

ONE HUNDRED FIFTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

November 7, 2017

To: Subcommittee on Environment Democratic Members and Staff
Fr: Committee on Environment and Commerce Democratic Staff
Re: Hearing on H.R. ___, the Farm Regulatory Certainty Act

I. INTRODUCTION

On **Thursday, November 9, 2017, at 10:15 in room 2322 of the Rayburn House Office Building**, the Subcommittee on Environment will hold a hearing entitled “H.R. ___, the Farm Regulatory Certainty Act.” The bill amends provisions of the Resource Conservation and Recovery Act (RCRA) to block the availability of citizen suits in some cases involving manure and crop residues.

II. MANURE AND CROP RESIDUES POSE THREATS TO PUBLIC HEALTH IF MISMANAGED

Animal manure is the primary source of nitrogen and phosphorus contamination in surface and ground water posing serious health risks.¹ Nitrogen-contaminated drinking water can cause methemoglobinemia, commonly referred to as Blue Baby Syndrome, which can be fatal. This condition primarily affects infants and pregnant women.² Agricultural manure also contains numerous pathogens, including *Escherichia coli*, antibiotics, growth hormones, and heavy metals. All of these contaminants impact public health when present in drinking water.

¹ Environmental Protection Agency, *Estimated Animal Agriculture Nitrogen and Phosphorus from Manure* (www.epa.gov/nutrient-policy-data/estimated-animal-agriculture-nitrogen-and-phosphorus-manure) (accessed Nov. 6, 2017).

² California Department of Health Services, Environmental Health Investigations Branch, *Health Concerns Related to Nitrate and Nitrite in Private Well Water* (Feb. 2000) (www.atsdr.cdc.gov/hac/pha/reports/pacificgaselectric_04222003ca/pdf/apph.pdf).

Nitrogen and phosphorus contamination also cause serious ecological effects, contributing to eutrophication and harmful algal blooms.³ This pollution costs the U.S. at least \$2.2 billion annually.⁴

III. CURRENT REQUIREMENTS FOR SAFE DISPOSAL OF MANURE ARE LIMITED

RCRA governs disposal of solid waste, which may include manure or crop residues. However, RCRA does not apply to material that is not waste, and material is not waste if it is not disposed of. For that reason, manure and crop residues that are returned to the soil as fertilizers are not considered solid waste, and are thus not subject to RCRA, including its citizen enforcement provisions.⁵ This exception is explicitly codified in regulation.⁶

In 2015, a citizen suit was brought under RCRA over large scale dumping of manure. In that case, *Community Association for Restoration of the Environment v. Cow Palace LLC*, the court found that large amounts of manure had been disposed of, not used as fertilizer, and was therefore subject to the requirements of RCRA. This decision was based on the specific facts of the case, particularly that the manure had been applied to the soil in amounts far exceeding the agronomic rate. The decision was a preliminary one that allowed the case to go forward.⁷ Ultimately, the parties to that case reached a settlement that required Cow Palace to line its manure lagoons, reduce its manure application to the land, and monitor groundwater.⁸

IV. H.R. ___, THE FARM REGULATORY CERTAINTY ACT

The discussion draft circulated for this hearing blocks citizen suits under RCRA over manure or crop residues in two sets of circumstances. First, it says that no suit may proceed against an agricultural operation if the Environmental Protection Agency (EPA) or the State is diligently prosecuting a civil or criminal case against that agricultural operation. This prohibition is similar to an existing bar in current law,⁹ except that it applies to any civil or

³ The Nature Education Knowledge Project, *Eutrophication: Causes, Consequences, and Controls in Aquatic Ecosystems* (2013) (www.nature.com/scitable/knowledge/library/eutrophication-causes-consequences-and-controls-in-aquatic-102364466).

⁴ Environmental Protection Agency, *Nutrient Indicators Dataset* (www.epa.gov/nutrient-policy-data/nutrient-indicators-dataset) (accessed Nov. 6, 2017).

⁵ See, EPA, Final Rule: Definition of Solid Waste 80 Fed. Reg. 1694 (Jan. 13, 2015).

⁶ 40 C.F.R. 257.1

⁷ *Community Association for Restoration of the Environment, Inc. and Center for Food Safety Inc. v. Cow Palace LLC*, No. 13-CV-3016-TOR (E.D. WA. Jan 14, 2015) (order re: cross motion for summary judgment).

⁸ *Id.*, Consent Decree May 11, 2015.

⁹ §42 U.S.C. 6972(b)(1)(B)(i)

criminal action against that agricultural operation, even if that action has no relationship to the violation or dangerous activity targeted by the citizen suit. It is unclear whether this provision is meant to be so broad.

The bill also bars citizen suits when EPA or the State is “diligently conducting” an administrative proceeding or has entered into a consent agreement with the agricultural operation. This language is similarly not limited to proceedings or consent agreements that relate to the violations or dangerous activities that are targeted.

Accordingly, an agricultural operation could argue that any pending lawsuit or administrative proceeding to which it is a party creates a safe harbor from all RCRA citizen suits.

V. WITNESSES

Panel I:

The Honorable Dan Newhouse

U.S. House of Representatives (WA-4)

The Honorable Jim Costa

U.S. House of Representatives (CA-16)

Panel II:

Dan Wood

Executive Director

Washington State Dairy Federation

Amy Romig

Partner

Plews Shadley Racher & Braun, LLP

Jessica Culpepper

Food Project Attorney

Public Justice

Lynn Utesch

Founder

Kewaunee Citizens Advocating Responsible Environmental Stewardship