



November 6, 2017

TO: Members, Subcommittee on Environment

FROM: Committee Majority Staff

RE: Hearing entitled “H.R. ____ the Farm Regulatory Certainty Act”

I. INTRODUCTION

The Subcommittee on Environment will hold a hearing on Thursday, November 9, 2017, at 10:15 a.m. in 2322 Rayburn House Office Building. The hearing is entitled “H.R.____, Farm Regulatory Certainty Act.”

II. WITNESSES

Panel 1

- Dan Newhouse, Member, U.S. House of Representatives (WA-4); and
- Jim Costa, Member, U.S. House of Representatives (CA-16).

Panel 2

- 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.

III. BACKGROUND

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901, *et seq* is a comprehensive environmental statute intended to address the nation’s industrial wastes. RCRA regulates the disposal of hazardous waste and solid waste. “Solid waste” is defined as “discarded material...resulting from industrial, commercial, mining, and agricultural operations.”¹

¹ 42 U.S.C. §6903(27) The term “solid waste” means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as

“Discarded material” is not defined by RCRA, but courts² and the Environmental Protection Agency (EPA) through regulations³ have determined that a substance is “discarded” where it is “disposed of, thrown away or abandoned.”

In enacting RCRA, Congress established that agricultural products that could be recycled or reused as fertilizers were not its concern. RCRA’s legislative history reveals that the statute was intended as “a multi-faceted approach toward solving the problems associated with the 3-4 billion tons of discarded materials generated each year, and the problems resulting from the anticipated 8 [percent] annual increase in the volume of such waste.”⁴

The House Report notes that “Congress was concerned with waste products of all types that were contributing to ever-increasing landfills...and that the words discarded materials more accurately reflect the Committee’s interest...Waste itself is a misleading word in the context of the committee’s activity....An increase in reclamation and reuse practices is a major objective of the Resource Conservation and Recovery Act.”⁵ The same House Report stated “[m]uch industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses....Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.”⁶

Likewise, EPA regulations exempt “agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners.”⁷ Agricultural operations that produce manure or other agricultural wastes are typically regulated under the Clean Water Act, the Safe Drinking Water Act, or state law.⁸

Over the years cases have been brought under the citizen suit provision of RCRA against agricultural operations regarding the storage and application of manure. Recently, a Federal district court in Washington determined that certain dairies that had previously entered a Consent Order with EPA under the Safe Drinking Water Act to address potential issues associated with manure management, violated the open dumping provision of RCRA.⁹

IV. DISCUSSION DRAFT

Section 1. Short Title.

amended (86 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

² *American Mining Congress v. U.S.*, 824 F.2d 1177 (D.C. Cir. 1987).

³ 40 CFR 261.2. See also <https://www.epa.gov/hw/criteria-definition-solid-waste-and-solid-and-hazardous-waste-exclusions>

⁴ H. R. Rep. No. 94-1491, at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6239.

⁵ *Id.* at 2-3.

⁶ *Id.* at 3.

⁷ 40 CFR § 257.1(c)(1).

⁸ <https://www.epa.gov/agriculture/agriculture-laws-and-regulations-apply-your-agricultural-operation-statute>

⁹ *Community Association for Restoration of the Environment Inc., et al v. Cow Palace LLC*, 2:13-cv-03016 (E.D. Wash).

Section 1 provides that the Act may be cited as the “Farm Regulatory Certainty Act.”

Section 2. Citizen Suits.

Section 2 provides that no action may be commenced against an agricultural operation if EPA or the state has commenced and is diligently conducting a civil, criminal, or administrative proceeding against the agricultural operation in order to seek compliance with any applicable permits, standards, regulations, conditions, requirements, prohibitions, or orders related to the storage of manure or crop residue that is to be returned to the soil as fertilizer or the return of manure or crop residue to the soil as fertilizer or soil conditioner.

V. ISSUES

The following issues may be examined at the hearing:

- The regulatory structure governing agricultural operations and agricultural nutrient management and the ramifications of potentially duplicative lawsuits under RCRA;
- The legislative history of RCRA and why the statute may not have been intended to govern manure and crop residue when it is returned to the soil as fertilizer or soil conditioner;
- The legislative history of RCRA and why the statute may not have been intended to govern agricultural nutrient management issues; and
- Whether the Discussion Draft would preclude the regulation of agricultural operations and nutrient management under the appropriate statutes and regulations.

VI. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Tina Richards of the Committee staff at (202) 225-2927.