislators, or do whatever else is necessary to assist you with your enforcement responsibilities."

In 1998, after years of the state regulatory failing to fix the problems in Yakima Valley, the community organized into CARE and threatened litigation to a number of the dairies in the Lower Valley. In response to the letters noticing a potential lawsuit, some of the dairies made significant improvements to their manure management systems and fixed the problems. For the dairies that refused to make changes to comply with the law, the community filed their first of several Clean Water Act lawsuits against the dairies for violations of their Clean Water Act and Washington state dairy permits. A court would later rule in the community and CARE's favor, establishing that the dairies in the Yakima Valley had violated the Clean Water Act. While these actions slowed pollution of the local rivers, the groundwater contamination problem persisted because the Clean Water Act does not address groundwater pollution. In the early 2000's, some of the civil penalties from the CWA lawsuits helped fund two studies of groundwater quality in the Lower Yakima Valley, the results of which showed nitrate contamination in residential water wells.

Armed with that information, multiple Washington state public interest groups, including CARE, have tried to persuade state regulators for decades to impose meaningful pollution control regulations on Concentrated Animal Feeding Operations ("CAFOs") under the CWA and the State's Water Pollution Control Act, R.C.W. 90.48.[3] In 2006, CARE was the lead petitioner in a challenge to the State's CAFO National Pollution Discharge Elimination System ("NPDES")

[3] The November 7, 2017 letter from Washington State public interest groups discusses how the State has been aware of groundwater contamination issues for years, but has failed to take actions to correct that contamination or address its sources.

permit under the Federal Water Pollution Control Act, otherwise known as the Clean Water Act. Among other problems, that NPDES permit failed to require lagoon lining or groundwater monitoring in and around permitted facilities – despite the fact that the State's own scientist testified that such monitoring was the only effective means to evaluate whether a facility was causing groundwater pollution. Nonetheless, the State approved the permit to the detriment of public health. Presently, CARE and others are involved in a challenge to Washington State's newest NPDES permit, which this time around includes a state groundwater discharge component. Unfortunately, the new permit again fails to require lagoon lining, groundwater monitoring, or adequate pollution control measures for livestock confinement pens, composting areas, and land application fields. Indeed, it allows for permittees to discharge manure and other pollutants into groundwater without *ever* having to monitor those discharges.

As it pertains to the *Cow Palace* defendants, CARE tried to work with EPA to obtain documents about the groundwater contamination surrounding those dairies before the EPA finalized its "Consent Order" so that the order could be amended to address residents' health concerns. Unfortunately, EPA administrators informed CARE that it would not provide any documents out of fear that such a move would "enflame" the dairies and throw off the Agency's settlement negotiations. CARE was forced to file suit against EPA to obtain the documents, which were provided after months of litigation in federal court. EPA also brushed aside CARE's complaints that the "Consent Order" was inadequate to protect human health and the environment, namely that it did not cover the full radius in which impacted homes could receive free drinking water. Additionally, the Consent Order failed to require double-lined lagoons nor a nutrient management budget that would result in lower levels of soil contamination – both of which were established major causes to the aquifer contamination. CARE also pointed out that the Consent Order did not address contamination from cow pens and compost areas or require any changes to those practices to reduce leaching into the community's sole source of drinking water. In the face of such deficiencies, CARE had no choice but to use the citizen suit provisions of RCRA – provisions that Congress specifically intended to be used in such situations.

In sum, it was only after decades of regulatory failure, and finally, when the EPA made clear that they would not fully fix the problem and shut the door on hundreds of community members who had lost access to their own wells, that this litigation was brought. No community should be forced to watch their common resources be degraded and their property values diminished with no recourse, which would have been the case for the people in the lower Yakima Valley were the Farm Regulatory Certainty Act law.

Responses to questions from the Honorable Frank Pallone

1. **Question: What are some of the health and environmental impacts you have seen in the communities you have worked with?**

Health and environmental impacts from CAFOs on fenceline communities have been well-documented for decades, and are only getting worse.[4] Some of those communities shared their compelling stories with you in letters filed in the record before the hearing. Their stories tell the truth about what industrial animal agriculture harms when allowed to mismanage their waste with impunity. They show that when waste from an industry is mismanaged, those who suffer most are the fenceline communities. Outside of what is illustrated by these community letters, health and environmental impacts from industrial animal agriculture range from very local bacterial outbreaks to the global impact of being one of the major contributors to climate change.

It is helpful to briefly outline the source of the impacts about which Mr. Pallone inquires. In 2010, the Centers for Disease Control worked with the National Association of Local Boards of Health in creating a report called Understanding Concentrated Animal Feeding Operations and Their Impact on Communities ("CDC Report").[5] My findings in my work with these communities matches exactly the findings in the CDC Report. The report's findings are best summarized in its own words:

> All of the environmental problems with CAFOs have direct impact on human health and welfare for communities that contain large industrial farms. As the following sections demonstrate, human health can suffer because of contaminated air and degraded water quality, or from diseases spread from farms. Quality of life can suffer because of odors or insect vectors surrounding farms, and property values can drop, affecting the financial stability of a community. CDC Report at 3.

The report defines the source of the environmental and public health problems caused by industrial agriculture as the enormous amount of waste the industry produces (in the form of raw animal sewage). *Id.* at 2. The report, along with many others, notes that large CAFOs produce more waste than some U.S. cities, but without any waste treatment, as occurs with human waste. *Id.* Instead, the facilities store the vast quantities of raw sewage in football field-sized lagoons, or in train-sized piles, before spreading the raw sewage onto land. The problems arise when there is more manure than can be used by the land or their crops, or when the manure is disposed of inappropriately so that it comes off the property and into the neighboring community or nearby waterways, where it degrades water quality. The CDC report also notes that the emissions from degrading waste harms air quality and is a source of greenhouse gases that contribute to climate change.

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[4]Casey, J.A., Kim, B.F., Larsen, J. Nachman, K., et al., *Industrial Food Animal Production and Community Health.* Curr Envir Health Rpt (2015) 2: 259. https://doi.org/10.1007/s40572-015-0061-0
[5] Available at https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf

Poor manure handling practices frequently result in clear and acute environmental problems. Just looking at fish kills in August-October of 2017, for example:

- In October of 2017, raw animal sewage from the Wild Rose Dairy in Wisconsin spilled into the Otter Creek, killing 1,300 fish.[6]
- In October of 2017, manure allowed to runoff an Iowa dairy facility killed 60,000 fish in eastern Iowa.[7]
- In October of 2017, a facility dumped manure into a creek in Lancaster County, Pennsylvania, which turned the creek water black and killed the fish in the tributary to the Conestoga River.[8]
- In August of 2017, bad manure management at an Iowa dairy caused a fish kill in a 5-mile portion of Dry Run Creek.[9]
- In August of 2017, bad manure management caused about 66,000 fish deaths in Lake Erie tributaries, where the creek water smelled of manure.[10]

The same waste that causes fish kills in surface water endangers entire communities reliant on contaminated groundwater or living near industrial facilities. Groundwater has long been recognized as an essential national resource, accounting for 40% and 36% of the nation's drinking water and irrigation water, respectively. The urine and manure stored and disposed of at industrial animal facilities contain pathogens, hormones, antibiotic resistant bacteria, pharmaceuticals, chemicals used at the facility, and nutrients like nitrate and phosphorus that can endanger public health and the environment. Many of the pathogens present in the fecal matter are zoonotic, meaning that people can get sick when they ingest them, and include *E. coli*, *Salmonella*, *Cryptosporidium*, *Listeria*, rotavirus, and hepatitis. Several studies have documented the transfer of these pathogens onto sprayfields and disposal sites, and subsequently, into surface and groundwater.[11] The CDC Report confirms that through misapplication of manure, these pathogens and excess nutrients end up in groundwater – often rural American's sole source of

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[6] McBride, J. *Manure kills 1,300 fish in Otter Creek near La Farge*, available at http://lacrossetribune.com/vernonbroadcaster/news/local/manure-kills-fish-in-otter-creek-near-la-farge/article_bc76f48c-47e1-51f9-8839-43d80a1fdfbc.html

[7] *Manure from Iowa dairy farm blamed for deaths of 60K fish*, available at http://fox6now.com/2017/10/31/manure-from-iowa-dairy-farm-blamed-for-deaths-of-60k-fish/

[8] *Crews cleaning up manure spill; Fish kill reported in nearby creek*, available at http://www.wgal.com/article/traveler-says-he-couldnt-board-flight-after-he-put-all-his-clothes-on/15335324

[9] *Manure runoff causes fish kill in stream near Decorah*, available at http://northiowatoday.com/2017/08/28/manure-runoff-causes-fish-kill-in-stream-near-decorah/

[10] Henry, T. *Poor manure practices culprit in thousands of fish deaths*, http://www.toledoblade.com/State/2017/08/24/Poor-manure-practices-culprit-in.html

[11] *See, e.g.*, Hutchison, M.L., et al. 2005. *Fate of Pathogens Present in Livestock Wastes Spread onto Fescue Plots*. Appl Environ Microbiol. 2005 Feb; 71(2): 691–696. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC546755/; Jones, D. L. Potential health risks associated with the persistence of *Escherichia coli* O157 in agricultural environments. 1999 Soil Use Manag. 15:76-83; Pell, A.N., *Manure and microbes: public and animal health problem?* J Dairy Sci. 1997 Oct; 80(10):2673-81.

drinking water, where it poses grave risk. Just some of the documented health impacts of living near a CAFO are that:

- You have almost three times the risk of carrying the antibiotic resistant bacteria MRSA from living within one mile of a hog facility that confines 2,500 or more hogs.
- Children attending schools within one-half mile from a CAFO have a "significantly increased prevalence of physician-diagnosed asthma."[12]
- For children with allergies, the prevalence of wheezing is 5% higher for those attending schools located within 3 miles of a CAFO and was 24% higher for those students at schools where farm animal odor was reported to be noticeable indoors twice per month.
- Residents living within the vicinity of a CAFO had elevated rates of mucous membrane irritation and respiratory and gastrointestinal problems, as well as higher reporting of headaches, runny noses, sore throats, excessive coughing, diarrhea, and burning eyes.[13]
- Doubling animal production at a facility increases infant mortality, driven by elevated levels of respiratory diseases, by 7.4%.

In the communities I have worked with, I have seen levels of nitrate, a substance that cannot be seen, smelled, tasted, nor boiled out, seven times the EPA's Maximum Contaminant Level ("MCL"). The EPA set the MCL for nitrate at 10 because above that level, nitrate can cause "blue baby syndrome" – a potentially fatal condition for infants who drink bottles made with contaminated water. In the Yakima Valley where the litigation took place, about 20% of the sampled drinking water wells, and about 35% in the immediate vicinity of the dairies, tested above the EPA limit. High levels of nitrates have also been linked to fatal birth defects, including anencephaly, in which the fetus never fully develops parts of the brain and skull. In the Yakima area, anencephaly occurs more than four and a half times the national average, and more pregnant women are affected by anencephaly there than anywhere else in the country. In North Carolina, the CDC linked water contamination from pig waste to miscarriages in the mid-1990s.

In Kewaunee County, Wisconsin, **60%** of the wells tested positive for fecal bacteria linked predominantly to cow manure. Cryptosporidium, a parasite which causes severe and acute digestive symptoms including diarrhea and vomiting, and can be deadly for young children, pregnant women, the elderly, and people undergoing chemotherapy, has also been documented in private wells. Kewaunee County has an estimated 140 cases of cryptosporidiosis

[12] Sigurdarson ST, *School proximity to concentrated animal feeding operations and prevalence of asthma in students*, Chest. 2006 Jun;129(6):1486-91.
[13] Wing S, Wolf S. *Intensive livestock operations, health, and quality of life among eastern North Carolina residents. Environmental Health Perspectives*. 2000;108(3):233–238.

per year from private wells, one of the highest rates per capita in the country.[14] There have been documented cases of wells showing *E. Coli* levels at 9,800 colony forming units per milliliter the EPA considers *any* amount of *E. coli* in drinking water to be dangerous. Simply bathing in their own well water in areas of Wisconsin have landed children in the hospital due to dehydration from vomiting, severe ear infections from *E. coli*, and exposure to antibiotic resistant bacteria.

In the communities in which I have worked, those impacts extend also to an infringement on community and family life– the loss of neighborhood cookouts, of outdoor birthday parties, of gardens and porches, and of evening walks and children's bicycle rides. The smell and flies I have personally experienced have been overwhelming. In places like Eastern North Carolina, the California's Central Valley, Maryland, and all over the Midwest I have walked in fenceline communities where the smell made my own eyes water and throat burn, causing uncontrollable coughing fits and gagging, and left my clothes and anything they touched reeking for days. One reporter that visited a poultry CAFO in California's San Joaquin Valley claimed that his suit continued to carry a putrid odor back at the studio. That is daily life for these communities all over rural America.

I have heard the people who are not aware of these conditions attempt to argue that these impacts should be expected from agriculture. It is critical to note for the record that these facilities are not agricultural, but industrial, and their impacts are simply not experienced in traditional pasture-based systems. As the grandchild of farmers, an attendee of a farm college, and having worked with farmers and ranchers, I am familiar with the smell of a farm. But living near these facilities is more like living by an industrial plant than a red barn. The industrial approach to animal agriculture discharges toxic chemicals far above what would be ever be created at a traditional small family farm. Indeed, in Public Justice's work, we represent and work with farmers and farming communities who view what is going on in their neighborhoods and grieve the change from agricultural to industrial.

2. **Question: Are these impacts isolated to Washington State, or do we see them nationwide?**

Over 15 million U.S. households rely on private well water for drinking water, and EPA regulations that protect public drinking water systems do not apply to privately owned wells. All private wells rely on groundwater. Health and environmental impacts from industrial animal agriculture will occur anywhere that the industry concentrates its animal confinements beyond what the ground can bear and dumps its waste rather than processing it or disposing it in a safe way. These impacts are unfortunately not isolated to Washington State, as described above, but can be found in rural communities nationwide. Counties in Iowa, Nebraska, Michigan, Ohio, Minnesota, Illinois, Indiana, and Wisconsin at the central part of the United States; Georgia,

[14] Murray, P., NPR, *Researchers Want To Know If Cows Are To Blame For Contaminated Wells In Northeastern Wisconsin*, available at https://www.wpr.org/researchers-want-know-if-cows-are-blame-contaminated-wells-northeastern-wisconsin; *see also* Painter, J.E., Cryptosporidiosis Surveillance — United States, 2011–2012 https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6403a1.htm.

Arkansas, North Carolina, Mississippi, and Alabama in the southern part of the United States; Delaware, Maryland, and Pennsylvania in the eastern part of the United States; and Arizona, California, Idaho, New Mexico, and Texas in the western part of USA contain "hotspots" of CAFOs. In these regions, if large facilities refuse to properly dispose of their waste, then the communities and environment are endangered.

While farmers face serious pressures with regulation, it has been well documented that environmental enforcement for unlawful behavior is lacking in this industry. Without enforcement, bad actors are allowed to produce cheaper product by externalizing their waste and costs onto others, giving them an unfair competitive advantage to farmers who are following the rules. Either because the regulators do not have the resources to properly inspect and respond to dirty facilities, or the agencies lack the political will, bad actors in this industry frequently act with impunity for decades. Here are just a few of the documented impacts nationally that were not mentioned above:

- In 2001, nationally, agriculture accounted for 59% of all sources of impairment for rivers.
- Detailed mapping of CAFOs in North Carolina documenting industrial animal agriculture pollution demonstrate 60% of the watersheds where CAFOs are located have "distinct differences in water quality reflecting swine and/or poultry manure effects" including high levels of nitrate and ammonia.[15]
- Detailed tracking of the manure load in the Western Lake Erie Basin established industrial animal agriculture as a major contributor to the growth of algae blooms in Lake Erie.[16]
- Four decades of studies of the Delmarva Peninsula, which includes most of Delaware, the Eastern Shore of Maryland, and the Eastern Shore of Virginia, have shown that excess nutrients from the land application of poultry waste is a major contributing factor in drinking water aquifers and the pollution in the Chesapeake Bay.
- An EPA-funded, decade-long study detailing seven CAFOs located in contaminated groundwater aquifers in south central United States found that the contamination "most likely resulted directly from the operation, either through leaking infrastructure piping, leaking lagoons, or land application of CAFO waste."[17]
- A report released by the California State Water Resources Control Board identified animal agriculture as a serious contributor to the contamination of the groundwater serving 21 million Californians, particularly in the Central Valley.

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[15] Environmental Working Group, *Exposing Fields of Filth*, https://www.ewg.org/research/exposing-fields-filth#.Wl-oCqhKuUk
[16] Sierra Club, *Follow the Manure: Factory Farms and the Lake Erie Algal Crisis* https://www.sierraclub.org/michigan/follow-manure-factory-farms-and-lake-erie-algal-crisis
[17] Hutchins, S.R., *Case Studies on the Impact of Concentrated Animal Feeding Operations (CAFOs) on Ground Water Quality*, EPA 600/R-12/052 (Sept. 2012) at 23.

It is also important to correct the record on the matter of environmental impacts in fenceline communities. Washington State Dairy Federation (WSDF) Director Dan Wood, in addition being loose with many supposed facts, testified falsely to the Committee that "[g]roundwater nitrates there [in lower Yakima Valley] have been high for more than 100 years, predating the dairies and much of agriculture that's in the area." Hearing at 21:00-21:10. This argument was made and discredited in the Yakima groundwater litigation. There are no facts that credibly support historic source of nitrate contamination in the area. Nitrate history was a central issue in the *Cow Palace* litigation and the dairy industry failed to put any evidence forward of historic nitrate contamination. In fact, it is just the opposite – the uncontroverted testimony is that over 99% of the potential loadings of nitrate in the area came from the four large dairy CAFOs, most of which had been operating since the 1970s.

3. **Question: Environmental justice is a real and serious concern. We should be doing everything we can on this Committee to increase environmental justice by helping low income communities and communities of color that bear the brunt of pollution. Who lives in these impacted communities?**

The issue of pollution from industrial animal agriculture is one of the most critical environmental justice issues of our time. Industrial animal agriculture facilities are overwhelmingly located in communities of color and in low-income communities.

A study of 48 states and Hawaii of CAFO siting and communities of color and low-income communities found "that the EJ issue is found to be valid for all the categories of industrial farms." [18] The study concluded that, in taking a national view, the percentage of African-American population, percentage of population below poverty, and the percentage of African-American population below poverty were significantly higher in areas with industrial chicken facilities. The percentage of white population below poverty level were found significantly higher in areas with cattle and hog farms at a national level, though there was recognition that concentration of siting varied on state-by-state bases.

In North Carolina, for example, 95% of hog CAFOs are located in low-income communities of color. The intensive hog confinement facilities are located squarely in the so-called Black Belt, a crescent-shaped band throughout the South where slaves worked on plantations. A century after slavery, black residents of this region still experience high rates of poverty, poor health care, low educational attainment, unemployment, and substandard housing. They also live alongside the highest concentration of CAFOs in the state. In response to years of inaction from North Carolina agencies, the affected communities filed an Administrative Complaint with the EPA against the state for violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 40 C.F.R. Part 7. The Complaint is based on the state's issuing permits to more than 2,000 swine operations in communities of color; those permits fail to

[18] Rafael Harun, S.M. and Ogneva-Himmelberger, Y. *Distribution of Industrial Farms in the United States and Socioeconomic, Health, and Environmental Characteristics of Counties*, Geography Journal (2013), Article ID 385893.

control pollution, leading to a disparate impact on African-Americans, Latinos, and Native Americans.[19] The proportions of African-Americans, Latinos, and Native Americans are 1.54, 1.39, and 2.18 times higher, respectively, than the proportion of non-Hispanic Whites in North Carolina living within 3 miles of an industrial swine facility. In a 25-page response to the complaint, the EPA said that the N.C. Department of Environmental Quality has not done enough to reduce asthma, stench, flies, truck traffic, and other problems caused by the facilities. The federal agency also says it has "grave concerns" about reports from minority neighbors of threats and intimidation against those who have complained, and documented where many neighbors gave up, feeling that state regulators would not help them.

A case study in Ohio found higher proportions of children and Hispanic populations in regions with high densities of dairy and swine CAFOs, and concluded that there was environmental discrimination with respect to the concentration of CAFOs in the state.[20] The study also found that Hispanic populations were disproportionately exposed to the environmental dangers of toxic emissions and airborne illnesses from concentrated animal facilities, as well as reduced quality of life. The study argued that the disproportionate impact of pollution on communities of color must be considered in future siting and construction of CAFOs.

In California, 90% of California's dairy cows and 30% of the state's disadvantaged communities are located in the San Joaquin Valley, where the communities are disproportionately non-white and low income relative to the rest of the state of California. While the average poverty rate in California is 14.2%, the average rate in the eight counties of the San Joaquin Valley is 20.49%.[21] The dairy industry in this region has disproportionate impacts on these communities. Though only about 9% of the state's population lives in the San Joaquin Valley (SJV), the region accounts for approximately 15% of the pollutants listed by the EPA as most concerning.[22] Despite being significantly more likely of drinking water contaminated with nitrates, the disadvantaged communities in the San Joaquin Valley are less likely to be able to afford to treat the contamination.[23] In fact, the majority of water systems that reported contamination in 2015 were in the Valley.

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[19] Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 40 C.F.R. Part 7 https://earthjustice.org/sites/default/files/files/North-Carolina-EJ-Network-et-al-Complaint-under-Title-VI.pdf

[20] Lenhardt, J. and Ogneva-Himmelberger, Y. *Environmental Injustice in the Spacial Distribution of Concentrated Animal Feeding Operations: A case study from Ohio, USA*. Environmental Justice. August 2013, 6(4): 133-139.

[21] Perez, Miguel, and Kathleen Curtis. *Healthy People 2010: A 2003 profile of health status in the Central San Joaquin Valley*. 2003. California State University, Fresno. p. 2.

[22] *Id.* at 8.

[23] STATE WATER RESOURCES CONTROL BOARD REPORT TO THE LEGISLATURE, *COMMUNITIES THAT RELY ON A CONTAMINATED GROUNDWATER SOURCE FOR DRINKING WATER* (Jan. 2013) https://www.waterboards.ca.gov/gama/ab2222/docs/ab2222.pdf

4. **Question: Under current law, citizen suits are blocked when EPA or the State is pursuing an enforcement action to address the dangerous condition the citizen suit seeks to address. How is the language in the discussion draft different from the approach in current law?**

The difference between the current law and the discussion draft is that the draft bill would block citizen suits for *any* civil, criminal, or Federal or State administrative action of *any* kind, including any "consent agreements" that seek compliance with *any* "applicable permit, standard, regulation, condition, requirement, prohibition, or order." Discussion Draft Subsection (E)(i)(I)-(II).

In plain language, that means that no citizen can enforce RCRA even if there is imminent and substantial endangerment to public health if a regulatory authority is asking the facility to comply with *any* requirement, whether or not that requirement has anything to do improving the health and safety of the community. This includes paper filing requirements or paying dues and taxes on permits. It encompasses any kind of compliance activity that one could possibly conceive of at these facilities. It would be like preventing the State from prosecuting someone for a hit and run if they were already fighting a parking ticket.

The current law, on the other hand, prohibits citizen suits where a state or federal agency is taking action to fix the very RCRA violations that may result in an endangerment to public health or the environment. Currently, that is limited to actions taken under relevant sections of RCRA or the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").

Additional limitations include judicial doctrines designed to stop any lawsuit that seeks relief from an injury that is already being addressed. One such doctrine is "mootness," which is a judicial principle where a court will not decide a case where there is no true controversy, including if a solution is already underway thanks to a State or Federal agency. For example, in the *Cow Palace* case, the defendants raised that argument – saying that the Administrative Order on Consent already provided the relief that the plaintiffs sought. The Court explicitly rejected that argument, saying that the plaintiffs sought relief that would not be provided by the Order so they could secure clean water to a larger area of impacted homes, and require waste management practices that were serious sources of drinking water contamination.

5. **Question: We received testimony from EPA in advance of this hearing, and they noted that "Unlike the current statutory bars, the EPA or state actions that would bar a citizen suit under this bill are not limited to RCRA or CERCLA actions." Do you agree with this assessment? Do you think this is appropriate?**

The EPA's assessment is correct. The statutory bar in this bill is virtually limitless. This is inappropriate for two reasons.

First, the discussion draft turns the intent of RCRA on its head. When Congress enacted RCRA in 1976, it sought to close "the last remaining loophole in environmental law, that of

unregulated land disposal of discarded materials and hazardous wastes." H.R.Rep No. 1491, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S.C.C.A.N. 6238, 6241. RCRA is designed to be protective of public health and the environment from solid and hazardous waste. Agricultural waste was major Congressional focus when RCRA was passed, which is highlighted by Congress specifically naming it in the statutory definition of solid waste. Given that RCRA's citizen suits are designed as a residual power to protect the public from endangerment, then any time there is a solid or hazardous waste that causes an endangerment, Congress gave citizens the power to act. The drafters were careful not to limit that power simply because an agency is already working with the polluter. In fact, it is almost the reverse! If there is an endangerment, the statute presumes citizens can act unless a limited subset of actions that cover the same issues are present. This discussion draft completely inverts those intentions by being utterly *un*protective of public health, through limiting citizens who are facing an imminent and substantial endangerment from being able to protect themselves if *any* action is being taken, whether or not it stops the endangerment. It leaves citizens defenseless if their drinking water is contaminated by solid waste, which cannot be what Congress intended when it passed this law.

Second, the discussion draft is dangerous because it removes the only safeguard rural Americans have to protect their own private wells from industrial agriculture facilities that mismanage their waste. If this draft is passed into law, private citizens are completely reliant on regulatory agencies to provide them with adequate clean replacement water for drinking and domestic uses, and to stop any further contamination that may endanger them or their families. This unfairly passes the cost of pollution from the wrongdoer onto the taxpayer, and unfairly puts rural Americans at the mercy of an already overburdened and under-resourced regulatory agency or an agency with no political will or ability to fix the problem, as was seen in the Yakima Valley. The people in Kewaunee County Wisconsin, in Eastern North Carolina, and in Iowa are *still* waiting for their respective State and Federal governments to act on their behalf, as they have been for more than two decades.

6. **Question: If this bill had been in effect, would the lawsuit brought by Community Association for Restoration of the Environment against Cow Palace have been blocked?**

Yes, CARE would not have been able to bring a citizen suit to get clean drinking water for the hundreds of community members who had been left out of the EPA's settlement with the dairies under the Safe Drinking Water Act. This is because the EPA's Order would have fallen under the statutory bar if there are any "consent agreements" with the EPA seeking "compliance with an applicable… requirement." Had this discussion draft been law, then there would currently be hundreds of community members reliant on contaminated drinking water with no way to get relief. Moreover, groundwater contamination would continue because the EPA's Order failed to seek compulsory changes to the waste management practices at the dairies for several of the sources of contamination.

7. **Question: What actions, required under the settlement in the CARES v. Cow Palace case, would not have been required under the Safe Drinking Water Act consent order?**

The following actions were not required under the Safe Drinking Water Act consent order:

- An expanded radius of the community eligible for replacement water, meaning hundreds of community members would be going without clean drinking water.

- The provision of drinking water to wider area by a neutral third-party, Nuestra Casa, an organization that provides educational and health services to immigrant women and leads community outreach efforts for cities and schools, rather than the dairies, which brought fear to the community and was limited in scope.
- Modern, synthetic liners with leak-detection systems for the waste storage lagoons to stop leaking of wastewater into the aquifer. EPA had no such requirements to stop discharges.
- Groundwater monitoring devices to detect new leaks of manure placed according to scientific measurements for where leaks were most likely to occur.
- A nutrient management budget that would result in lower levels of soil concentration of nitrate, an established major cause to the aquifer contamination.
- Contamination prevention requirements from cow pens and compost areas, such as building concrete aprons around water troughs and directing feed sileage leachate into the waste storage lagoons to reduce leaching into the aquifer.
- Limitations on amounts of nitrogen and phosphorus to fields that were causing a significant amount of the contamination.
- Mandatory recordkeeping for compliance.
- Updating each facility's state-required Dairy Nutrient Management Plan to reflect these requirements so that their operations reflected a waste management system that was protective of public health.

8. **Question: It has been suggested that the requirements of RCRA are duplicative with the requirements of the Safe Drinking Water Act or the Clean Water Act. Do you agree with that suggestion?**

While there are similarities in language, the requirements of RCRA are quite different from that of the Safe Drinking Water Act ("SDWA") and the Clean Water Act ("CWA"). The main difference is that neither the SDWA or RCRA impose any regulatory burdens or requirements on agricultural facilities at all, while the Clean Water Act creates a regulatory permitting system to prevent and control discharges of pollution from "point sources" to surface waters of the United States. Notably, the Clean Water Act does not regulate groundwater or "non-point sources" and importantly the statute exempts from regulation the runoff from land application of animal manure to fields or manure storage on a facility.

Both RCRA and the SDWA provide emergency powers to the EPA to take to stop persons from causing or contributing to imminent and substantial endangerments to public health, but the SDWA limits such actions to public water systems or underground sources of drinking water, 42 U.S.C. § 300i, while RCRA limits such actions to the disposal of solid or hazardous waste. 42 U.S.C. § 6973. However, neither of those statutes impose requirements that must be complied with, outside of prohibiting a person from seriously endangering the public health.

In terms of citizen enforcement, the Safe Drinking Water Act limits citizen suits to public water systems that are failing to meet primary drinking water standards or against the government for failing to discharge their duties under the law. 42 USC § 300j-8; 40 CFR Part 141. Those suits cannot be used to protect private wells, or against private actors who are the source of the contamination.

The primary statute invoked by citizen-plaintiffs generally is the Federal Water Pollution Control Act, otherwise known as the Clean Water Act, 33 U.S.C. §1251 *et seq.* ("CWA"). Like RCRA, citizen-plaintiffs suing under the CWA's "citizen suit" provision must provide statutory pre-suit notice and are barred from litigation if a state or federal regulatory entity is "diligently prosecuting" a civil or criminal action against the defendant. *See* 33 U.S.C. § 1365(b). The Yakima citizens did bring actions against the big dairy CAFO's in the late 1990's. While these successful actions slowed pollution of the local rivers, the groundwater contamination problem persisted because the Clean Water Act does not regulate pollution to groundwater.

Unfortunately, CWA citizen suits against CAFOs are limited by three important factors. First, jurisdiction under the CWA is confined to surface waters, *not* groundwater, which becomes drinking water.[24] In the context of *Cow Palace*, there were no active, ongoing surface water discharges that would have given rise to a cause of action under the CWA. Instead, manure pollutants were being released from soil to groundwater, causing widespread nitrate contamination of the underlying aquifer. Second, the remedy for CWA violations is typically a court-ordered cessation of discharges coupled with civil penalties. Injunctive relief of the type achieved by the Plaintiffs in *Cow Palace* to clean up the contamination would not have been available had the case been litigated under the CWA. Third, the Second Circuit's decision in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2005), reversed EPA policy and held that only facilities with "actual discharges" are obligated to obtain a NPDES permit. In Washington State, virtually all CAFOs dropped their NPDES permit coverage after the decision, claiming no actual discharges of pollutants originated from their facilities. As such, there were no NPDES permits to enforce against CAFOs, making CWA litigation even more difficult.

[24] Some courts have recognized that discharges to surface water that first enter "hydrologically connected" groundwater are actionable under the CWA. Discharges directly to groundwater, however, are outside the purview of the statute.

In sum,

- RCRA and the SDWA do not impose any regulatory or statutory burdens or requirements, apart from prohibiting a person from gravely endangering the public health.
- Citizens cannot bring enforcement actions for pollution to private well water under the Safe Drinking Water Act as it only pertains to community and public water systems; only RCRA covers pollution of private wells.
- Citizens cannot bring enforcement actions for pollution to drinking water aquifers under the Clean Water Act as it only pertains to discharges of
- pollution to *surface* water; only RCRA covers groundwater pollution impacting private wells.

9. **Question: It has also been suggested that communities have extensive alternatives to citizen suits. What alternatives would have been available to the Community Association for Restoration of the Environment if their citizen suit had been blocked?**

It is worth providing a background to this issue for the record, but the short answer is none. Private well water is completely unregulated in America. If your well water is contaminated by a third party, and the government has refused to step in and fix the problem, RCRA is your only option.

As a primer, there are typically two avenues of litigation against a polluting CAFO facility: common law tort claims or causes of action arising under federal environmental statutes. As discussed below, each of these avenues has substantial constraints, leaving cases brought under the Resource Conservation and Recovery Act ("RCRA") as the only meaningful way to remedy CAFO pollution.

First, under Washington State law, impacted citizens face major legal and financial barriers when bringing trespass, nuisance, or negligence claims against agricultural operations for contaminating their drinking water. In particular, Washington's "Right to Farm Act," codified in R.C.W. 7.48.300 *et seq.*, insulates agricultural activities like dairy CAFOs from such lawsuits. RCW 7.48.305(1).

In the context of *Cow Palace*, the Washington State Department of Agriculture had deemed the facility to be "in compliance" with its Dairy Nutrient Management Plan, the only state-mandated operational document required of the CAFO. *See* R.C.W. 90.64.026 (requiring dairy CAFOs to obtain and have certified a "dairy nutrient management plan" pursuant to Washington's "Dairy Nutrient Management Act").[25] In a nuisance-type case, statements about such "compliance" would likely have been used offensively to seek dismissal of the state tort

[25] There are no citizen enforcement mechanisms contained within the Dairy Nutrient Management Act.

action, with a counterclaim under the Right to Farm Act that would have put the individuals who brought action at risk of serious, personal financial jeopardy. Under RCRA, however, the Yakima Plaintiffs defeated a motion to dismiss and, in discovery, uncovered that the Washington Department of Agriculture and its inspectors had *completely* failed in their role to protect human health and the environment. Inspectors, either deliberatively or through incompetence, had inputted incorrect data on their inspection reports. They had also failed to review critical documents evidencing Cow Palace's *non*-compliance with its Nutrient Management Plan.

Even more problematic, an unsuccessful plaintiff facing a Right to Farm Act counterclaim is liable for a prevailing farmer's actual damages, exemplary damages, attorneys' fees, and costs. RCW 7.48.315(1). Indeed, the law even authorizes a state or local agency that merely *investigates* a complaint against an agricultural activity to recover its "full investigative costs and expenses" against an unsuccessful complainant. RCW 7.48.320. This creates a great disincentive to bringing tort actions because losing could be financially devastating.

Finally, and perhaps most importantly, the remedy in state tort cases is almost universally money-damages, which do not abate the past and ongoing environmental harms caused by polluting CAFOs.

The high evidentiary burden accompanying state tort claims, coupled with the potentially devastating financial implications for an unsuccessful citizen under the Right to Farm Act, make state tort claims against operations like *Cow Palace* exceptionally risky and non-advisable endeavors.

The second avenue of litigation for citizens impacted by CAFOs lies with federal law. As discussed above, the Clean Water Act is limited to surface water discharges and does not cover the drinking water aquifer contamination that causes the public health risks addressed by RCRA. Similarly, the Safe Drinking Water Act does not cover private wells, leaving rural Americans without a federal safeguard except for RCRA.

Against this backdrop, RCRA citizen suits are, indeed, the "last resort" to abate and remedy groundwater pollution from CAFOs. Make no mistake, citizen litigation under RCRA is an expensive, time-consuming, and complex endeavor. It is not entered into lightly. Plaintiffs in the *Cow Palace* lawsuit expended hundreds of thousands of dollars proving that the facility was causing or contributing to an imminent and substantial endangerment to human health by inundating the aquifer with dangerous levels of nitrate contamination. The outcome in the case was significant for the community— over 100 families have so far been provided clean, safe drinking water, and major operational and structural modifications are being made at the facilities to ensure future contamination is eliminated.

[The attachments to Ms. Culpepper's answers can be found at: *https://docs.house.gov/meetings/if/if18/20171109/106603/hhrg-115-if18-wstate-culpepperj-20171109-sd006.pdf.*]

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ONE HUNDRED FIFTEENTH CONGRESS

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December 21, 2017

Mr. Lynn Utesch
Founder
Kewaunee Citizens Advocating Responsible Environmental Stewardship
P.O. Box 84
Kewaunee, WI 54216

Dear Mr. Utesch:

Thank you for appearing before the Subcommittee on Environment on November 9, 2017, to testify at the hearing entitled "H.R.___, Farm Regulatory Certainty Act."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on Friday, January 12, 2017. Your responses should be mailed to Allie Bury, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to Allie.Bury@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

John Shimkus
Chairman
Subcommittee on Environment

cc: The Honorable Paul Tonko, Ranking Member, Subcommittee on Environment

Attachment

Lynn Utesch
Founder
Kewaunee Citizens Advocating Responsible Environmental Stewardship
P.O. Box 84
Kewaunee, WI 54216

January 12, 2018

Hon. John Shimkus
Chair, Subcommittee on Environment
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Chairman Shimkus,

Thank you for the opportunity to testify at the hearing entitled "H.R.___. Farm Regulatory Certainty Act" on Thursday, November 9, 2017. Per your request, please find attached my response to your questions for the record.

Sincerely,

/s/
Lynn Utesch

Enclosures

Responses to questions from the Honorable Frank Pallone:

1. **What are some of the health impacts you and your neighbors have experienced as a result of manure spraying?**

   It is hard to underestimate the negative health effects of living hear a CAFO. Many of our neighbors have suffered health impacts that research shows are often linked to exposure to CAFO wastes. For example, in our community:

   - A young boy went swimming in a local creek with a skinned knee and contracted a life-threatening infection. He had to have part of his knee cap removed as a result. Antibiotic resistant bacteria are associated with CAFO waste.
   - A young woman had a typical blemish on her face, but when she scratched it, her face became infected with antibiotic resistant MRSA, an opportunistic pathogen. The infection was so severe that she had to have a hole drilled in the top of her mouth to drain the infection.
   - Another community member, who relies on well water, has experienced ongoing, severe diarrhea. Microbial source tracking testing of water from his well showed that there were contaminants from a bovine source in the water.

   Many neighbors have suffered many other health problems associated with CAFO wastes.

   In 2014, John Hopkins Center for a Livable Future wrote a letter addressing our community and the increased risks associated with exposure to increasing volumes of manure. In the last 2 months our local health department has reported confirmed cases of salmonella, campylobacter, giardia, & cryptosporidium. While these were not traced to the source, due to the small size of our health department, USDA researcher Mark Borchardt found many of these same pathogens in well water in our county, likening the condition of our water quality "to that which one would expect to find in a third world country." In this same research, the majority of contaminants came from bovine sources.

   Here in the state of Wisconsin, antibiotic resistant infections such as MRSA, are not tracked by state and local health departments, therefore we cannot get true numbers on how prevalent these infections are in our community. With that being said, we are aware of multiple cases of MRSA in our community, some severe enough to require removal of appendages. Prevalence of these pathogens in our environment were shown in a study conducted by Marquette University which tested water and sediments from our local streams and rivers. This research showed the presence of multiple antibiotics, and antibiotic resistant bacteria. Samples indicated that some of the antibiotics are used exclusively in veterinary medicine. In 2013, Dr.

Angelia Bauer's research indicated "significant human health threats" found in water in northeastern Wisconsin, including the presence of endocrine disrupting compounds. We are highly concerned with air quality issues where we live, and toxic emissions known to be neurotoxins, but since emissions are not regulated we are offered virtually no protection against air tainted with considerable hydrogen sulfide, ammonia, methane, particulate matter and multiple volatile organic compounds. Attached: John Hopkins letter; Marquette University research; USDA Mark Borchardt research; Angelia Bauer research.

2. **What are some of the economic impacts you and your neighbors have Experienced?**

In November, 2017, Wisconsin's Department of Revenue conducted a study of home values in Kewaunee County. The study found that homes within a quarter mile of a large CAFO had a 13% reduction in property value. If the home was from a quarter mile to one mile from a large CAFO the property value was reduced by 8%. The study shows citizens are losing value on what is most residents largest asset –through no fault of their own, merely their proximity to CAFO activities within a certain radius. This study does not take into account other issues these homes may have such as toxic emissions, a contaminated well, or non-stop semi traffic in their neighborhoods. In the Town of Lincoln, when a large CAFO turned a pastoral field into a feed pad and 76 million gallon lagoon, 8 families immediately left, with some of the housing was bought at considerably reduced rates by the CAFO operator. It is not unusual for operators to buy homes cheaply after their operation has devastated families who seek to leave the health threats and diminished quality of life issues that arise due to CAFO activities and production areas, and the accompanying land, water, and air pollution.

Living in a county that has 34% of the tested wells contaminated with e. coli or nitrates makes it very difficult to attract new businesses and residents. While our county is attempting to increase tourism, it is difficult to get people to choose this as a travel destination since our Lake Michigan beaches are covered with dense algae mats that stink and cover the beach, fueled by excessive phosphorus from farm run-off into our tributaries which empty into Lake Michigan. Externalized costs from these mega dairies is untold to our environment; Our 3 major rivers, the Ahnapee, Kewaunee, and East Twin, are all on the EPA's impaired waters list. Many rivers in Kewaunee County are seriously impaired, although at one time held the status as class 1 trout streams.

Obviously, the biggest concern homestead owners have is a contaminated well, which in large part renders a home without water fit to drink, wash vegetables, brush one's teeth or bathe in. Costs to remediate problems are very costly for homeowners, well into thousands of thousands of dollars, and

digging a new well has unfortunately failed for some residents who found in a very short time that their well had been re-contaminated. Remediation for well contamination through different technologies is extremely expensive, and buying multiple gallons of water at the store on a regular basis is also a financial burden for citizens. Water testing is also expensive for homeowners to incur costs on, and many are deterred from regular well testing due to costs associated.

The continued growth of CAFOs has highly impacted small dairy farmers by the surplus volumes of milk generated, which are driving milk prices down, having the greatest negative impact on small farmers. In 2017 Wisconsin lost 500 dairy farms. As of January 1, 2018, there were 8,801 licensed dairy herds. The number of dairy farms has dropped by 20% in Wisconsin in the last 5 years. The CAFO model has driven up land costs making it almost impossible for young and new farmers to purchase land. Land is valuable not in as so much for crop production, but for manure disposal.

3. **You, yourself are a farmer, so you have experience handing manure for farming purposes. In your experience, what are the big differences between the way you use manure as a farmer and the way Concentrated Animal Feeding Operations dispose of their manure?**

Manure handling in our area is primarily through the use of liquid manure. What that means is the manure and urine are mixed with water for ease of handling. For the CAFOs this means all the wash water for dairy equipment, barns, leachate etc. is added to the manure, which is stored in a manure pit. These pits hold millions of gallons—the largest in our area a 76 million gallon lagoon. In addition, in the state of Wisconsin these pits can accept up to 10% industrial waste of the total volume of the pit, which is classified as "manure". These pits are storing manure under anaerobic conditions [without oxygen], which starts the putrefaction process, which produces toxic gases such as hydrogen sulfide, methane, ammonia and up to 300 Volatile Organic Compounds. This liquid manure is then applied to the soil at what is termed agronomic rates. The typical rate for corn in our area is 22,000 gallons per acre, but it could be as high as 32,000 gallons per acre. These rates are based on the crop needs for the entire growing season. Unfortunately, liquid manure is applied in a single application. This application often takes place late in the fall when corn has been harvested on to bare soil that will not be planted until the next spring. This practice creates the potential for this liquid manure to migrate into the ground water or run off to surface waters. Even when this manure is applied in the spring at the volumes allowed, it creates the potential for the manure to leach below the root zone and enter the ground water.

On our farm, we use a rotational grazing system with 110 acres of pasture and 40 acres of woods and hedgerows. During the growing season our cows are moved to fresh pasture on a daily basis. Since our cows spend their time on grass we have a minimum of manure handling. The manure from our cows is in a solid form, and is deposited directly to the soil where the biology of the soil and living forms such as worms and dung beetles convert the waste to a bioavailable nutrient that can be used by the plant immediately. By using solid manure deposited on a carpet of plants we minimize the potential for our manure to migrate to our ground water or surface water. Even during the winter months our cows are moved on our pasture to round bales put out in different locations on the field, which reduces the concentration of manure from any one area. Any manure in the barns is cleaned out with a skid steer and composted, which reduces its volume by as much as 50%.

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Disclaimer: The opinions expressed herein are our own and do not necessarily reflect the views of The Johns Hopkins University.

Re: Manure from intensive livestock operations: health and environmental concerns

To whom it may concern:

We are researchers at The Johns Hopkins Center for a Livable Future, based at the Bloomberg School of Public Health. The Center engages in research, policy analysis, education, advocacy, and other activities guided by an ecologic perspective that diet, food production, the environment, and public health are interwoven elements of a single complex system. We recognize the fundamental importance of food animal production in these issues as they relate to the U.S. food system.

We are writing to present some of the concerns associated with the generation and management of manure from intensive livestock operations, particularly regarding the health of Wisconsin's rural citizens. These health and environmental concerns include:

- The spread of infectious disease, including antibiotic-resistant bacteria, to nearby communities.
- Groundwater and surface water pollution, and associated health and ecological impacts.
- Air pollution, odors, and associated health and social impacts.

These are detailed below, with supporting evidence from the peer-reviewed scientific literature.

Background

According to the 2007 Census of Agriculture, Wisconsin is the second leading dairy-producing state in the country. The state is home to over 1.2 million milk cows, with an inventory of close to 3.4 million cattle and calves—the 9th largest in the nation. Wisconsin is also a significant contributor to U.S. pork, poultry and egg production (1,2).

Over half of Wisconsin's cattle and calves are on farms with reported inventories of over 200 head, and 27 percent are on farms with over 500 head (1). With regards to health and environmental concerns, it is critical to consider inventory size alongside other important factors such as feed inputs, stocking density, and the amount of available cropland for spreading manure.

Producing large numbers of animals over a relatively small land area presents the challenge of managing the quantities of manure they generate. A 1400 pound lactating cow, for example, produces an estimated 148 lbs of waste daily (3). Humans, by comparison, produce 2.5 lbs daily. An intensive dairy operation with several hundred animals, by extension, may produce as much excrement as a small city, concentrated over a tiny fraction of the land area and without the benefit of a wastewater treatment plant to eliminate biological and chemical contaminants. In large part because of these challenges, intensive livestock operations have emerged as a major source of pollution to ground and surface waters (4–9).

Any farmer can attest to the value of manure as a source of nutrients and organic matter for their soil. The quantity of manure generated at intensive operations, however, frequently exceeds the amount that can be utilized by surrounding cropland, and transporting manure further may not be economically feasible (10–12). When manure is over-applied, the excess—along with chemical (13–17) and microbial (4,18,19) contaminants associated with it—may be transported by runoff into surface waters and/or leach into groundwater. Results from a 2005 study, for example, suggest 71 percent of Wisconsin dairy farms generate manure in amounts that exceed the nutrient requirements of the cropland on which manure is applied (20). The potential health and ecological effects associated with these scenarios are detailed below.

Spread of infectious disease to nearby communities

Crowded conditions in intensive livestock operations present frequent opportunities for the transmission of viral and bacterial pathogens among animals, and between animals and humans. Many of these pathogens live in the digestive tracts of animals and may be passed in their waste (4,18,19).

The disease risks stemming from intensive livestock production are heightened by the potential for infection with antibiotic-resistant bacteria. The use of low doses of antibiotic drugs as a means to promote growth (often also called "disease prevention") in animals has become commonplace—an estimated 80 percent of antibiotics sold for human and animal uses in the U.S. are sold for use in food-producing animals (21). Administering antibiotics to animals at doses too low to treat disease fosters the proliferation of antibiotic-resistant pathogens, which can cause infections in humans. When a person is infected with antibiotic-resistant bacteria, these infections can be more difficult and expensive to treat (22).

A growing body of evidence points to the potential pathways by which pathogens (antibiotic-resistant or otherwise) might spread from intensive livestock operations into communities. Studies suggest, for example, that antibiotic-resistant pathogens may be transmitted by workers into their homes and communities (23,24), conveyed by runoff into ground and surface waters (19), blown out of ventilation systems (25–27), and spread to consumers via contaminated meat (28,29). Pathogens may also be transported by flies (30), wild birds (31,32), and animal transport vehicles (33). Further evidence for these pathways is documented in a 2013 study in which living closer to swine operations—and to fields where manure is spread—was significantly associated with elevated rates of infection with methicillin-resistant *Staphylococcus aureus* (MRSA), an antibiotic-resistant pathogen that can be challenging and expensive to treat (34). A similar study found similar associations between proximity to a swine operation and colonization with MRSA (35).

Health and ecological impacts of ground and surface water pollution

Manure from intensive livestock operations may introduce a range of waterborne contaminants into ground and/or surface waters, including nitrates (7,8), microbial pathogens (4,19,34), veterinary pharmaceuticals(14–18,36) and natural and synthetic hormones (37,38). Communities living downstream from these operations may be exposed to these agents via drinking or having skin contact with contaminated ground or surface waters.

Exposure to these waterborne contaminants can result in adverse health effects. Ingesting high levels of nitrate (naturally occurring in manure), for example, has been associated with increased risks for thyroid conditions (39,40), birth defects and other reproductive problems (39,41), diabetes (39), various cancers (39,42), and methemoglobinemia (blue baby syndrome), a potentially fatal condition among infants (43).

The risks of exposure to waterborne contaminants are particularly salient for the 70 percent of Wisconsin's population who depend on groundwater for their drinking water

supply—the state ranks fourth in the nation for the percentage of households on private wells (44). Adding to these concerns, much of southern and eastern Wisconsin has karst geology—a feature that can readily channel surface contaminants into groundwater sources (45). Private wells are not subject to federal drinking water regulations, and while some states have minimal requirements for private wells, state-level action is usually only triggered during property transfer and rarely requires periodic monitoring of water quality (46). Further, most water treatment systems for private wells are designed to deal with heavy metals and other more common drinking water contaminants, and are not suited for removal of drug residues and hormonally-active compounds.

Nutrient runoff into surface waters may also have consequences for marine ecosystems and the people who depend on them for recreation and economic activity. Intensive livestock operations are a major source of nutrient runoff (6,7,47), contributing to algal blooms and subsequent hypoxic "dead zones" that may result from algal decomposition. Aquatic regions exposed to long periods of hypoxia often see dramatic reductions in fisheries, among other health, ecological, and economic harms (48). Nutrient runoff has also been implicated in the growth of harmful algal blooms (49), which may pose health risks for people who swim or fish in recreational waters, or who consume contaminated seafood. Exposure to algal toxins has been linked to neurological impairments, liver damage, stomach illness, skin lesions, and other adverse health effects (50).

In more severe cases, manure storage facilities may rupture, leak, or overflow during extreme weather events, releasing their contents into surrounding waterways. For example, in 1995 a large swine waste holding lagoon in North Carolina ruptured due to faulty management. Close to 26 million gallons of manure emptied onto fields and lawns of adjacent homes before draining into a nearby river. The pollution load led to the proliferation of toxic algal blooms and widespread fish kills, and fecal bacteria were detected in river sediment at levels over 15,000 times higher than state standards (51).

Air pollution, odors, and associated health and social impacts

Intensive livestock operations release a range of airborne pollutants, including ammonia, hydrogen sulfide, and other gases emitted from animal waste; and airborne particulates, which may be comprised of dried feces, animal dander, fungal spores, and bacterial toxins (52). Results from a two-year air monitoring study, jointly sponsored by the U.S. Environmental Protection Agency and representatives of the pork, poultry, dairy and egg industries, suggest intensive livestock operations produce several of these pollutants at levels well above federal standards.(53)

Much of the research on the health effects associated with exposure to airborne pollutants from confinement operations has focused on workers. At least one in four workers in these operations are estimated to suffer from respiratory illness (54).

A growing body of evidence suggests residents living near intensive livestock operations may also be at greater risks of respiratory illness. Results from a study of industrial-scale dairy operations in Washington State, for example, suggest intensive dairy operations are a significant source of particulate matter among nearby rural communities (55). Another study detected high concentrations of particulate matter downwind from swine confinement operations, which was linked to wheezing, breathing difficulties, and eye, skin, and nasal irritation among residents of downwind communities (56). Indicators of air pollution from swine confinement operations have also been linked to asthma symptoms among students at nearby schools (57). Additional studies have illustrated relationships between proximity to intensive livestock operations and respiratory effects (58–61) among other adverse health outcomes.

Odors associated with air pollutants from intensive livestock operations have been known to interfere with daily activities, quality of life, social gatherings, and community cohesion (62,63). In addition to the stigma and social disruption they often generate, odors from swine confinement operations have been associated with physiological and psychological effects, including high blood pressure, depression, anxiety, and sleep disturbances (64–66).

Despite the above concerns, all but the largest livestock operations—those designated as "Large CAFOs" (concentrated animal feeding operations)—are required by federal law to report hazardous airborne emissions, and then only if the levels are above certain thresholds. Even in cases when operations report emissions, such information may not be available to the public. For these reasons, the relationships between intensive livestock operations, air quality, and the health of rural residents are poorly understood. These data gaps speak to the need for better methods of estimating emissions, including more stringent reporting requirements and air monitoring stations at intensive livestock operations and communities (67).

Conclusion

For thousands of years, manure has been valued by farmers for its roles in building soil quality and increasing crop yields. Producing livestock such that they generate more manure than can be utilized by nearby cropland is not only a waste of this important resource, it is also a public health and environmental problem. A growing body of evidence has implicated the generation and management of manure from intensive livestock operations in the spread of infectious disease (including antibiotic-resistant strains), the

introduction of microbial and chemical contaminants into ground and surface waters, impacts to air quality, and the wide range of adverse health, social, ecological and economic outcomes that result from these events.

We hope our letter is helpful in describing some of the public health and environmental concerns associated with the generation and management of manure from intensive livestock operations. Please do not hesitate to contact us if you have any questions.

Sincerely,

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[The attachments to Mr. Utesch's answers can be found at: *https://docs.house.gov/meetings/if/if18/20171109/106603/hhrg-115-if18-wstate-uteschl-20171109.pdf.*]

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