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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.