

November 7, 2017

The Honorable Greg Walden  
Chairman  
Committee on Energy & Commerce  
U.S. House of Representatives  
2185 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Frank Pallone  
Ranking Member  
Committee on Energy & Commerce  
U.S. House of Representatives  
237 Cannon House Office Building  
Washington, DC 20515

The Honorable John Shimkus  
Chairman  
Committee on Energy & Commerce,  
Subcommittee on the Environment  
U.S. House of Representatives  
2217 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Paul Tonko  
Ranking Member  
Committee on Energy & Commerce, Subcommittee on  
the Environment  
U.S. House of Representatives  
2463 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Walden, Ranking Member Pallone, Subcommittee Chairman Shimkus, and Subcommittee Ranking Member Tonko:

We, the undersigned Washington State public interest groups, write today regarding H.R. 848, a proposed amendment to the Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*, otherwise known as the Resource Conservation and Recovery Act. The bill, sponsored by Rep. Newhouse (R-Wash.), would exclude from the definition of “solid waste” any “animal or crop waste, manure, or fertilizer or constituents derived from such animal or crop waste, manure, or fertilizer.” It would also create a special provision for the agricultural industry that prohibits the filing of an enforcement suit against a polluting operation if an “administrative proceeding,” civil action or criminal case is ongoing, without ensuring that the government’s action will remediate the harm. If passed, the bill would create an unprecedented legal shield for industrialized agriculture to contaminate the public’s air, land, and water. We urge you to take all appropriate action to ensure that this bill is defeated, for it puts Americans in danger and threatens to undermine one of our nation’s greatest assets: clean, potable groundwater.

H.R. 848, sponsored by industrial agricultural special interests, is a direct reaction to the *Cow Palace* litigation, a set of successful citizen lawsuits brought against large dairy Concentrated Animal Feeding Operations, or CAFOs, in the Lower Yakima Valley of Washington. Residents living in the Valley have been forced to deal with nitrate-contaminated groundwater for decades. The extent of that contamination was brought to light in 2008, when a public elementary school in Outlook, WA tested above the federal “Maximum Contaminant Level” or “MCL” for nitrates.<sup>1</sup> While the children were provided bottled water as a temporary fix, the cause of the problem, industrial dairies, was ignored by both state and federal entities.

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<sup>1</sup> Leah Beth Ward, *Hidden Wells, Dirty Water*, available at <https://www.centerforhealthjournalism.org/fellowships/projects/investigation-water-wells-rural-washington>.

In October 2008, the Yakima-Herald Republic published the results of its independent investigation into the Lower Yakima Valley's widespread nitrate contamination. The newspaper found that no regulatory agency understood the extent of the contamination or had evaluated which areas would be at risk of consuming water in excess of the nitrate MCL. Residents that were interviewed acknowledged that their wells had been found unsafe, but could not afford expensive, point-of-use reverse osmosis machines to clean their water. More troubling, journalists discovered "that broader efforts to scientifically identify and monitor groundwater pollution have been thwarted by the dairy and livestock industries – which in Yakima County account for an estimated 115,000 dairy cows and beef cattle living in concentrations as great as 8,000 per farm."<sup>2</sup> In fact, a dairy CAFO with just 2,500 mature dairy cows produces as much waste as a human population of 411,000 residents.<sup>3</sup> The key difference: human waste is treated in sophisticated waste treatment facilities, whereas cow manure is stored in unlined lagoons and dumped on fields as untreated waste.

As a result of the Yakima-Herald Republic's investigation, the United States Environmental Protection Agency ("EPA") finally took notice and, in 2010, began sampling groundwater from private wells throughout the Yakima Valley.<sup>4</sup> After three years of testing and analysis, the EPA issued a final report, finding that five large dairy facilities were a likely source of widespread nitrate contamination documented in groundwater found downgradient of the facilities.<sup>5</sup>

Shortly thereafter, the EPA entered into an agreed order with the dairies under the Safe Drinking Water Act. Local residents were incensed that the agreement did not require meaningful changes at the dairy facilities that would remediate the groundwater. Instead, residents viewed the agreement as a series of half-measures, effectively allowing nitrate contamination to continue to the detriment of the Valley residents that rely upon groundwater for drinking water. Consequently, organized residents retained attorneys and provided requisite pre-suit notice under the Resource Conservation and Recovery Act ("RCRA"), alleging that the five dairies had mishandled their manure in such a manner that caused or contributed to an imminent and substantial endangerment to human health and the environment. The state and federal governments had the opportunity to step in to take over the suits but did not.

On February 14, 2013, the Community Association for Restoration of the Environment, Inc. ("CARE") and the Center for Food Safety ("CFS") brought suit against each of the owners of the

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<sup>2</sup> *Id.*

<sup>3</sup> *Relation Between Nitrate in Water Wells and Potential Sources in the Lower Yakima Valley Report*, EPA-910-R-13-004, p. 31 n. 21. Available at [https://www3.epa.gov/region10/pdf/sites/yakimagw/nitrate\\_in\\_water\\_wells\\_study\\_march2013.pdf](https://www3.epa.gov/region10/pdf/sites/yakimagw/nitrate_in_water_wells_study_march2013.pdf).

<sup>4</sup> See EPA website, "Lower Yakima Valley Groundwater," available at <<https://yosemite.epa.gov/r10/water.nsf/gwpu/lyakimag>>

<sup>5</sup> *Relation Between Nitrate in Water Wells and Potential Sources in the Lower Yakima Valley Report*, EPA-910-R-13-004, available at [https://www3.epa.gov/region10/pdf/sites/yakimagw/nitrate\\_in\\_water\\_wells\\_study\\_march2013.pdf](https://www3.epa.gov/region10/pdf/sites/yakimagw/nitrate_in_water_wells_study_march2013.pdf).

dairy facilities. The crux of the lawsuits was that the dairy facilities had discarded their manure, eliminating its use as a crop fertilizer and transforming it into a “solid waste” under RCRA. To that end, the Plaintiffs established that the *Cow Palace Dairy*, one of the dairy defendants, had grossly over-applied manure to its crop fields, stored manure in lagoons that the defendant knew leaked and were in fact designed to leak, and composted manure on bare ground, allowing manure nutrients to leach into the soil and groundwater.<sup>6</sup>

The consequence of this mishandling of manure was the significant and widespread nitrate contamination of the underlying aquifer. The Court concluded that “[t]he undisputed facts are that residential wells downgradient of the Dairy exceed the maximum contaminant level, as established by the EPA,” and that even if the Dairy were taking steps to “reduce” the risk of danger posed by consumption of water in excess of that maximum contaminant level, “the risk still remains to these residents,” as well as to those in the flow path of the contamination from the Dairy site.<sup>7</sup>

After the Court found in the Plaintiffs’ favor in the *Cow Palace Dairy* case, the remaining dairies entered into binding Consent Decrees. Those Decrees required the dairies to fund a Clean Drinking Water Program, which provides clean drinking water or installation of a reverse osmosis machine to residents within the dairies’ contamination plume. They also required major structural and operational changes at the dairy facilities to ensure that manure would be stored in lagoons that do not leak, composted on areas that prevent leaching, and applied to fields in a manner that maximizes its function as a crop fertilizer while also protecting groundwater.<sup>8</sup>

The *Cow Palace* decision emphasizes the importance of the distinction Congress drew between wastes that are “returned” to the soil as fertilizer and wastes which are merely dumped onto fields as a method of disposal. As described in H.R. Rep. No. 94-1491(I), Congressional intent in passing RCRA was that “[a]gricultural wastes which *are returned to the soil as fertilizers or soil conditioners* are not considered discarded materials in the sense of this legislation.” (emphasis added) (see also 1976 U.S.C.C.A.N. 6238, 6240). On the one hand, farmers who use the tools available to them to use animal wastes as fertilizer are not “discarding” their manure, but rather putting it to beneficial re-use. These are the farmers that Congress intended to protect from RCRA’s requirements, as they are “returning” agricultural wastes to the soil for fertilization.

On the other hand, farmers who dump millions of gallons of manure onto their fields after receiving soil testing showing no agronomic need for additional fertilization – like Cow Palace Dairy, Bosma Dairies and George DeRuyter Dairies – do not beneficially recycle that manure. They discard it, because the crops cannot make use of the extra manure nutrients. The same is true for facilities that store manure in lagoons that leak (and are, in fact, designed to leak) and compost manure on bare ground. Those wasted nutrients – especially nitrate – move deeper and deeper into the soil, eventually polluting groundwater and rendering the aquifer unsuitable for

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<sup>6</sup> *Community Association for Restoration of the Environment, Inc. v. Cow Palace Dairy*, 80 F. Supp. 3d 1180 (E.D. Wash. 2015).

<sup>7</sup> *Id.* at 1128.

<sup>8</sup> See, e.g., Cow Palace Dairy Consent Decree, available at [http://www.yakimaherald.com/cow-palace-consent-decree/pdf\\_d0c6ab62-c16a-11e6-99ed-d7cbb50e6d62.html](http://www.yakimaherald.com/cow-palace-consent-decree/pdf_d0c6ab62-c16a-11e6-99ed-d7cbb50e6d62.html).

human consumption. Contrary to Representative Newhouse’s statements, the legislative history shows congressional intent was not to insulate these bad actors from RCRA’s requirements. Instead, as the Court recognized in the *Cow Palace Dairy* case, such farming operations must be held accountable for the pollution they cause.

And make no mistake: pollution from industrialized agriculture is not unique to the Lower Yakima Valley. The northwestern part of Washington State is also home to many dairy CAFOs and, unfortunately, similar environmental problems have arisen. Runoff and seepage from fields receiving excessive quantities of manure contain extremely high levels of bacteria, such as fecal coliform, that can cause shellfish bed and beach closures. For instance, between 2011 and 2014 there were 52 shellfish harvesting areas closures due to high levels of fecal coliform.<sup>9</sup> 180 acres of shellfish beds were closed from 1996-2006, costing the Lummi Nation an estimated \$8 million in revenue.<sup>10</sup> More shellfish bed acres have since been closed, causing the loss of even more money and severely impacting traditional cultural practices as well. Passage of H.R. 848 will only exacerbate this problem further, as citizens will lose one of their last tools to fight against polluting, industrialized agricultural operations.

In sum, H.R. 848 subverts and distorts original Congressional intent. The existing version of RCRA already insulates farmers who correctly fertilize their crops with manure, while the Newhouse bill would improperly insulate those who improperly use their agricultural fields as a dumping ground for their unwanted waste. It takes away from citizens a critically important tool in the fight against pollution and puts hundreds of thousands of Americans, if not more, at risk of consuming polluted groundwater. And perhaps most importantly, RCRA already contains protections against frivolous, duplicative, or unnecessary litigation, which have worked effectively for decades, and suits under RCRA (already rare because of the extensive evidentiary burdens required to prove a case) are already prohibited when EPA or the State are engaged in diligent prosecution that actually addresses the endangerment.

We urge you to oppose the Farm Regulatory Certainty Act, as well as all similar bills that weaken federal protections from toxic waste and prevent public access to justice.

SIGNED THIS 8TH DAY OF NOVEMBER, 2017.

Helen Reddout, President <i>Community Association for Restoration of the Environment, Inc.</i>	Lauren Goldberg, Staff Attorney <i>Columbia Riverkeeper</i>
Chris Wilke, Executive Director <i>Puget Soundkeeper Alliance</i>	Lee First, North Sound Baykeeper <i>RE Sources for Sustainable Communities</i>
Joshua Tsavatewa, President <i>Friends of Toppenish Creek</i>	Stephanie Hillman, Northwest Campaign Representative <i>Sierra Club</i>

<sup>9</sup> Puget Sound Partnership, Samish Basin: Keeping Shellfish Beds Open (October 2014) at 1; Skagit County Public Works Department, Clean Water Skagit County 2013 Annual Report (2013) at 4.

<sup>10</sup> Northwest Treaty Tribes, Dairy Farm Pollution Costs Lummi Nation (January 16, 2015), at <http://nwtreatytribes.org/dairy-farm-pollution-costs-lummi-nation/>.