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**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



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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.