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RPTR ALLDRIDGE

EDTR CRYSTAL

H.R. _____, THE FARM REGULATORY CERTAINTY ACT

THURSDAY, NOVEMBER 9, 2017

House of Representatives,

Subcommittee on Environment,

Committee on Energy and Commerce,

Washington, D.C.

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

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Advisor and Staff Director, Energy and Environment; Alexander Ratner, Minority Policy Analyst; and Catherine Zander, Minority Environment Fellow.

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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:]

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Mr. Shimkus. Congresswoman Blackburn, did you want a second or 2 to say something?

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

[The prepared statement of Mrs. Blackburn follows:]

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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:]

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Mr. Shimkus. Thank you very much for that.

The full committee chairman is not here. The ranker of the full committee -- they are downstairs. Okay. 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.

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**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.

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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 reenforce 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

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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:]

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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

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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

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Control Board, the Central Valley Regional Water Quality Control Board, the environmental 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.

I mean, 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

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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:]

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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.

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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.

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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.

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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 there 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 entered 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,

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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:]

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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

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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 citizen 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

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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 hardworking 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.

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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:]

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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

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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.

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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

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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.

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[The prepared statement of Ms. Culpepper follows:]

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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.

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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.

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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. This, 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.

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[The prepared statement of Mr. Utesch follows:]

***** INSERT 1-6 *****

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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.]

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[11:23 a.m.]

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 am know there 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 draft, 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.

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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 under 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.

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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. So you are -- 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. Okay. 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 working with -- if they are under enforcement, whether it be a consent order or a penalty and any other

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oversights from a Federal or State agency, then they have it 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 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

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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 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

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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 are not -- 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.

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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.

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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

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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. Okay.

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 lawsuits, 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. Okay. 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, there are times -- and, 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.

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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. Okay. Point well taken.

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

Thank you all.

Mr. Shimkus. The gentleman yields back his time.

If it is okay 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 okay 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

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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, "Okay, 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. Okay.

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.

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Mr. Shimkus. Okay.

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. Okay. And that is why we have the hearings. I mean, 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.

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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 do, 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. Okay. 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 it to the RCRA violation.

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

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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

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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

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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 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 follows:]

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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.]