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HEARING TO EXAMINE S.2663, THE AGRICULTURE CREATES REAL EMPLOYMENT (ACRE) ACT

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

MARCH 14, 2018

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ONE HUNDRED FIFTEENTH CONGRESS
SECOND SESSION

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HEARING TO EXAMINE S.2663, THE AGRICULTURE CREATES REAL EMPLOYMENT (ACRE) ACT

WEDNESDAY, MARCH 14, 2018

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 10:10 a.m. in room 406, Dirksen Senate Office Building, Hon. John Barrasso (chairman of the committee) presiding.

Present: Senators Barrasso, Carper, Inhofe, Capito, Boozman, Wicker, Fischer, Rounds, Ernst, Cardin, Booker, and Van Hollen.

OPENING STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM THE STATE OF WYOMING

Senator BARRASSO. Good morning. I call this hearing to order.

Today we will hold a legislative hearing on the Agriculture Creates Real Employment, or the ACRE, Act. This is bipartisan draft legislation to help farmers, ranchers, and the communities they depend on get their relief from burdensome Federal regulations and policies.

The Senate Environment and Public Works Committee has a unique role to play in the policies that impact agriculture. Just last month this Committee held a hearing on this important issue and we heard testimony from real farmers and ranchers representing a diverse group of States.

The message from our witnesses' testimony was clear: the negative impact of many Federal environmental regulations and policies on American farming and ranching communities is real and it needs to be addressed. The testimony we heard was not about the value of environmental regulations, but about how some Federal regulations can be inflexible, antiquated, duplicative, and ultimately harmful to American agriculture, a critical part of our Nation's economy.

The draft bill we are discussing today is designed to provide relief for hardworking people that put a shovel in the ground every day, working to feed this Country. I believe the ACRE Act provides that relief.

My bill addresses many issues that are critical to ranchers and farmers. These include protecting farmers' and ranchers' privacy; eliminating duplicative environmental permitting for the use of pesticides; addressing unneeded and counterproductive reporting requirements under the Comprehensive Environmental Response,

Compensation, and Liability Act, the CERCLA Act; and doing away with the unfair punishment of farmers who are wrongly accused of baiting migratory game birds simply because they are following normal farming practices.

The ACRE Act also supports an efficient permitting process at the U.S. Fish and Wildlife Service for predator control. The change will allow ranchers and farmers to better protect their livestock from predator attacks.

Most of these provisions were introduced as individual bills and have bipartisan support. One such bill introduced by Senator Fischer, the Fair Agriculture Reporting Method Act, or the FARM Act, has 12 Democratic cosponsors, including our Ranking Member. This bill addresses new animal waste emission reporting requirements.

Over the past several months, farmers and ranchers struggled to comply with ambiguous agency directives following an April 2017 decision in the D.C. Circuit Court. The ruling meant up to 100,000 farmers and ranchers, who have never been required to report under these laws, would suddenly be required to comply. Even though they wanted to comply with the ruling, the process and implications of compliance were unclear. Because both CERCLA and EPCRA were not written with the intent of regulating these farm and ranches, the requirement to report emissions from animal waste came without context and largely without agency guidance.

Another bill is Senator Crapo's S. 340, the Sensible Environmental Protection Act, which was introduced along with Democrat Senators Donnelly, Heitkamp, and McCaskill. This bill amends the Federal Insecticide, Fungicide, and Rodenticide Act, or FIFRA, and the Clean Water Act to eliminate a duplicative permitting requirement.

The bill prohibits the Environmental Protection Agency from requiring a permit under the National Pollutant Discharge Elimination System for a pesticide application from a point source as long as the application is approved under FIFRA. In addition, the ACRE Act also has legislation sponsored by Independent Senator Angus King, S. 1206, which will ensure fair treatment and licensing requirements for the export of certain echinoderms.

Let us remember that farmers and ranchers are the original stewards; they understand that landscapes and watershed need to be healthy to support native plants, wildlife, crops, and livestock. They are living proof that interacting with nature can be done in an environmentally sound way, often leaving the resources in better condition than they were found.

Washington policies do not always translate well in rural America. As I mentioned at our last agriculture hearing, in February, when I was home in Wyoming, I often hear about just how out of touch the environmental regulations have become. It has gotten to the point where ranchers and farmers are burdened by the thought that they will be fined thousands of dollars for simply putting a shovel in the ground.

I believe we should prioritize updating and revising policies that, while well-intentioned, were never designed to micromanage agriculture production. This is what the ACRE Act does.

Now, before we move to our witnesses today, I would like to turn to Ranking Member Carper for his remarks.

OPENING STATEMENT OF HON. THOMAS R. CARPER, U.S. SENATOR FROM THE STATE OF DELAWARE

Senator CARPER. Thanks, Mr. Chairman. I have had a chance to personally welcome, as you have, each of our witnesses.

We are happy that you have joined us today. Welcome, with your presence and your testimony, your willingness to respond to some questions. I am going to have to leave here today at 11, so I will not be here for the entire hearing, but I very much want to make the next hour count, so thank you all.

Mr. Chairman, thanks a lot for bringing us in to cover this subject that is on our minds. It is something we have talked about a fair amount lately in another hearing actually right here in this room.

I think we all can agree on the title of the legislation that we are considering here today. There is no doubt that agriculture creates real employment; it does in our State, in Delaware, and I know it does in States that are represented in this Committee and the Senate.

As I have said in some of our previous hearings here, agriculture, believe it or not, is a critical economic driver in Delaware. Over 40 percent of our land is dedicated to farming and our State's agricultural sector employs some 30,000 Delawareans, while contributing nearly $8 billion a year to the State's economy. That is a lot of money for a little State.

As my colleagues have heard me say a time or two before, I believe that our Country's environmental laws and regulations have, by and large, served our entire Nation, including our farmers, well. It is possible to have clean air and clean water. It is possible to protect our land and conserve species and still have good jobs, plenty of jobs. It takes some work to find the right solutions to achieve that balance, but the hard work almost always pays off.

One such example is the FARM Act, which is included as one of the sections in the ACRE Act. Its prime sponsor is here with us today, the Senator from Nebraska.

But, Mr. Chairman, as you know, we worked hard to strike a careful compromise on that legislation. In my opinion, the FARM Act is an example of where we can do a good job balancing the needs of our farmers, while preserving access to information that can help protect public health.

Unfortunately, I do not believe that the ACRE Act in its entirety represents the same thoughtful approach. The legislation recognizes and attempts to address concerns raised by some of our farmers. As drafted, though, I don't believe that it adequately balances those interests with the interests of other natural resource-dependent industries.

For example, Delaware has a booming wildlife tourism industry. I know other States represented here do too. But visitors come from all over the world to observe migratory birds in Delaware, including the federally listed threatened Red Knot. A 2016 U.S. Fish and Wildlife Service study found that more than 45 million people, 45 million people enjoyed bird watching that year, enjoying other

wildlife watchers and contributing more than $75 billion to the U.S. economy. The Endangered Species Act and Migratory Bird Treaty Act help ensure the long-term viability of that industry, too. In its current form, I fear that the ACRE Act could have harmful implications for these important laws.

Having said that, there may be ways to address farmers' concerns without unintended consequences. For example, our Federal agencies can work with stakeholders to explore administrative options that may resolve endangered species and migratory bird concerns. Or we in this Committee may be able to reach narrower, truly bipartisan compromises in some of the items contained in the ACRE Act. I hope so.

Further, there are stewardship success stories that this Committee and the Congress should examine that are examples of ways to improve collaboration and conservation outcomes in agriculture. For example, just last year, in the town of Blades, just south of Seaford, the world's first nylon plant was built some almost 80 years ago.

But in the town of Blades, located in the southwestern part of our State, Perdue Farms worked with several communities to expand its multimillion dollar nutrient recycling investment on Delmarva. This investment and new composting operation increased the company's capacity to handle surplus poultry litter and allowed other agricultural byproducts to be recycled.

This actually started in my last term as Governor, Mr. Chairman. We took some State money, added to that a lot of money from Perdue, and created this industry in the southwestern part of our State, so we are not just going to spread all those nutrients on farm fields, but actually turn some of them into—I think it was the Scott lawn care people, the Scott people, they sell the stuff all over the Country as an organic fertilizer. But we have taken some important other steps in Delaware to help farmers become even better stewards of the land.

I have mentioned before, and I will do it again here briefly today, again, when I served as Governor, the last year or two, we addressed high levels of agricultural runoff by forming the Nutrient Management Commission, farmer-led. The Commission brought together farmers and members of the environmental community to devise commonsense solutions, and that is basically three things: have farmers check the nutrient levels in their field, the ability of fields to absorb nutrients, phosphorous and nitrogen in particular; each of the farmers are going to be using the nutrients to develop a plan that is appropriate for their farms at non-polluting levels; and then provide the training necessary to implement the plans.

Initiatives like those led by the Nutrient Management Commission and smart investments like those by Perdue in the State of Delaware are just two examples that this Committee can, and I think should, look at as we strive to protect our air, our water, while also creating economic opportunity in the agricultural industry.

So, we look forward to hearing from all of our colleagues, our witnesses today to advance current and future legislation that supports our farmers and protects our environment. I look forward to

hearing from all of you. Thank you again so much for joining us today. Welcome.

Senator BARRASSO. Well, thank you very much, Senator Carper.

We are now going to turn to the witnesses, but I would like to first introduce Mr. Doug Miyamoto, who is joining us today and the first one to testify. He has served as the Director of the Wyoming Department of Agriculture since 2015. In his role as Director, Doug deals with issues that we will discuss here today on a daily basis: environmental reporting for Wyoming agriculture producers, predator management, liaising with Federal agencies to coordinate environmental resource issues, and many other issues that arise when getting our agriculture products to the end consumer.

Doug previously served as the Executive Director of the Wyoming Livestock Board, the Deputy Director of the Wyoming Department of Agriculture, and in several other positions at the Natural Resource Conservation Service, Wyoming State Engineer's Office, and the University of Wyoming.

Doug is uniquely qualified to speak to today's issues, both from his professional experience and because he received the highest quality education from the University of Wyoming.

Senator CARPER. Shameless.

[Laughter.]

Senator CARPER. Shameless pandering. What is their mascot? What is their mascot?

Senator BARRASSO. My wife has three degrees from the University of Wyoming.

[Laughter.]

Senator BARRASSO. I am going to get her down here and debate you, Mr. Ranking Member, and you don't stand a chance.

Senator CARPER. I would lose.

Senator BARRASSO. He is uniquely qualified because of his incredible education, background, and degree. He studied range management for his undergraduate degree and later earned a Masters in rangeland ecology. He serves Wyoming well by bringing his holistic approach to his leadership at the Wyoming Department of Agriculture, and I am pleased that he would join us here today.

In addition to Doug, we also have Mr. Ryan Yates, who is the Director of congressional Relations for the American Farm Bureau Federation, and Mr. Jim Lyons, who is a Senior Fellow at the Center for American Progress.

So, I would like to welcome all three of you today. We would like to remind you that your full written testimony will be made part of the official hearing record, and please keep your statements to 5 minutes so that we may have time for questions.

Doug, please proceed.

STATEMENT OF DOUG MIYAMOTO, DIRECTOR, WYOMING DEPARTMENT OF AGRICULTURE

Mr. MIYAMOTO. Chairman Barrasso, thank you for that kind introduction. Ranking Member Carper, members of the Committee, thank you so much for the privilege of speaking to you today about the ACRE Act.

Again, Doug Miyamoto. I am the Director of the Wyoming Department of Agriculture, and I also currently serve as the Chair-

man of the Natural Resources and Environment Committee of the National Association of State Departments of Agriculture.

I am here today to talk about my support for the ACRE Act, and I will highlight a few of the reasons why in my testimony today. I am not an expert on all of the issues that are addressed by the ACRE Act, but there is a common theme of ensuring that the ag industry is subject to the correct and intended regulations for normal agricultural activities. I will emphasize individual sections of the ACRE Act on which the Wyoming Department of Agriculture and NASDA have concentrated on in recent years, as those are the ones with which I am most familiar.

Importantly, and I am sure you are all aware, Section 3 of the ACRE Act provides the exemptions from notice requirements and penalties revolving around CERCLA. I don't want to go into too much detail on this because I am sure you all have heard about the issues surrounding CERCLA, so I would just like to point out some specifics regarding the impact of CERCLA and its affiliated reporting requirements to Wyoming.

Exempting farmers and ranchers not engaged in confined animal feeding operations is, in my opinion, simply the right thing to do. CERCLA was never intended to regulate the livestock industry, but, rather, to ensure cleanup of the Nation's most contaminated Superfund sites to protect the public.

I have been asked many questions from Wyoming's producers about how they are to estimate emissions and how they are supposed to report those emissions in a non-confined range cattle setting. Unconfined range cattle represents the majority of the operations in the State of Wyoming, and by one suggested measure this continuing estimating reporting requirement would apply to all livestock operations involving more than 206 head of cattle.

Obviously, this standard would incorporate the majority of the commercial livestock operations in Wyoming, and there is simply no way for the majority of Wyoming's cattle producers to know if their cattle are emitting more than 100 pounds of ammonia or hydrogen sulfide in any given day. Frankly, I don't know what to tell producers when they call me for technical assistance on how to comply with CERCLA at this point.

The exemptions proposed in this Act will provide producers some protection from liability, and it also will address Federal agencies of jurisdiction, the EPA and the Coast Guard, and eliminate them wasting their limited resources on administering a program that does nothing to protect public health and also does not ensure that the Nation's priority Superfund sites are addressed appropriately. Including livestock operations in the reporting and penalty provisions of CERCLA is counterproductive both for producers and for the agencies, and illustrates why this language has 29 bipartisan cosponsors.

Specific to Wyoming, another section I really wanted to highlight was Section 11 of the ACRE Act, and this simply reaffirms the authorities of the Fish and Wildlife Service to issue appropriate permits to address livestock depredation. As an example, I want to discuss eagle management and its challenges in Wyoming.

Wyoming is home to the largest population of Golden and Bald Eagles in the lower 48 States. Wyoming is also known as a destina-

tion for wildlife viewing, and we view eagles as a valuable component of a balanced ecosystem. We do not want to decimate eagle populations.

But in the instance of newborn livestock losses to eagle depredation, typically, additional newborn loss has already occurred before Fish and Wildlife Service can even pursue the first step of an eagle take permit, which is eagle harassment. It is such a slow process that is a rarity for the next step, which would be live capture and removal, to ever even be pursued. Livestock producers have more frequently had to resort to much more surveillance of their young stock; they have had to move herds completely to entirely new locations; and they have had to build and purchase lambing sheds, calving sheds to conduct operations indoors to protect from these depredations.

We have seen a lot of sheep business leave entirely due to eagle depredation. In 2017 alone, Wyoming experienced 1,000 sheep and lamb losses to eagle depredation, according to the National Agricultural Statistic Service. This doesn't even mention the impact of ravens on sage grouse, which can be addressed also by this provision within the Act.

In conclusion, I would say, as a representative of government, I would assert to you that we have an obligation to ensure that our regulations are clear, consistent, and effective. I have made it a goal of the Wyoming Department of Agriculture to support commerce in the ag arena, even given the regulatory nature of our Department. One of my highest priorities is to lead the Department of Ag in a manner that emphasizes education before regulation and provides regulatory certainty for our producers.

Again, I sincerely appreciate specifically the work of my Senator and Chairman Barrasso, Ranking Member Carper, and Senators Fischer and Donnelly on your specific work on CERCLA. That is very much appreciated. And I also appreciate the opportunity to present to the Committee today, and please know I am available for anything that you may need as a Committee. Thank you.

[The prepared statement of Mr. Miyamoto follows:]

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March 12, 2018

Environment and Public Works Committee
410 Dirksen Senate Office Building
Washington, DC 20510

Statement of Doug Miyamoto, Director, Wyoming Department of Agriculture

Chairman Barrasso and Senate Environment and Public Works Committee members:

Thank you for the privilege of speaking with you today regarding the Agriculture Creates Real Employment (ACRE) Act. I have spent my career working on agriculture and natural resources issues with the Natural Resources Conservation Service, the Western Governors' Association, the Wyoming Association of Conservation Districts and the State of Wyoming. I currently serve as the Chairman of the Natural Resources and Environment Committee of the National Association of State Departments of Agriculture. Through these experiences over the past couple of decades, hopefully I have gained some perspective that you may find beneficial as it relates to governance and regulation of the agriculture industry as contemplated by the ACRE Act.

Wyoming supports the ACRE Act and I will highlight a few of the reasons why in my testimony. I am not an expert on every issue addressed by the ACRE Act, but there is a common theme of ensuring that the agriculture industry is subject to the correct and intended regulations for normal agricultural activities. There are issues addressed by the ACRE Act that if left unaddressed, have potential to cause harm to agriculture with no corresponding environmental benefit. I will emphasize individual Sections of the ACRE Act on which the Wyoming Department of Agriculture and the Natural Resources Environment Committee of the National Association of Departments of Agriculture have concentrated in recent years as these are the issues with which I have familiarity.

Section three of the ACRE Act provides exemption from certain notice requirements, and associated penalties outlined by the Comprehensive Environmental Reporting, Compensation and Liability Act (CERCLA) of 1980. This would codify the Environmental Protection Agency's (EPA) own exemption for farms and ranches as implemented in 2008 and subsequently vacated by D.C. circuit court ruling in 2017. Exempting farmers and ranchers not engaged in confined animal feeding operations is simply the right thing to do. CERCLA was never intended to regulate the livestock industry but rather to ensure cleanup of the nation's most contaminated Superfund sites to protect the public. I have been asked questions from Wyoming producers about how they should calculate emissions for non-confined range cattle which represent the majority of cattle operations in my State. There are no credible resources that we as a state department of agriculture, can ethically recommend for estimating emissions in a non-confined range cattle setting. By one suggested measure, this continuous reporting requirement would apply to all livestock operations involving two hundred six (206) or more head of cattle. This standard would incorporate the vast majority of commercial livestock operations in Wyoming. There is simply no way for the majority of Wyoming's cattle producers to know if their cattle are emitting more than 100 pounds of ammonia or hydrogen sulfide per day. Without the reporting and penalty exemption

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proposed in this act, producers will have increased liability and the federal agencies of jurisdiction (EPA and the Coast Guard) will be wasting limited resources administering a program that does not protect the public and does not ensure that the nation's priority Superfund sites are addressed. Including livestock operations in the reporting and penalty provisions of CERCLA is counterproductive for both our producers and our federal agencies and illustrates why this stand-alone text has 29 bipartisan cosponsors.

Section six of the ACRE Act amends the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Clean Water Act (CWA) to eliminate duplicative permitting requirements and is important for not only agricultural producers but for pesticide applicators, state governments and local governments. As is the case with CERCLA reporting and penalty requirements, this section of the ACRE Act will address a Judicial Branch ruling in 2009 mandating CWA National Pollution Discharge Elimination System (NPDES) permits for pesticide applications already regulated for water quality by FIFRA. In fact, FIFRA requires EPA to conduct extensive research and pre-market approval processes for pesticide products focused on environmental and human health and safety impacts. There is a right way and a wrong way to regulate pesticides. After experiencing pesticide regulation under FIFRA alone compared to regulation under FIFRA with the additional requirements of the NPDES program, it is clear that the NPDES program adds nothing for environmental protection. The NPDES program was designed to regulate point source discharges into waterways. The definition of point source has been argued for decades, but regulating pesticide applications as a point source pollution discharge has proven to be burdensome and expensive. FIFRA, on the other hand, was designed to regulate pesticide product approval and use, and includes specific analysis of the impacts of pesticide products on water quality and aquatic species. FIFRA represents a clear, consistent and effective method of pesticide regulation as the regulations are printed as a label for each product. Label compliance alone ensures that environmental considerations, including water quality, have been addressed through the product approval process of EPA. Additionally, State Departments of Agriculture enforce labeling, distribution, storage and use of pesticide products. Pesticides are effectively regulated at every step from formulation to on-the-ground application by FIFRA. Section six of the ACRE Act maintains environmental protection while increasing governmental efficiency.

Section seven of the ACRE Act, which provides Identity Protection for farmers, is also important for Wyoming's producers. The aggregate reporting proposed by Section seven of the ACRE Act provides the necessary level of specificity to address environmental considerations of the EPA without compromising individual privacy of the nation's family farms and ranches. For example, in Wyoming, we have experienced targeting of ranchers by special interest groups hoping to eliminate federal grazing permits by identifying any missteps in permitting or data collection by federal agencies of jurisdiction or permittees. Providing some level of anonymity, while still submitting important resource data for environmental protection, but in aggregate form will help to protect individual farmers and ranchers from those that intend to cause them harm.

Section 11 of the ACRE Act simply reaffirms the authorities of the U.S. Fish and Wildlife Service (FWS) to issue appropriate permits to address livestock depredation by nuisance species. As an example, I will discuss eagle management and its challenges in Wyoming. Wyoming is home to the largest population of golden and bald eagles in the lower 48 states. Wyoming is also obviously a big state, and due to these considerations, our

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wildlife and livestock managers find the current regulations for eagle management cumbersome, inefficient and ineffective. In the instance of newborn livestock loss, typically additional newborn loss has occurred before FWS can be informed and authorize even the first step which is eagle harassment. It is such a slow process that it is a rarity for the next step of eagle live trapping and removal to ever be used. Livestock producers resort to more surveillance of their young stock, moving of the herd to an entirely new location, or purchasing and building an enclosed facility that protects young animals from eagles. In many cases, we have seen livestock producers completely vacate the livestock business, especially sheep operations, due to predation from eagles. In 2017, Wyoming experienced 1,000 sheep and lamb losses to eagle depredation according to the National Agricultural Statistics Service (NASS). Any expedience provided by FWS regarding eagle management would be very welcome in Wyoming.

There are ever increasing regulatory demands on today's family farms and ranches. The agriculture industry is vital for food production, national security, open spaces, wildlife habitat, as well as American customs and heritage. I am not advocating for the complete de-regulation of the agriculture industry, but as a representative of government, I assert that we do have an obligation to ensure that our regulations are clear, consistent and effective. I have made it a goal of the Wyoming Department of Agriculture to support commerce in the agricultural arena even given the regulatory nature of the Department. One of my highest priorities is to lead the Wyoming Department of Agriculture in a manner that emphasizes education before regulation and provides regulatory certainty for producers. I believe the ACRE Act addresses many important issues facing today's farming and ranching families and will support agricultural commerce and provide much-needed regulatory certainty. Again, I sincerely appreciate the opportunity to present to you today and am available for anything this committee might need.

Sincerely,

Doug Miyamoto
Director, Wyoming Department of Agriculture

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Senate Committee on Environment and Public Works
Hearing entitled, *"S. __, the Agriculture Creates Real Employment (ACRE) Act"*
March 14, 2018
Questions for the Record for Doug Miyamoto

Ranking Member Carper:

1. President Trump's fiscal year 2019 budget request includes significant cuts to USDA operations and Farm Bill programs. The President's budget proposes to cut the Department of Agriculture's budget by 16 percent, on top of cutting Farm Bill programs by $260 billion. If these cuts were enacted, I fear they would undermine essential programs that support farmers and ranchers and eliminate important technical assistance provided to states by USDA. In fact, the American Farm Bureau already testified that the proposed budget cuts would be harmful at a hearing we held last month.

   Would you please comment on the impact the President's budget might have on farmers and conservation activities? How should Congress react to these proposed cuts?

Full funding is necessary for delivery of USDA's conservation programs. USDA-NRCS is a crucial partner to states and private partners in implementing voluntary, incentive-based conservation programming. Proposed funding cuts could impact farmers' on the ground conservation efforts. As a member of the National Association of State Departments of Agriculture's leadership, I would refer you to the association's FY18 appropriations priorities which include:

- Protect mandatory Environmental Quality Incentives Program (EQIP) funding at $1.75 billion
- Ensure Conservation Stewardship Program (CSP) availability at 10 million acres
- Protect mandatory Regional Conservation Partnership Program (RCPP) funding at $110 million plus eligible funds from EQIP, CSP and ACEP
- Protect mandatory Agriculture Conservation Easement Program (ACEP) at $250 million
- Provide the maximum funding available for Conservation Technical Assistance

I urge Congress to maintain support for these programs.

Senator Merkley:

2. One of the proposed changes of the ACRE Act is exempting agricultural operations from reporting air emissions under CERCLA. In testimony submitted to the Committee, you said that you supported exempting those operations that were not CAFOs. Do you believe that there is a risk of hydrogen sulfide and ammonia emissions from larger operations, such as CAFOs? Please provide information on emissions and any reports of community concerns on public health or air quality from CAFOs in your state.

I support the exemptions for agriculture operations created by the Senate ACRE Act. This section of the bill, included in the FY18 omnibus, reaffirms Congressional intent that farmers and ranchers were never meant to be subject to CERCLA reporting. EPA has not been able to create animal emissions reporting standards because the data and collection of emissions has not warranted creation of standards. I do not believe there is a risk of hydrogen sulfide and ammonia emissions from large animal operations which may explain why we, at least at the Wyoming Department of Agriculture, do not have any reports of community concerns on public health relating to livestock operations of any kind.

3. The ACRE Act would prohibit the EPA from disclosing any locational information from livestock operations. This would create an inconsistency from how EPA handles data from all other industries under the Clean Water Act and creates a potential barrier for sharing discharge information from neighboring communities directly impacted by the pollution. Please describe how communities that may be impacted by farms that are discharging into the environment can be kept informed if EPA or a state agency is not able to share locational information of these facilities from its neighbors.

The U.S. Court of Appeals for the 8th Circuit ruled in 2016 that personal farm data cannot be disclosed in FOIA requests. Farm data and locational information often includes the addresses and contact information of private residences since most families that farm or ranch as their occupation also live at their place of business. As such, EPA and state environmental agencies must permit and monitor animal feeding operations to ensure they are in compliance with state and federal laws. These rules and regulations monitor any potential community impacts. This information exchange sufficiently helps producers manage their farms in an environmentally sound way and be in compliance with any rules and regulations.

Senator BARRASSO. Well, thank you very much for your very thoughtful and thorough testimony. Appreciate it.

Mr. YATES.

STATEMENT OF RYAN YATES, DIRECTOR OF CONGRESSIONAL RELATIONS, AMERICAN FARM BUREAU FEDERATION

Mr. YATES. Chairman Barrasso, Ranking Member Carper, and members of the Committee, thank you for calling this important hearing on the ACRE Act and inviting me to testify on behalf of the American Farm Bureau Federation. Farm Bureau commends you for your leadership in advancing legislation which addresses a range of environmental policy issues which impose real costs and substantive burdens to our members. I will highlight our comments and support section by section.

Farmers and ranchers support the solution provided in Section 3 of the ACRE Act, which will protect their businesses from financial strain and burden of unnecessary reporting requirements. CERCLA was enacted to provide for cleanup of the worst industrial chemical and toxic waste dumps and spills.

CERCLA has two primary purposes: to give the Federal Government tools necessary for prompt response to problems resulting from hazardous waste disposal, and to hold polluters financially responsible for cleanup. Unfortunately, in April 2017, the D.C. Circuit Court of Appeals issued a decision vacating EPA's 2008 exemption for agricultural operations. I would like to point out the public safety concerns caused by these reporting requirements.

Up to nearly 200,000 farms may have to report to the National Response Center, overwhelming that system and drawing resources from actual emergencies. Additionally, there are national security implications. By requiring reporting, we will be creating a roadmap for nearly our entire animal agriculture production system. Obviously, this creates an opportunity for mischief for those wanting to harm our very safe and abundant food supply. Last, requiring individual farmers and ranchers to disclose personal home addresses along with their farm information creates an opportunity for activists to harass farmers and ranchers where they live and work.

Section 5 would protect farmers from Federal penalties levied under the Migratory Bird Treaty Act if they are following best practices provided by their State Cooperative Extension Service. AFBF supports the Hunter and Farmer Protection Act, which would allow each State's Cooperative Extension Service to clarify the difference between what constitutes baiting and normal agricultural practices.

Section 6 of the ACRE Act is a proposal that has long enjoyed bipartisan support, and we strongly support its adoption. It simply states that when a pesticide is lawfully applied under FIFRA, it is not also regulated under the Clean Water Act. It has been the longstanding view of the law until it was thrown into question by decisions in the Ninth Circuit. We believe it is a sensible approach that reflects the will of Congress and prevents overregulation.

AFBF supports Section 7, the Farmer Identity Protection Act, which would prohibit the EPA or an EPA contractor from disclosing information collected under Clean Water Act requirements from livestock operations. AFBF opposes the disclosure of personal and/

or business information by an organization, business, or government agency about individual farmers and ranchers. The release of any information should only be allowed under specific written or electronic authorization of the individual or the private business entity.

Section 8 would prohibit the EPA from enforcement of the Clean Water Act for agricultural operations through aerial surveillance without the written expressed consent of the owner-operator of the land. Farm Bureau supports the use of unmanned aircraft systems, or UAS, as another tool for farmers and ranchers to use in managing their crops and livestock, and making important business decisions. While Farm Bureau supports this technology and the potential opportunities it offers for farmers and ranchers, we are also concerned about the data collected from UAS and the privacy and security of the data. It is critical that data collected via UAS remain under the ownership and control of the farmer and is not available to government agencies or others without the farmer's permission.

Section 9 would provide immediate relief to the aquaculture industry by reinstating the force and effect of the U.S. Fish and Wildlife Services' statutory depredation order for the double-crested cormorant with respect to freshwater aquaculture facilities. In response to a legal challenge against the Service, the U.S. District Court for the District of Columbia remanded the 2014 Aquaculture Depredation Order for the cormorant. The cormorant is a large water bird that feeds mainly on fish. As you can imagine, commercial fish ponds that are stocked at high densities make them highly susceptible to bird predation particularly by the cormorant. Predator control is vital to the success of American aquaculture.

Thank you, Mr. Chairman. We look forward to continuing to work with the Committee in securing enactment of this critically important legislation. I would be happy to answer any questions that you or the Committee may have. Thank you.

[The prepared statement of Mr. Yates follows:]

Statement of the American Farm Bureau Federation

TO THE UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

S._____, the Agriculture Creates Real Employment (ACRE) Act

March 12, 2018

Presented By:

Ryan Yates
Director of Congressional Relations
American Farm Bureau Federation

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Chairman Barrasso, Ranking Member Carper, and Members of the Committee, my name is Ryan Yates and I am Director of Congressional Relations at the American Farm Bureau Federation. I am pleased to be here today to offer testimony on the Agriculture Creates Real Employment (ACRE) Act. This legislation addresses several issues of importance to farmers and ranchers across the country.

On behalf of the nearly 6 million Farm Bureau member families across the United States, I commend your leadership in providing oversight of federal environmental regulations and policies and appreciate the Committee's desire to understand the "real-world effects" of federal regulations. Such a review is timely and, in our judgment, will permit policymakers to gain a greater appreciation for the impact federal regulations have on farmers and ranchers, how farmers and ranchers must respond to the demands of regulations and how those regulations affect agricultural producers in their efforts to produce food, fiber and fuel.

Farmers and ranchers today face an increasing array of regulatory demands and requirements. Federal regulations – and the state and local regulations that often flow from them – permeate virtually every phase of agricultural production. The Agriculture Creates Real Employment (ACRE) Act addresses a range of environmental policy issues which impose real costs and substantive burdens to our members.

AFBF policy speaks to both the regulatory process and specific regulations. As a general observation, our members believe that federal regulations should respect property rights; be based on sound scientific data; be flexible enough to recognize varying local conditions; be transparent; and take into account the costs and benefits associated with public and private sector compliance prior to being promulgated.

Section 3. Exemption from Certain Notice Requirements and Penalties

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted to provide for cleanup of the worst industrial chemical and toxic waste dumps and spills, such as oil spills and chemical tank explosions. CERCLA has two primary purposes: to give the federal government tools necessary for prompt response to problems resulting from hazardous waste disposal into water and soil, and to hold polluters financially responsible for cleanup. The Emergency Planning and Community Right-to-Know Act (EPCRA) requires parties that emit hazardous chemicals to submit reports to their local emergency planning offices, thus allowing local communities to better plan for chemical emergencies.

In 2008, EPA finalized a rule to exempt all agricultural operations from CERCLA reporting and small operations from EPCRA reporting requirements, recognizing that low-level continuous emissions of ammonia and hydrogen sulfide from livestock are not "releases" that Congress intended to regulate. When the rule was challenged in 2009, the Obama administration spent eight years defending this Bush-era regulation. In defending the lawsuit, the Obama EPA argued that CERCLA and EPCRA language does not explicitly exempt farms because Congress never

believed that the continuous emissions of agricultural operations would fall into the realm of regulation. However, in April 2017, the D.C. Circuit Court of Appeals issued a decision vacating EPA's 2008 exemption, concluding that the exemption violated the statutes.

Not only does this court decision have the potential to require nearly 200,000 farms and ranches to report their low-level emissions, but it will also unnecessarily jeopardize our nation's environmental and public health. Currently, Hazardous Substance release reports are taken by the National Response Center (NRC), run by the Coast Guard. This department has averaged 28,351 reports per year over the last eight years. When farms from across the nation must suddenly report their low-level emissions, these reports from over 200,000 agricultural operations will inundate the NRC. This increase of over four times the average annual amount, in the weeks after the court's decision goes into effect, could prevent the Coast Guard from responding to actual hazardous waste emergencies, entirely defeating the primary purposes of CERCLA.

Importantly, emergency responders do not see value in reporting from farms, and the influx of agricultural reports could compromise emergency response coordination. The National Association of SARA Title III Program Officials, which represents state and local emergency response commissions, notes the continuous reports "are of no value to [Local Emergency Planning Committees] and first responders" and that the reports "are generally ignored because they do not relate to any particular event." In addition, the Coast Guard and EPA have stated that these emission reports will serve no useful purpose in terms of the crisis and emergency response function of CERCLA and EPCRA. The massive volume of reports will impede the efforts of the Coast Guard, EPA, and state and local emergency responders. CERCLA and EPCRA were intended to focus on significant events like spills or explosions, not routine emissions from farms and ranches.

Following the D.C. Circuit Court of Appeals decision, the EPA's options are limited. EPA has provided reporting guidance to farmers and ranchers, but there is no scientific consensus on how to measure air emissions on individual farms, requiring many farmers to spend resources on consultants. These requirements not only require reporting by larger farms, but also small pastured cow-calf farms, ranchers grazing on federal lands and horse farms.

The court recently granted a stay for three months, providing additional time for the agency to further develop administrative guidance and streamlined reporting forms, but buying time does not change the ultimate outcome: thousands of farms and ranches across the nation will be forced to report their daily emissions to the EPA or face liability of up to nearly $54,000 per day.

The ACRE Act will ensure that the EPA is not required to implement this overly burdensome court decision and expose hundreds of thousands of farms and ranches to the threat of activist lawsuits while potentially creating a database of sensitive private farmer information. The whole point of activists' dogged effort to require reporting is to create a federal database that makes it easier to harass farmers and ranchers.

Farmers and ranchers support the solution provided in Section 3 of the ACRE Act, which will protect their privacy and their businesses from the financial strain and burden of these unnecessary reporting requirements on ordinary activities on their land.

Section 5 – Baiting of Migratory Game Birds

Section 5 would protect farmers from federal penalties levied under the *Migratory Bird Treaty Act* if they are following best practices provided by their state Cooperative Extension Office. Under the *Migratory Bird Treaty Act*, the government has the authority to regulate hunting seasons for some protected species and prohibit certain actions in the interest of preserving those species.

The U.S. Fish and Wildlife Service has stated that ratoon crops which have been rolled qualify as baited fields, making them out-of-bounds for hunters, despite the fact that local Cooperative Extension Offices advised farmers to roll their fields to help return nutrients to the soil. Inadvertent baiting of a field can produce a fine of up to $15,000 or prohibit hunting on the land.

When a government regulation affects the ability of a farmer to use his or her land, that regulatory impact "hits home" – not just figuratively but literally. That happens because the farm often is home and may have been passed down in the family for generations. If the regulatory demand is unreasonable or inscrutable, it can be frustrating. If it takes away an important crop protection tool for speculative or even arguable reasons, it can harm productivity or yield.

AFBF supports Section 5, the Hunter and Farmer Protection Act. This section would allow each state's Cooperative Extension Service to weigh in on the difference between what constitutes baiting and normal agricultural practices.

Section 6. Use of Authorized Pesticides; Discharges of Pesticides; Report

For nearly three decades, the application of pesticides to water was regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), not the Clean Water Act (CWA). A series of lawsuits, however, yielded a trio of 9th Circuit Court of Appeals decisions holding that pesticide applications also needed CWA National Pollutant Discharge Elimination System (NPDES) permits. To clear up the confusion, EPA promulgated a final regulation to clearly exempt certain applications of aquatic pesticides from the CWA's NPDES program. EPA's final rule was challenged and overturned in National Cotton Council v. EPA. This decision exposed farmers, ranchers, pesticide applicators and states to CWA liability by subjecting them to the CWA's NPDES permitting program.

The general permits are now in place for over 360,000 new permittees brought within the purview of EPA's NPDES program. This program carries significant regulatory and administrative burdens for states and the regulated community beyond merely developing and then issuing permits. It goes without saying that a meaningful environmental regulatory program

is more than a paper exercise. It is not just a permit. EPA and states must provide technical and compliance assistance, monitoring and, as needed, enforcement. These new permittees do not bring with them additional federal or state funding.

There are three fundamental questions each member should ask. First, are FIFRA and CWA regulations duplicative? Second, in light of FIFRA's rigorous scientific process for labeling and permitting the sale of pesticides, are duplicative permits the appropriate way to manage pesticide applications in or near water? And third, is this costly duplication necessary or does it provide any additional environmental benefit? Your answer to all three questions should be NO. Never, in more than 40 years of FIFRA or the CWA, has the federal government required a permit to apply pesticides for control of pests such as mosquitoes, forest canopy insects, algae, or invasive aquatic weeds and animals, such as Zebra mussels, when pesticides are properly applied "to, over or near" waters of the U.S.

Lastly, state water quality agencies repeatedly have testified that these permits provide no additional environmental benefits, that they simply duplicate other regulations and impose an unwarranted resource burden on their budgets.

Section 7. Farmer Identity Protection

The American Farm Bureau Federation opposes the disclosure of personal and/or business information by an organization, business or government agency about individual farmers and ranchers. The release of any information should only be allowed by specific written or electronic authorization of the individual, or any private business entity. Farmers and ranchers have a strong privacy interest in their personal information, including their home address, even when they live and work on the farm.

Farm families usually live on the farm and federal information disclosures could facilitate unwanted contact and harassment of farmers and ranchers. The fact that government agencies may have that information and even store it on the Internet does not eliminate the individual's privacy interest.

AFBF supports Section 7, the Farmer Identity Protection Act, which would prohibit the EPA or an EPA contractor from disclosing information collected under CWA requirements from livestock operations. Relevant information includes names, telephone numbers, email addresses, physical addresses, global positioning system coordinates, and other information related to the location of the owner, operator, livestock or employees.

Section 8. Privacy of Agricultural Producers

Farm Bureau supports the use of unmanned aircraft systems (UAS) as another tool for farmers and ranchers to use in managing their crops and livestock and making important business decisions. A farmer faces daily challenges that can affect the farmer's yield, environmental

conditions on the farmer's property and, ultimately, the economic viability of the farm. Farmers rely on accurate data to make these decisions, and the use of UAS adds a valuable and accurate tool for the farmer in making optimal decisions to maximize productivity.

America's farmers and ranchers embrace technology that allows their farming businesses to be more efficient, economical and environmentally friendly. American agriculture continues to evolve. Farmers and ranchers use precision-agriculture techniques to determine the amount of fertilizer they need to purchase and apply to the field, the amount of water needed to sustain the crop, and the amount and type of herbicides or pesticides they may need to apply. These are only a few examples of the business decisions a farmer makes on a daily basis to achieve optimal yield, lower environmental impact and maximize profits.

UAS provides detailed scouting information on weed emergence, insect infestations and potential nutrient shortages. This valuable information allows the farmer to catch threats before they develop into significant and catastrophic problems.

The imagery from UAS also allows the farmer to spot-treat sections of fields as opposed to watering or spraying the entire field. Images from UAS allow the farmer to identify the specific location where a specific treatment – be it fertilizer, water, pesticides or herbicides – is necessary. By spot-treating threats to the crop, the farmer lowers not only the cost of treatment but also, potentially, the environmental impact by minimizing application.

While Farm Bureau supports this new technology and the potential opportunities it offers for farmers and ranchers, Farm Bureau is also concerned about the data collected from UAS and the privacy and security of that data.

Even if an individual operator follows all the applicable rules, regulations, and best management practices in his or her farming operation, there is still concern that regulatory agencies or one of the numerous environmental organizations that unnecessarily target agriculture might gain access to individual farm data through subpoenas. While a farmer's pesticide or biotech seed usage may be a necessary, appropriate and accepted practice, it also may be politically unpopular with certain groups.

The biggest fear that farmers face in data collection is government accessing their data and using it against them for regulatory action.

Questions abound within the agricultural community about "who owns and controls the data." If a farmer contracts with a company authorized to fly UAS, does the farmer own all the data from that UAS or is it shared by both the contractor and the farmer? In the case of a farm on rented ground, does the tenant or the landlord own the data?

Farm Bureau supports the use of UAS and believes it will be an important addition to farmers' management toolbox, but it is critical that the data remain under the ownership and control of the farmer and is not available to government agencies or others without the farmer's permission.

Section 9. Regulations relating to the taking of Double-Breasted Cormorants

In response to a legal challenge, led by Public Employees for Environmental Responsibility, against the FWS for its five-year extension of two depredation orders that had been in place since 1998, the U.S. District Court for the District of Columbia remanded the 2014 Aquaculture Depredation Order (2014 Order) for the double-crested cormorant. The Court directed the FWS to expand its consideration of alternatives that had been included in its prior National Environmental Policy Act review.

In its subsequent May 2016 opinion, the Court noted the opportunity for FWS to issue individual permits and appeared to rule in favor of vacatur because of the availability of individual permits. The Court wrote:

> "...if the Court were to vacate these orders, the parties agree that alternative routes remain available for the management of cormorant populations, for example, through individual predation permits under the Migratory Bird Treaty Act...According to FWS, 'migratory bird permits could be requested and issued for the reduction of cormorant impacts on sensitive species or their habitats (vegetation).' <u>While the Court understands the limitations of relying on state management plans and individual permits...particularly in the long term, the takeaway remains that any seriously detrimental impact of [the Court's decision] in the short term could be mitigated</u>." (Emphasize added).

In explaining his decision, the judge concluded that the FWS had "...not made a compelling case that rescission [of the depredation order] will cause significant consequences to aquaculture because the forecasted harms are imprecise or speculative." In effect, the FWS failed to provide the Court with details of how seriously fish farmers would be impacted without the ability to control cormorants.

The double-crested cormorant is a large water bird that feeds mainly on fish. Commercial fish ponds are stocked at high densities ranging from 2,000 to 60,000 catfish per acre and 50,000 to almost 200,000 bait fish per acre. These production practices make fish farms highly susceptible to bird predation, particularly by cormorants. A study conducted prior to the 2014 Order estimated cormorant related production losses on catfish farms in the Mississippi Delta region at 18 million to 20 million fingerlings per winter. A 1996 USDA survey of catfish producers indicated that birds were responsible for 37% of catfish losses. Cormorants cause additional economic hardship by spreading fish parasites.

Section 9 would provide immediate relief to the aquaculture industry by reinstating the force and effect of the U.S. Fish and Wildlife Service's statutory depredation order for double-breasted

cormorants with respect to freshwater aquaculture facilities in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Minnesota, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas.

Section 10. Applicability of Spill Prevention, Control, and Counter Measure Rule

Section 10 includes language from Senator Fischer's S. 1207, the Farmers Undertake Environmental Land Stewardship (FUELS) Act. The bill would amend the Water Resources Reform and Development Act of 2014 to provide a limited exemption to the EPA's Spill Prevention, Containment, and Control rule for farms with 10,000 gallons or less of fuel storage. The bill also provides for a volume increase for self-certification under the rule (from 22,000 to 42,000 gallons) for farms with no spill history and an established spill response process. Certification for farms with greater than 42,000 gallons of storage and/or a reported discharge history would need to be completed by a professional engineer.

Farm Bureau supports clearly defined requirements for on-farm, aboveground fueling facilities. Farmers should be assured of regulatory certainty before investing in corrective measures. We support revising Environmental Protection Agency (EPA) rules regarding aboveground fuel storage tanks to exempt farm fuel (diesel and gasoline) tanks from EPA mandates and allowing farmers, regardless of their on-farm fuel storage capacity, to complete and self-certify a spill control plan. In addition, we oppose the inclusion of any materials beyond petroleum products into the Spill Prevention, Control and Countermeasure (SPCC) regulations.

Section 11. Predatory and other Wild Animals

Section 11 reaffirms the respective authorities of the U.S Fish and Wildlife Service (FWS) and the U.S. Department of Agriculture's Animal and Plant Health Inspection Service's (APHIS) Wildlife Services division to issue appropriate permits in instances of depredation for nuisance species, birds, and other predators. The language directs the appropriate authority to use the most expeditious permitting process, including through collaboration between FWS and APHIS authorities.

Controlling wildlife damage is a critical factor in maintaining the success of American agriculture. AFBF supports property owners' having the right to protect crops and livestock from protected wildlife and predators. We support federal efforts to create a consistent process for livestock producers to follow when obtaining federal depredation permits. The process should include the ability for producers to work with local agencies to complete and submit all needed paperwork.

Additionally, increased funding is required for USDA-APHIS Wildlife Services for the agency's continued legal depredation efforts and roost dispersal of avian species that affect aquaculture production. This funding shall be utilized to efficiently manage, mitigate and further assist aquaculture producers in their efforts to deter avian depredation at aquaculture production

facilities. This shall include adequate staffing and the use of efficient and proven dispersal and depredation practices.

Conclusion

We at the American Farm Bureau Federation appreciate the Committee's willingness to listen to our concerns. The need for continued oversight and reform of the nation's environmental regulatory framework cannot be overstated. Farmers, ranchers, and small businesses rely on regulatory certainty and the Constitutional protection of private property rights to make sound business decisions. We look forward to continuing to work with you and the Senate Environment and Public Works Committee in pursuing solutions to these important

Senate Committee on Environment and Public Works
Hearing entitled, *"S. __, the Agriculture Creates Real Employment (ACRE) Act"*
March 14, 2018
Questions for the Record for Ryan Yates

Senator Merkley:

1. There are many communities that have reported poor air quality from pollution generated at neighboring farms. In testimony submitted to the Committee, you said that there was no useful purpose in agricultural operations reporting emissions. Does the American Farm Bureau believe that there is no risk to the community at large from emissions from larger agricultural operations, such as large CAFOs?

Many people outside of agriculture and the livestock industry have concerns about the environmental and health impacts of livestock operations. Some have gone so far as to demonize livestock operations, calling them factory farms and industrial livestock production. In fact, many of these livestock farms continue to be family owned and operated. Contrary to anti-livestock rhetoric, this nation's livestock industry is proficient at producing safe and abundant food while protecting our natural resources. The industry is highly regulated and farmers often surpass requirements when fulfilling their roles as caretakers of the environment and good citizens of their communities.

It is often overlooked, but a majority of farmers who operate CAFOs are involved in a family-based business, are highly educated college graduates, community leaders, and experts in science and technology. Most are trained in humane animal husbandry and environmental sciences and spend great amounts of time, money and other resources ensuring that their operations do not harm the environment. More good news is that the efficiency of livestock production in the United States ensures Americans can purchase beef, pork, eggs, turkey, chicken and milk that is safe, nutritious and affordable. Providing meat to the United States and international markets also supports hundreds of thousands of jobs on farms, in rural communities, and in value-added food chain facilities nationwide.

If Americans are concerned about the environmental impacts of agricultural production and the safety of their foods and beverages, the nation would be well-served to preserve food production here at home. The United States has the best environmental and food safety protocols in the world. Recent concerns about the safety of imported foods point out the simple fact that if regulations make it so hard and cost-prohibitive for America's farmers and ranchers to stay in business, then the U.S. will be forced to import a larger portion of its food supply. The imported food supply would come from nations which have significantly fewer environmental, food safety and labor safeguards. Simply put, any misguided effort to stamp out problems here at home that are either marginal or do not exist, would create larger problems that are arguably more serious.

The majority of farmers and ranchers live on or near their livestock operations. This means they and their families breathe the same air as their neighbors. Most livestock farms are proactively instituting practices to reduce air quality concerns for the welfare of their workers, neighbors, animals, and their own families.

Farmers and ranchers understand their roles in improving and maintaining the health and safety of the nations' environmental resources. Farmers are sensitive to the environment because they own and manage two-thirds of the nation's land. They are doing their part to promote the principles of environmental stewardship by being good caretakers of the nation's soil, air and water resources. But the cost of this stewardship is not cheap. Meeting the demand for food, feed and fuel as well as society's demands for improved environment quality requires farmers and ranchers to balance, and often individually bear, the cost of achieving many competing goals and objectives.

Agriculture's impacts on the environment are closely intertwined with countless human activities that yield a higher quality of life for all Americans. The current production rates for U.S. farmers and ranchers is unprecedented. This productivity allows U.S. farmers and ranchers to meet the demands of the nation's growing population as well as growing world populations. On top of this unprecedented productivity, there is little doubt that farmers and ranchers have made great strides in improving our environment over the last three decades. By nearly every measure, the nation's environment and natural resources are in better condition than any other time in recent history.

A University of Georgia study looked at particulate matter levels in the air 100 feet away from chicken house ventilation fans. They found that levels were statistically indistinguishable from ambient air, and, in fact, lower than typical particulate levels in urban areas. Another study found ammonia levels at typical setbacks do not exceed the Occupational Safety and Health Administration and Environmental Protection Agency (EPA) odor detection thresholds.

No evidence indicates that farms and ranches pose any specific health risk to people in general. Livestock and poultry farms have been operated for more than 50 years in many areas by thousands of farm families. The fact that these families have not experienced any significant health issues attributable to these operations would suggest that livestock and poultry farming is no more of a health risk than any other type of farming.

Farm Bureau recognizes that improvements can always be made to environmental stewardship and our members strive to be the best neighbors as possible. Reality must also be considered; farming is a dirty job that requires the careful management of many factors including odors.

When it comes to clean air, Farm Bureau policy supports the following principles:

A balanced and science-based implementation of the Clean Air Act (CAA) is of the utmost concern to farmers and ranchers.

- Sound Science - To protect public health, all CAA rules and incentive-based programs must be based on peer-reviewed, science-based, reliable and accurate information.
- Transparency - The EPA should establish and maintain a deliberate, consistent and transparent decision-making process to inform the public, including farmers, of any criteria used to regulate air emissions.
- Workability - The CAA must be administered in a practical and realistic way to establish workable and reasonable rules and incentive-based programs. EPA should always

consider incentive-based programs, before regulation, to achieve emission reduction. Compliance costs associated with meeting any imposed standards should be the responsibility of the federal government.

- Practicability - Farm Bureau will work with industry groups and the appropriate agencies to ensure common sense implementation and economic achievability of any new rule and incentive-based programs.
- Cost Benefit Analysis/Affordability - Benefits should significantly exceed the cost of any regulation or program and affordability should be a major consideration.
- Congressional Oversight - Congress should review the effects of CAA on agricultural operations and ensure workable and reasonable CAA rules and programs.
- Exempting air emissions from manure from emergency response reporting under Comprehensive Environmental Recovery, Compensation and Liability Act (CERCLA) and Emergency Planning and Community Right to Know Act.

2. In modifying the description of activities that constitute baiting, the ACRE Act would broaden the instances under which an agricultural producer would be able hunt migratory game birds. While crop protection is important for all farmers, the bill creates an exemption to the Migratory Bird Treaty Act that opens very large parcels of land to hunting. In your testimony, you said that productivity or yield could be harmed if farmers do not have this "crop protection tool." Please provide data on recent productivity and yield loss to farmers over the past 3 years, nationally and in Oregon, as a result of not being able to hunt these migratory game birds.

While available data on this subject predates your request, research has identified significant losses to crops and aquaculture from wildlife including migratory birds. Farm Bureau is concerned about the recent impacts to commercial fisheries by the double-crested cormorant. As stated in my testimony, the double-crested cormorant is a large water bird that feeds mainly on fish. Commercial fish ponds are stocked at high densities ranging from 2,000 to 60,000 catfish per acre and 50,000 to almost 200,000 bait fish per acre. These production practices make fish farms highly susceptible to bird predation, particularly by cormorants. A study conducted prior to the 2014 Order estimated cormorant related production losses on catfish farms in the Mississippi Delta region at 18 million to 20 million fingerlings per winter. A 1996 USDA survey of catfish producers indicated that birds were responsible for 37 percent of catfish losses. Cormorants cause additional economic hardship by spreading fish parasites.

Regarding cormorants and catfish aquaculture, USDA Wildlife Services data (via National Agricultural Statistics Service) states:

> *Commercial catfish production is one of the largest aquaculture industries in North America with much of this production occurring in the southeastern U.S. During the winter months, more than 60,000 cormorants can frequent these primary aquaculture-producing regions on any given day. USDA, WS National Wildlife Research Center (NWRC) scientists have documented that on average 16 cormorants per day feeding on a 15 acre pond over the winter can result in a 22 percent decline in the weight of harvested*

catfish. Such predation impacts due to cormorants in western Mississippi alone were estimated at $5.6 million – $12.0 million annually. To date, NWRC research indicates that the most effective tools for cormorant control have been combining non-lethal harassment and lethal shooting on the fish farm, and at cormorant night roosts. These activities are conducted primarily by producers and USDA's Wildlife Services program. These programs have been successful in reducing cormorant foraging on nearby farms, and potentially save individual farmers and the industry hundreds of thousands of dollars annually.

The United States Government Accountability Office wrote a report entitled, *Wildlife Services Program: Information on Activities to Manage Wildlife Damage* (http://www.gao.gov/products/GAO-02-138) in 2001 and reported:

> *"Fish-eating birds (e.g., cormorants, herons, egrets, and pelicans) can cause severe damage at aquaculture farms, eating catfish, crawfish, salmon, bass, trout, and ornamental fish. According to a USDA National Agricultural Statistics Service (NASS) survey of catfish producers from 15 states, 69 percent reported some wildlife-caused losses, with a financial loss of $12.5 million to wildlife predation in 1996."*

Additionally, USDA Wildlife Services writes:

> *"The survey on wildlife damage by the National Agricultural Statistics Service (NASS) reported wildlife damage to U.S. agriculture at $944 million during 2001. Field crop losses to wildlife totaled $619 million and losses of vegetables, fruits, and nuts totaled $146 million."*
>
> *"More than half of all farmers and ranchers experience damage from wildlife each year."*
> https://www.aphis.usda.gov/wildlife_damage/informational_notebooks/2012/Protecting_Agriculture_combined.pdf

When it comes to wildlife, Farm Bureau policy supports the following general principles:

- There is an increased need to safeguard farmers and ranchers from crop and livestock damage caused by game animals, migratory fowl, certain species of birds and predatory animals.
- Many species of wildlife and migratory birds feed on private property with no recourse available to the property owner.
- Compensation to farmers and ranchers for damages caused by wildlife.
- Farmers having the right to protect their crops and livestock from destruction by wildlife and migratory birds, on both private and public lands.

Adjusting hunting seasons in certain areas to help control damage caused by wildlife and migratory birds.

Senator BARRASSO. Thank you so very much, Mr. Yates. We appreciate your testimony.

Now, Mr. Lyons.

STATEMENT OF JIM LYONS, SENIOR FELLOW, CENTER FOR AMERICAN PROGRESS, LECTURER, YALE SCHOOL OF FORESTRY AND ENVIRONMENTAL STUDIES

Mr. LYONS. Mr. Chairman, members of the Committee, I am Jim Lyons. I am currently a Senior Fellow at the Center for American Progress and a lecturer at the Yale School of Forestry and Environmental Studies. Previously, I have served as Deputy Assistant Secretary for Land and Minerals Management in the Department of the Interior under President Obama and as USDA Under Secretary for Natural Resources and Environment under President Clinton. And from 1985 to 1993 I was a member of the House Committee on Agriculture staff, where I had the opportunity to help lead the effort to shape both the Conservation and Forestry Titles of the 1990 Farm Bill.

I bring up the 1990 Farm Bill because I believe it was a groundbreaking effort that expanded the scope of our conservation toolkit. Since then, through successive Farm Bills I believe we have demonstrated the important relationship between farmers, ranchers, and Federal conservation agencies and the power of their partnership.

Voluntary conservation made possible by the technical and financial assistance by Federal conservation agencies and their State and private partners have maintained and restored the health of millions of acres of farm and ranchlands, and conserved fragile soils, wetlands, water quality, and wildlife habitat.

We continue to depend on the Nation's farmers and ranchers not only for our food and fiber, but also for the care of our lands and natural resources. As Conservationist Aldo Leopold described in 1939, "It is the American farmer who must weave the greater part of the rug on which America stands." Nearly fourscore years later, Leopold's comments remain very valid.

American farmers and ranchers remain conservation leaders, and we have an obligation to the American people to ensure that we protect and promote the public-private partnership that has helped protect our capacity to produce safe and affordable food and fiber, and conserve America's soil, water, air, and wildlife resources.

The ACRE Act is an interesting amalgam of bills. I will do my best to address them today, but I implore you to work together in a thoughtful, bipartisan approach to build on the foundation of prior Farm Bills to improve efforts to weave the rug of conservation of which Leopold has spoken.

Given the limited time, I will comment on just a few sections of the bill.

On Section 3, the exemption from certain notice requirements and penalties under CERCLA, I understand that this would simply codify an exemption from these requirements that had been implemented since 2008. Minimizing the burden on farmers for collecting and reporting necessary data makes sense, and I strongly support that objective.

I hunt and have hunted waterfowl on Maryland's eastern shore, so I understand the intent of Section 5 to further clarify the definition of normal agricultural activities under the Migratory Bird Treaty Act. But I would suggest, Mr. Chairman, that it might be better to address this definitional issue administratively, rather than setting a one-size-fits-all standard and statute. This should be done in collaboration with the NRCS, the U.S. Fish and Wildlife Service, and relevant State Fish and Wildlife agencies.

With regard to Section 6, the Congress has made several attempts in recent years to find common ground in avoiding duplication, providing clarity, and reducing the burden associated with data collection and reporting under FIFRA and the Clean Water Act. Efficiency in data collection reporting is important, provided the intent of both FIFRA and the Clean Water Act are met.

In places like Maryland, where I currently reside, this can be particularly problematic given the potential for pesticide applications to inadvertently impact waterways and the Chesapeake Bay. Simply having a pesticide registered under FIFRA, in my opinion, does not obviate the need for ensuring the Clean Water Act requirements are met where the potential for impacting water resources occurs.

While I understand the purpose of Section 7, the Farmer Identity Protection Act, and the concern of livestock producers, I think it is important the data related to these activities be collected in a manner that permits research and analysis to benefit producers, help reduce operator costs, improve the efficiency of livestock operations, as well as protect public safety and the environment.

Regarding Section 8, aerial photography and assessments by their very nature are intended to cover large landscapes, making it difficult, if not nearly impossible, to gather permission from all those owners and operators who may be in the area that is the focus of these aerial surveys. Aerial surveys are an important tool for wildlife managers and research scientists whose studies can improve management practices that can benefit farmers and ranchers, as well as wildlife and the environment.

Finally, reaffirming the respective authorities of the U.S. Fish and Wildlife Service and APHIS to work together to address animal damage issues can do no harm, but I would suggest that a change in the law is not warranted. The issue raised by Mr. Miyamoto with regard to eagles and sheep losses is a very serious concern, I am well aware of that, but it seems to be more of an issue of providing adequate resources to the Fish and Wildlife Service to do its job, rather than reaffirming in statute that APHIS and the Service do their jobs.

Thank you, Chairman Barrasso and members of the Committee. Appreciate the opportunity to share my thoughts today.

I would close by emphasizing one thing, and that is data and information are important management tools that can improve farm and ranch operations, inform new and better approaches for achieving conservation goals, and ensure that taxpayer dollars are used efficiently and effectively. That is, data are an asset, not just a bludgeon. If we can focus on opportunities to work together, agriculture, fish and wildlife, public health and safety, and our environment will benefit.

Thank you, Mr. Chairman.
[The prepared statement of Mr. Lyons follows:]

STATEMENT OF
JIM LYONS
SENIOR FELLOW, CENTER FOR AMERICAN PROGRESS
and
LECTURER, YALE SCHOOL OF FORESTRY AND ENVIRONMENTAL STUDIES
Regarding
S. ____, Agriculture Creates Real Employment Act (ACRE)

March 14, 2018

Mr. Chairman and Members of the Committee, my name is Jim Lyons. I am currently a Senior Fellow at the Center of American Progress and a Lecturer at the Yale School of Forestry and Environmental Studies. Previously I served as Deputy Assistant Secretary for Land and Minerals Management in the Department of the Interior under President Obama and as USDA Under Secretary for Natural Resources and Environment under President Clinton. In the late 1980s through 1993, I was a senior staff member for the Chairman of the House Committee on Agriculture where I had the opportunity to help lead the effort to shape both the Conservation and Forestry Titles of the 1990 Farm Bill.

I have worked in conservation and agriculture for most of my career. I mentioned the 1990 Farm Bill because it was grounding breaking in many ways. It was only the second farm bill to have a conservation title and the first to have a forestry title.

Building on the establishment of the Conservation Reserve Program and the sodbuster, swampbuster, and conservation compliance programs in the 1985 Farm Bill, the Congress greatly expanded the conservation partnership between what was then the Soil Conservation Service (now the Natural Resources Conservation Service (NRCS)) and farmers and ranchers in the 1990 Farm Bill.

Former House Agriculture Committee Chairman, Kika de la Garza, from Texas, often emphasized that farmers are the original conservationists as their livelihoods are dependent upon their commitment to conserve the landscapes that they manage. His view, and clearly that of the congress which passed the 1985 and '90 farm bills, was that the role of the federal government was to further assist private landowners in implementing practices to protect their soil, water and wetland resources, and to enhance wildlife habitat.

Kika was a great chairperson and a great conservation champion. Under his guidance – and that of then-Senate Agriculture Committee Chairman Leahy -- the '90 bill established the wetlands reserve program, the farmland protection program, the Wildlife Habitat Improvement Program, the Environmental Quality Incentive Program (EQIP) which was a cost-share assistance program that served as the precursor for similar programs utilized by millions of farmers today, the forest legacy program, and similar conservation programs that demonstrated the important partnership between farmers and ranchers and federal

conservation agencies like the NRCS, Farm Services Agency, and Forest Service in the US Department of Agriculture, and the US Fish and Wildlife Service in the Department of the Interior. Voluntary conservation made possible by the technical and financial assistance provided by federal conservation agencies, and their state and private partners, maintained and restored the health of millions of acres of farm and ranchlands, set aside lands for wildlife and water quality, and through conservation easements, preserved fragile soils, wetlands, and wildlife habitat.

Our work was bipartisan, it was thoughtful and deliberate. Though staff and Members didn't always agree and the debates were, at times, intense, the 1990 Farm Bill reflected a vision for the future of private land conservation that was founded on the recognition that the health of our Nation's natural resources is a function of our collective commitment to manage for the greatest good, for the greatest number, for the long term. After leaving the committee staff in 1993, I had the honor of serving as the first USDA Under Secretary for Natural Resources and Environment and helping to implement many of the innovative conservation measures I had worked with my staff colleagues and Members to design.

We continue to depend on the nation's farmers and ranchers not only for our food and fiber, but also for the care of our lands and natural resources. Conservationist Aldo Leopold described the conservation picture well in 1939 when he wrote that,

> "[I]t is the American farmer who must weave the greater part of the rug on which America stands."

Leopold's comments are as valid today – nearly four score years later – as then. We depend on American farmers and ranchers to remain the conservation leaders they have long been, and we have an obligation to the American people to ensure that we protect and promote the public/private partnership that has helped conserve America's soil, water, air, and wildlife resources.

The ACRE Act is an interesting amalgam of bills apparently designed, for the most part, to address a number of concerns raised by various farm and ranching interests. While I recognize the importance of responding to constituent concerns, I encourage you to consider the gains made and the lessons learned in previous Farm Bills in working to develop a thoughtful, bipartisan approach to agriculture policy issues built upon the important foundation that past farm bills have provided for improving conservation of fish and wildlife habitat across the nation.

An important example is NRCS's Sage Grouse Initiative (SGI) which committed half a billion dollars to private land conservation and habitat restoration activities across the remaining eleven state range of the species. The SGI has led to juniper removal in Idaho restoring 50 square miles of sage grouse habitat across private and public lands; conservation easements to protect grouse habitat on private ranches in Wyoming; and conservation agreements with farmers and ranchers from Oregon and Nevada to Montana and the Dakotas. The SGI, capitalizing on policies and programs authorized in previous farm bills, made possible conservation practices for sage grouse habitat that farmers and ranchers are implementing that

will provide them certainty that their operations will not be adversely impacted should a change in the status of the species warrant listing. In this way, farmers and ranchers are demonstrating a commitment to collaborative conservation that will benefit them, their lands, and the wildlife they enjoy. "What's good for the herd is good for the bird", one Oregon cattleman said. All of this is based on a commitment to translate science to policy based on research derived from real-world, on the ground data. This is what conservation can and should be.

The nation's conservation legacy will be determined by the farm bill that you build here, and in the agriculture committee, and on the Senate floor. Think about that as you proceed with this bill and other pieces of farm legislation.

This morning, I have been asked to provide comments on each of the measures in the ACRE Act and will do so to the best of my ability.

On **Section 3, taken from the FARM Act, the exemption from certain notice requirements and penalties under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA**), I understand that this would simply codify an exemption from these requirements that had been implemented since 2008. Minimizing the burden in collecting and reporting such data seems to make sense provided there remains a means to track any unintended, adverse impacts associated with the release of animal waste for non-intensive livestock operations.

Section 4, the exemption of Exportation of Certain Echinoderms from Permission and Licensing Requirements, would provide an exemption from inspections under the Endangered Species Act's export requirements for sea urchins and sea cucumbers for consumption or recreational purposes. While I understand the objective, I think you recognize the importance of gathering information about the harvests of these increasingly popular delicacies. I don't believe that the ESA is a burden in this regard. Reporting harvest data is important to ensure that these species don't become candidates for future ESA listing. I am confident that some means can be found to monitor harvest of these species that minimizes impacts on commercial and recreational activities so that they can continue in a sustainable way.

Section 5 would allow agricultural producers to engage in "normal agricultural activities" that may have been previously considered baiting under the Migratory Bird Treaty Act (MBTA). I hunt and have hunted waterfowl on Maryland's eastern shore, so I understand the intent of this measure. I will say, however, that I have been in fields where the remaining grain seems to be excessive – or maybe the harvest was not as clean as it could have been – so these judgements are important. I would suggest that the Natural Resources Conservation Service (NRCS) and the appropriate state and federal fish and wildlife agency personnel be involved in more narrowly defining what constitutes "normal agricultural activities" for this bill. I would also suggest that it might be better to address this definitional issue administratively rather than setting a "one size fits all" standard in statute. I would also suggest that NRCS, the US Fish and Wildlife Service, and the relevant state fish and wildlife agency be involved in monitoring implementation of any changes made to ensure that the intent of this bill is realized.

Section 6 would amend the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Clean Water Act to eliminate duplicative reporting requirements for approved pesticide applications under FIFRA. The Congress has made several attempts in recent years to find common ground in avoiding duplication, providing clarity, and reducing the burden associated with data collection and reporting while being mindful of the need to provide the data necessary to protect the public and our environment. Efficiency in data collection and reporting makes sense provided the intent of the requirements of both FIFRA and the Clean Water Act can be met. In places like Maryland, where I currently reside, this can be particularly problematic given the potential for pesticide applications to inadvertently impact waterways and the Chesapeake Bay. Simply having a pesticide registered under FIFRA, in my opinion, does not obviate the need for meeting Clean Water Act requirements where the potential for impacting water resources or water-based crops (e.g. cranberries) occurs. However, I agree with the objective of seeking the most efficient and effective way of providing the necessary data to protect the public and the environment while minimizing the burden on farmers.

Section 7, the Farmer Identity Protection Act, would prohibit the EPA, or EPA contractors, from disclosing information under the Clean Water Act from livestock operations. The intent of this section sounds very similar to a provision that we included in the 1990 farm bill to prevent farmer-specific information about pesticide applications from being disclosed to the public. While I understand the concern that livestock producers may have, I also believe it is important that data related to these activities be collected in a manner that permits research and analysis to benefit producers, that can help reduce operator costs, improve the efficiency of livestock operations, as well as protect public safety and the environment. And, I would recommend that if the actions of a livestock operator have resulted in or are suspected of resulting in significant harm to the public, a federally-protected species, or the environment, that the Administrator should be granted the authority to waive the prohibition on procurement and disclosure of information.

Section 8 would prevent enforcement of the Clean Water Act for agricultural operations resulting from aerial surveillance without express written consent of the owner/operator. Regarding this section of the bill, I fully understand agricultural operators concerns, however I question if any use of aerial surveys would be possible with the permissions required. Aerial photography and assessments, by their very nature, are intended to cover a large landscape, making it difficult if not nearly impossible to gather permission from all those owners/operators who may be in the area that is the focus of aerial surveys. I would point out that aerial surveys are an important tool for monitoring wildlife populations – e.g., migratory bird counts; for tracking changes in important habitat such as the status of wetlands in the prairie pothole region which provides critical nesting areas for ducks and other migratory waterfowl; and gathering data for research that can improve management practices that can benefit farmers and ranchers as well as wildlife and the environment. For this reason, I question the ability to implement this bill in a way that permits the continued collection of management information that is essential to continue to make progress in improving resource management and wildlife conservation goals.

Section 9 would allow the continued take of Double-Breasted Cormorants with respect to freshwater aquaculture facilities. I am also a fisherman and I recognize the impacts that cormorants can have on fish populations, especially when concentrated as in aquaculture operations. Rather than codifying this exemption, I would suggest that the industry work with the US Fish and Wildlife Service and USDA to develop appropriate administrative measures to remedy the industry's concerns.

Section 10, would provide an exemption to the EPA's Spill Prevention, Containment, and Control rule for certain farms and permit an increase in volume of fuel that can be stored on farm for self-certification. Like my comments regarding cormorants, I question the need to codify these changes. The administration has ample authority to propose a change in rules applicable to fuel storage requirements and seeking changes in the law for each "limited exemption" seems unnecessary and inappropriate. If warranted, the administration should use its existing authority to make these changes administratively.

Section 11 seeks to reaffirm the respective authorities of the US Fish and Wildlife Service and APHIS in the US Department of Agriculture regarding animal damage control. This, too, seems like an unnecessary change in the law although there is no harm in reaffirming the importance of collaboration between the Fish and Wildlife Service and APHIS regarding animal depredation issues.

In closing, Mr. Chairman, I want to reaffirm the importance of coordination and collaboration between the US Fish and Wildlife Service, state fish and wildlife agencies, and USDA, EPA, and other relevant federal and state agencies in implementing farm bill programs and practices that benefit farmers and ranchers and the conservation of our nation's wildlife and natural resources. In my experience, the working relationships between these agencies was good provided they had adequate resources and continued their efforts – at all levels – to coordinate and collaborate. Encouraging that continued working relationship is valuable, but legislating "fixes" for each perceived incidence of inadequate coordination or collaboration can be counterproductive.

I also want to emphasize the importance of ensuring that measures intended to protect farmers and ranchers from the perceived threat of enforcement using data collected from various sources, including aerial surveys, satellite imagery, and other advancing technologies is a double-edged sword. Going back to my experience with the 1990 Farm Bill, we sought to protect the identity of individual producers to prevent use of data for enforcement actions in part to ensure that farmers and ranchers would not be afraid to avail themselves of the technical and financial assistance provided by USDA agencies. We think it worked well as evidenced by the substantial gains in conservation on private lands we've seen in the past 25 years. But gathering data is an important part of measuring success, of improving the delivery of conservation assistance and resources, and further refining and improving our conservation efforts. It is essential that the agencies of the federal government provide technical and financial assistance in the most efficient and cost-effective manner and that the intended benefits of this assistance – be they financial or environmental – be realized. Data are essential to ensure that this objective is achieved, and the taxpayers' investments are made wisely.

I fear that the fear of data – and of government agencies collecting data -- is adversely impacting our ability to improve our conservation programs and do a better job of conserving the soil and water resources that are essential for producing the food and fiber, fish and wildlife habitat, clean air, water resources, and outdoor recreation opportunities that come from our farms and ranches. It is interesting how much some people fear the data collection efforts of government agencies when private businesses are collecting data and information from us constantly and, often, without our knowledge – every time we use our cell phone, make a purchase, or ask Google or Alexa the weather forecast.

We live in a time of "big" data. Information is a powerful tool that we should embrace in working together to ensure a sustainable future. In this regard and given the conservation legacy of our prior Farm Bills, government agencies should be viewed as partners, not adversaries.

Thank you for the opportunity to testify before you today.

Responses to Questions from the Senate Committee on Environment and Public Works regarding the Hearing on S. ___, *the Agriculture Creates Real Employment Act (ACRE),* March 14, 2018

Submitted for the Record by Jim Lyons, Senior Fellow, Center for American Progress and Lecturer, Yale School of Forestry and Environmental Studies

May 2, 2018

Question 1: In your testimony, you discuss the importance of conservation programs administered by federal conservation agencies and their state and private partners. Would you elaborate on how voluntary conservation partnerships have served both farmers and the environment? Would you provide one or two specific examples of how federal investments – such as the Sage Grouse Initiative mentioned in your testimony – have helped preserve the environment to the benefit of farmers? What should Congress focus on to improve and further incentivize conservation partnerships?

Answer: Nearly two-thirds of the land base in the United States is privately-owned. Of this, approximately 45 percent is managed as cropland, pastureland, and rangeland and 30 percent is managed as forestland. For this reason, the future of conservation in American will be heavily dependent upon the conservation decisions made by farmers, ranchers, and forestland owners. As I noted in my testimony, Aldo Leopold, conservation leader and philosopher, stated,

"[I]t is the American farmer who must weave the greater part of the rug on which America stands."

For decades conservation programs administered by the Soil Conservation Service and its successor, the Natural Resources Conservation Service, have played a critical role in advancing efforts to conserve fragile soils, wetlands, and important fish and wildlife habitats on state and private lands. Beginning in the 1985 Farm Bill, Congress authorized conservation measures to protect highly-erodible soils (a program known as "sodbuster") and prevent the draining and destruction of farm wetlands (a program known as "swampbuster"). Through the Conservation Reserve Program, the Congress also authorized the temporary set aside and removal from agricultural production, on a voluntary basis, of highly erodible lands through establishment of the Conservation Reserve Program (CRP). CRP benefitted farmers by providing incentives in the form of direct payments to reduce the production of crops that might be in surplus in order to balance market supply and help to stabilize prices for that commodity. Since the lands taken out of production were required to meet certain environmental criteria – e.g., were determined to be highly erodible lands at the beginning of the CRP program and later were determined to meet a number of environmental measures – not only did CRP help reduce the production of

crops in surplus thus stabilizing commodity prices to farmers' benefit but it also helped to prevent production on environmentally-sensitive lands to reduce soil erosion and benefit water quality by reducing polluted runoff into nearby waterways. Farmers and the environment benefitted from CRP and continue to do so.

During the 10-year period of a typical CRP contract, farmers plant cover crops on these fragile soils not only to prevent soil erosion but often to enhance wildlife habitat. Many farmers make their CRP lands available for hunting when habitat is restored which provides them with the potential for income from fee hunting in addition to the payments received by the government for resting these lands from production. In fact, the CRP was so effective that the concept of temporary land retirements was expanded in subsequent farm bills to include special measures to protect the environment. For example, under the Conservation Reserve Enhancement Program (CREP) initiated in the 1990s, farmers were compensated for voluntarily planting trees along streamside buffers to prevent soil erosion from nearby croplands further helping to reduce polluted runoff into streams and adjacent water bodies. In fact, one of the first CREP initiatives was launched on the Eastern Shore of Maryland to benefit the Chesapeake Bay.

The 1990 Farm Bill conservation title significantly expanded programs to benefit farmers who voluntarily participate in conservation programs such as the Wetland Reserve Program (WRP), and the Farmland Protection Program (FPP). In every instance, farmers are paid for enrolling in programs that protect the environment and help keep farmlands in agricultural production. The 1990 Farm Bill also included the first farm bill Forestry Title which provided measures to protect forest lands threatened with conversion and development through the Forest Legacy Program. Many states continue to use this program to conserve forests for their watershed and wildlife habitat benefits.

Conservation titles in subsequent farm bills, beginning with the 1990 farm bill, significantly expanded opportunities for farmers to voluntarily participate in programs to protect fragile soils, water quality, air quality, wetlands, and wildlife habitat. For example, farmers benefitted by obtaining payments for implementing specific conservation practices and were afforded free technical assistance from the NRCS, state conservation personnel, and conservation district employees. The environment benefitted through the protection and restoration of highly erodible lands, important wildlife habitat, and forest and farmlands threatened with development. As farm bills have evolved, greater emphasis has been placed on measures to enhance voluntary, collaborative conservation on a landscape scale and encourage the coordinated use of specific farm bill conservation authorities to further their effectiveness.

Farm bill conservation and forestry programs have been a critical part of the nation's conservation tool kit and the partnership between farmers, ranchers, forest landowners, and conservation professionals in state, federal, and private organizations remains an essential part of the effort to maintain agricultural productivity and protect the environment. One important example was the innovative use of farm bill conservation programs to protect and restore private land habitat for the Greater sage grouse across 11 western states. Through the Sage

Grouse Initiative (SGI), hundreds of millions of dollars were committed to protecting and restoring the sagebrush ecosystem which provides habitat for the Greater sage grouse. SGI provided technical assistance and financial resources for private land owners in these states to improve Sage grouse habitat through various means including the protection and restoration of seeps and wetland areas and the removal of invasive species, including juniper trees which render habitat useless for the Greater sage grouse. Using existing conservation programs and authorities, NRCS and its partners worked with landowners throughout the remaining range of the Greater sage grouse to protect, restore, and enhance several hundred million acres of sage brush habitat. In turn, the US Fish and Wildlife Service (FWS) established agreements with farmers and ranchers to ensure that, should the Greater sage grouse be listed as a threatened or endangered species, private landowners enrolled in SGI who continued to implement prescribed conservation practices would not be required to implement added measures to protect the grouse. Fortunately, as a result of these private land conservation practices and the conservation efforts of state, federal, and private partners across public and private lands in the sagebrush ecosystem, the FWS determined that listing the grouse as threatened or endangered under the Endangered Species Act was not warranted.

In summary, as a result of the imagination and initiative of past Congresses to invest in private land conservation measures, we have made considerable progress in addressing a broad range of environmental concerns including improvements in water and air quality; the protection, restoration, and enhancement of habitat for at-risk, game, and non-game species of fish and wildlife; keeping farm lands threatened by growth and development in agricultural production; improving forest health and reducing wildfire risk; reducing the loss of highly erodible soils and wetlands; and helping farmers, ranchers, and associated rural communities remain economically-viable and a vibrant part of the American landscape.

To continue progress, it is essential that the Congress and administration continue to invest in these conservation programs and support landscape-level, science-based, collaborative conservation efforts throughout the United States. These initiatives are fully consistent with the important role that private lands play in conserving America's lands, waters, wildlife, and important natural resources while continuing the important production of food, fiber, and other resources essential to the nation. This approach for encouraging and investing in private land conservation to benefit the environment and private landowners is fully consistent with the philosophy envisioned by Leopold who recognized that, "Conservation will ultimately boil down to rewarding the private landowner who conserves the public interest."

Question 2: Section 9 of the ACRE Act would codify a regulation that seeks to address the impacts of double-crested cormorants on aquaculture operations. However, the U.S. District Court for the District of Columbia found that regulation was not compliant with the National Environmental Policy Act or supported by sufficient science. Would you elaborate on why it would be important to redo an environmental assessment on this rule to ensure that it is science-based and in the best interest of both cormorants and the aquaculture industry?

Answer: As noted in my testimony, I understand the concerns of the aquaculture industry for the potential impacts of cormorants on their industry. However, a proper and balanced solution requires a close look at alternative measures to mitigate the impacts of cormorants in a manner that does not lead to greater impacts on the environment nor cause unnecessary harm to cormorant populations over the long term. In this way, science-based solutions can be identified that achieves both of these outcomes in an economically-viable manner. Rather than circumventing NEPA in completing this work, the alternatives identified should be put through rigorous environmental analysis to ensure that the most effective and cost-efficient alternative can be identified that avoids unintended impacts to other species of wildlife and/or the environment. I am confident that this can be achieved with minimal additional burden on the aquaculture industry and cost to the US Fish and Wildlife Service.

Question 3: In your testimony you suggest more narrowly defining "normal agricultural practices" in terms of what should and should not constitute bird baiting. You also mention that the Administration may be able to work with farmers and hunters to address this issue. Given your hunting and farming experience, I am very interested in your perspective. Would you elaborate on why a narrow definition is important? How might the Administration work with stakeholders to resolve Migratory Bird Treaty Act liability concerns?

Answer: Normal agricultural practices are farming activities where seeds or grains have been scattered solely as the result of normal agricultural operations, including harvesting and post-harvesting activities. Of course, agricultural practices depend on the crop planted and harvested and what might constitute customary cultivation, harvesting and post-harvesting activities associated with a given crop in a given part of the country. For this reason, I believe it is important for state and federal wildlife officials to work closely with farmers, farm organizations, and federal and state agricultural agencies to ensure that the rules that apply to post-harvest hunting are reflective of the practices for a given crop in a given region or state.

The USDA Natural Resources Conservation Service, which has extensive experience in working with agricultural producers on conservation and wildlife concerns, the USDA Extension Service, and the US Geological Survey's Fish and Wildlife Service's Cooperative Wildlife Research Units (formerly administered by the US Fish and Wildlife Service) which are associated with land grant colleges across the nation, have important insights into what constitutes both normal agricultural practices and traditional sport hunting activities in different regions of the country for different types of game. A definition of "normal agricultural practices" for purposes of addressing concerns for bird bating must reflect how farming is conducted in a given region for particular agricultural crops given traditional planting, harvesting, and post-harvesting practices. If done in this way, I believe "normal agricultural practices" can be narrowly defined and tailored, consistent with existing scientific information on migratory birds and agricultural practices, to reduce the potential for conflict over bird baiting and issues associated with enforcement of the Migratory Bird Treaty Act. If too broadly defined, wide interpretation of the term is likely to result based on the expertise and experiences of the individual responsible

for enforcement. Using existing agricultural and wildlife science and expertise is the best way for the Administration to work with farmers and sportsmen and women to minimize the likelihood of confusion and conflict in hunting migratory birds in agricultural areas.

Question 4: Just like other facilities, farms that store substantial quantities of fuel onsite have been required to have certain safeguards in place to protect against the risks of fuel spills. The more fuel you store, the more safeguards you must have in place, because of the greater risks that come from a larger spill. The 2014 WRDA bill changed the way this rule applied to farms, by letting farmers store larger quantities of fuel before safeguards are required. The WRDA bill also directed EPA to study the issue. EPA completed its study and found that the 2014 WRDA bill exempted between 81-96% of farms from any requirements, and that less than 1% of farms had to meet the strictest safeguards. It also found that "small discharges cause significant harm and [there is a] lack of evidence that farms are inherently safer than other" facilities. Section 10 of the ACRE Act would exempt even more farms from requirements under this rule by further increasing the amount of fuel that could be stored on a farm with reduced safeguards. Given the EPA study, why are these changes necessary at all?

Answer: Based on the information provided by the EPA as reflected by this question, I, too, would question the need for additional changes in the 2014 WRDA bill leading to further exemptions. Of course, it would also be useful to have additional data on the extent to which small discharges occur on farms and the "significant harm" that these discharges may cause, as well as what measures might be adopted and implemented to mitigate their impacts. Were additional data available regarding the extent to which small on-farm discharges occur and their impact to health, safety, and the environment, it would be much easier to address this question and further define the nature and extent to which exemptions should be granted. I assume, however, that this would be difficult to determine given the exemptions granted under current law that likely limit the data available to assess the extent and impacts of on-farm fuel spills. For these reasons, I would encourage the committee to proceed with caution in authorizing any further exemptions from the current safeguards required to protect against the risks for fuel spills without additional information regarding the nature, extent, and impacts of on-farm fuel spills.

Question 5: Mr. Lyons, last fall, I along with Senator Capito, Senator Carper, Senator Cardin, and 4 other Senators introduced a bill called the Chesapeake Bay Farm Bill Enhancements Act. Governors in the Chesapeake Bay Region, including MD Governor Hogan and DE Governor Carney support the bill, as do over 70 organizations like the Chesapeake Bay Foundation. This bill seeks to strengthen the Department of Agriculture's Regional Conservation Partnership Program (RCPP) through additional funding and technical assistance. Amongst other things, this program has been successful in bringing together conservationists and farmers to enhance their practices to reduce nutrient runoff into the Chesapeake Bay. Can you tell us more about how you have seen farmers and conservation partners working hand in hand to protect our environment through programs like the Regional Conservation Partnership Program?

Answer: The Regional Conservation Partnership Program (RCCP) provides an important means to encourage locally-led, collaborative conservation efforts to address important conservation concerns across the nation. Through financial and technical assistance offered under the RCCP by the Natural Resources Conservation Service (NRCS), agricultural producers, forest landowners, Indian tribes, and other private landowners can work together to achieve a wide range of conservation objectives through the coordinated use of the Agricultural Conservation Easement Program (ACEP), Environmental Quality Incentives Program(EQIP), Conservation Stewardship Program (CSP), and the Healthy Forests Reserve Program (HFRP).

Addressing the many environmental issues affecting the Chesapeake Bay requires a landscape-level, science-based collaborative approach involving federal and state agencies, private landowners, private non-profit conservation organizations, businesses, community leaders, and local conservationists. The RCCP was designed to encourage this kind of coordinated, collaborative approach to address environmental issues that transcend physical and political boundaries. It is the most effective and efficient way to leverage the technical and financial expertise needed to deal with regional issues and to tap into the diverse resources that all parties can bring to the table.

A landscape-level approach to coordinating the development and delivery of conservation programs has been employed in addressing many other conservation issues requiring a regional strategy and collective conservation effort. Examples include the effort to protect and restore threatened salmon runs in the Pacific Northwest, efforts to curb the expanding hypoxia zone in the Gulf of Mexico resulting from polluted runoff originating in the upper reaches of the Mississippi and Missouri watersheds, and the recent successful efforts avoid the need to list the Greater sage grouse as a threatened or endangered species in the sagebrush ecosystem covering eleven states from the Rocky Mountains to the Great Basin in Utah and Nevada. This same collaborative approach is being employed to reduce the risk of wildland fire in many western states and to protect the ecological integrity and rural economies of portions of the Northern Rockies. A great discussion of the value of a landscape-level approach to conservation, including regional examples of landscape conservation initiatives, can be found on the USDA Natural Resources Conservation Service website at: https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/initiatives/.

Partnerships, collaboration, and coordination at a landscape scale are essential to successful efforts to conserve America's great landscapes, wildlife, and other important natural resources and the rural and urban communities upon which they depend for food, fiber, water, outdoor recreation, and other resources. Through the RCCP, greater efficiency and effectiveness in developing and implementing conservation strategies to address regional conservation concerns such as improving the health of the Chesapeake Bay can be achieved. While this approach still requires individual landowners who volunteer to participate to implement specific conservation measures, through collaboration, coordination, and shared learning, the benefits of individual landowner conservation efforts can be enhanced and amplified. Continued investment in the RCCP and the technical and financial support that conservation programs implemented through the RCCP provide is essential if we are to make continued

progress in partnership with farmers, ranchers, forest landowners, American Indian tribes, and others in addressing regional conservation issues.

Senator BARRASSO. Well, thank you very much for your testimony. Thank you all.

We will now have a round of 5 minutes of questions, and I will defer my time to Senator Inhofe.

Senator INHOFE. Well, thank you, Mr. Chairman.

I was listening, Mr. Miyamoto, to your opening statement. I chaired this Committee for a number of years, and the one thing, particularly during the last Administration, as a general rule, the Democrats want more regulation, and they want that regulation to come from Washington, not from locally or from the States. I remember going over the WOTUS rule. That was at a time when, and I think, Mr. Yates, you will remember this, that was the No. 1 concern, I think, for the Farm Bureau at one time. This was the big issue.

Now, my State is an arid State, and we can just envision if the regulation that was put forth by the Obama administration had become a reality. It wouldn't be long until our panhandle would be a wetland, and we were fully aware of that. There would be another army of bureaucrats crawling all over our farms and ranches in Oklahoma.

So, anyway, that is the overall thing. And, by the way, there was one really good program, it was called the Partnership Program that came from Fish and Wildlife, and this happened actually in the last Administration, where they actually came out, in my case, before confirmation of the Fish and Wildlife Director, I said I want you to make two trips out to Oklahoma and talk about the partnership and the people who are the farmers and the ranchers on the ground; and they came back with the conclusion that they are just as concerned or more concerned than the bureaucracy here in Washington is on what they want to do with the land, and they were very impressed by the fact—and it just stands to reason, but a lot of bureaucrats don't understand this, if you own a piece of property, you want it to be clean, you want it to conform. This is to your financial and to your benefit.

Mr. Miyamoto, when I look at the list of regulations, I come to the conclusion that there is the idea in Washington that you have to have someone here looking out after your property because you are not going to do a good job yourself. You, yourself, acknowledge that some of these regulations targeted in the bill were of no environmental benefit, so it is unclear as to why would the opposition be opposition to them, other than loss of control. Unfortunately, it is our State partners that are then forced to comply with Federal mandates coming with no financial support, so it comes back to unfunded mandates.

So, I ask you the question can you speak to the burdens that you and your fellow State agencies face when Washington or the courts hand down unfunded mandates?

Mr. MIYAMOTO. Mr. Chairman, Senator, thank you for the question. The issue of unfunded mandates and delegated authority for State Departments of Agriculture is something that we have to think about frequently. We do carry out FIFRA regulations as a State Department of Agriculture in Wyoming, so this issue of pesticide regulation really does fall on the Department of Ag.

There are other examples of many other programs that we have delegated authority from the Federal Government to implement regulations in the State. As an example, within the Wyoming Department of Agriculture, we also undertake food safety measures from FDA and we have Federal Meat Inspection Act under the Food Safety Inspection Service, and we have to make sure that we can do a good job of carrying out our regulatory obligations.

So, when it comes to budgeting and unfunded mandates, we want to do a good job to carry out these Federal statutes in our State and uphold our end of the bargain, but it does become a challenge from time to time when there are so many of them. If they become duplicative, then it becomes impossible.

Senator INHOFE. And I really think that this bill addresses a long list of them, and I have taken the time, as other cosponsors have, of going over and analyzing each one.

I don't want to run out of time here. Mr. Yates, last week, in Senator Rounds' subcommittee hearing on the FARM Act, a colleague on the other side accused the Trump EPA of failing to provide farmers and ranchers with the guidance they need to comply with the recent court decisions that now requires ag industries to report to the EPA and the Coast Guard emissions from animal waste.

Your testimony states that there is no scientific consensus on how to measure these emissions, and it is worth noting that the Obama EPA believed that this information wasn't needed and defended the Bush era policy. So, since you believe there is not the scientific consensus, do you think the EPA would be able to develop the guidance that is really needed here?

Mr. YATES. Well, ultimately, that is something that livestock operators are going to need from the EPA and, to date, they have not been able to receive appropriate guidance that would give them the tools that they need to effectively measure those emissions on their livestock operation. I know there are a couple models that have been referenced. Texas A&M, I believe, and I believe there is another university that has developed a model.

Again, the application of those models to a particular livestock operation is inaccurate, at best, it is a guess, so I think if we are going to be requiring livestock operators to report these emissions, they need to have the tools and the guidance to be able to effectively measure what it is that they are being required to report.

Senator INHOFE. I think it is interesting that back during the Obama administration that is pretty much what their feeling was, too, at that time.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Inhofe.

Senator CARPER.

Senator CARPER. Before I ask a couple questions of our witnesses, I just want to note, if I could, Mr. Chairman and colleagues, for the record that during our hearing this morning, students across our Country are walking out of the classrooms for a brief while to mourn the loss of the victims of the Parkland shooting and to demand action to prevent gun violence in the future. I just want to acknowledge their efforts and to say that I share in solidarity with them.

First question I have for our witnesses, again, we appreciate you being here. Thank you very much for your testimony and for your willingness to stay on and answer some questions, and maybe even some questions for the record.

As you all know, and I think Mr. Lyons may have stated this, there is a longstanding tradition of bipartisan collaboration on Farm Bills and a lot of other agriculture legislation. I hope that this Committee and I hope that this Congress can uphold that tradition this year.

With that said, based on what you just heard from your colleagues, what are the areas where you see agreement among the three of you? What are the areas where you see agreement among the three of you, please.

Mr. Lyons, do you want to lead us off?

Mr. LYONS. I think, first of all, Senator Carper, we agree that reducing the burden on agriculture producers of data collection and providing information is important, but we do need data and information, so gathering that in the most efficient and effective way possible is important.

I agree with the concern about harassment and the desire to make sure that the information is managed properly to help achieve its intended purpose; to help improve programs, to help improve the operations of producers, to help reduce costs both for them and to the taxpayer.

And I would like to think that we all agree that we need to meet not only the objectives of benefiting producers, but we also have an obligation as a community to protect public health and safety and the environment, and that is certainly an important part of why these statutes exist.

Senator CARPER. All right, thank you.

Mr. Yates and Mr. Miyamoto, do you agree with anything he said?

Mr. YATES. For the record?

Senator CARPER. Yes.

Mr. YATES. For the record, Senator Carper, I am pleased to agree with Jim on the issues that he brought up. I think farmers and ranchers across the Country are the best stewards of our land and I think we want to work collectively within the regulatory fabric that we have to live and work in to produce the best results not only for farms and ranches, but for the environment. So, again, I would agree with Jim's comments on this.

Senator CARPER. Good. Would you like to add any other thoughts of your own about what are some other areas you might see for agreement?

Mr. YATES. Well, I think, across the board, farmers and ranchers, when we go out to the field, I know President Duvall was in a couple weeks ago at your least hearing on environmental regulation.

Senator CARPER. Zippy Duvall.

Mr. YATES. Zippy Duvall, yes, sir. He appreciated the commentary that you and he had at that hearing. But the No. 1 thing that we hear from our farmers is concerns over red tape and regulations, in addition to a number of other issues that keep farmers up at night, and I think this bill represents a good start at looking at identifying duplications of regulations and identifying opportuni-

ties to streamline those to ensure that the regulations are commonsense and they make the most sense for the folks that have to live and work under the guidance of those rules and regulations.

Senator CARPER. I quote my parents almost every day of my life, something that they said, words of wisdom that they imparted to my sister and me when we were kids growing up. My dad was famous for saying, "Just use some common sense" to my sister and me, and he said it a lot. He did not say it so kindly.

All right, Mr. Miyamoto. Just come back to what Jim has said and Ryan has said. Anything that you agree with that they have said and anything you would like to add, other possible areas of agreement? Go ahead.

Mr. MIYAMOTO. Thank you, Senator. From what I heard today, there is a lot more agreement than there is disagreement. If there was one thing that I could certainly identify specifically, it would be the CERCLA piece and addressing that. So you are aware, I think that the aspects that are approached in this bill that addressed duplicative regulations and then sometimes regulations aimed in the wrong direction is a good start for us and would help me do a better job at home to not only regulate the agricultural community, but also to advocate for it. Because I kind of have that dual role and take it very seriously.

Senator CARPER. All right, thank you.

I have about 15 seconds left. I am going to have some questions for the record. I wish I could give them in person, but we will submit those for the record. Again, we appreciate very much your presence today and your contributions. Thank you.

Senator BARRASSO. Thank you, Senator Carper.

Senator ERNST.

Senator ERNST. Thank you, Mr. Chair.

Thank you to our witnesses for being here today.

Mr. Miyamoto, I will start with you, Director. FIFRA established an effective and comprehensive regulatory——

Senator CARPER. Could I interrupt?

Senator ERNST. Oh, yes.

Senator CARPER. I apologize. I am going to go speak on the floor on the banking bill right now. I apologize.

But could I just ask unanimous consent to submit for the record—I have a unanimous consent request that somewhere in this pile right here, and I would ask permission to submit for the record.

And I apologize for interrupting you.

Senator BARRASSO. Without objection. And had you attended the University of Wyoming, you wouldn't have——

[Laughter.]

Senator CARPER. Let the record show I was wait-listed there.

[Laughter.]

Senator CARPER. As were our sons. They had to go to MIT and William & Mary.

[Laughter.]

Senator CARPER. Thank you. I apologize.

Senator ERNST. No, you're fine, Senator Carper.

OK, Director, we will start over again. As you know, FIFRA established an effective and comprehensive regulatory web to provide

pesticide-related environmental and public health protections, and this regulatory system is pretty darn rigorous in examining environmental data and health exposure assessments for pesticide products.

Because this process specifically examines a product's potential impact on water, additional permitting requirements under the Clean Water Act are duplicative. We have talked a little bit about duplication of effort, and this will significantly increase the cost for State permitting authorities and pesticide users.

So, we have already discussed the duplication of effort, the unfunded mandates, but if you could, could you please describe—let's go a little bit further into the weeds—the challenges that State Departments of Agriculture face when dealing with duplicative regulatory requirements, whether it is the costs associated with the paperwork shuffle, the timelines? Could you delve into that so that we know exactly what our State Departments of Ag go through?

Mr. MIYAMOTO. Mr. Chairman, Senator, thank you for the question. It is something that we struggle with. Initially, when the NPDES requirements for pesticide applications came to light, which was eight or 9 years ago now, we had to do a series of workshops around the State with all of our certified pesticide applicators to inform them of this process, and it was quite an undertaking.

It was a good collaboration; we used our State Department of Environmental Quality, EPA Region 8 was also represented. But there was a lot of training that went into how our applicators would become compliant with NPDES permitting requirements that were never aimed in that direction.

So, initially there was a whole bunch of education, and even now, as people get recertified for pesticide application, we have training elements that are part of our training program that informs them of all of the steps that they have to take to get their NPDES permits and what the liabilities associated with those permits are.

I think you quoted or you stated very eloquently that FIFRA handles the regulation of pesticides. We do that as a State Department of Agriculture, and, really, both NPDES and our regulation of pesticide applications boil down to the approved label by EPA. And if you follow that label that is attached to that product, you will be in compliance. Other than that, you are just shuffling paper.

Senator ERNST. Very good. And that is a concern, too, the duplication of effort. The costs associated with that, what is a ballpark figure, to be qualified, and might be to the State Department as well?

Mr. MIYAMOTO. Mr. Chairman, Senator, if it is OK with you, I will have to research that a little bit. I am unsure of what DEQ spends on their NPDES program specific to pesticides. I know for us, the training and certification program that we, as a State, put into our program, not Federal funds, but State funds, is about half a million dollars.

Senator ERNST. OK. And, bottom line, it boiled down to, you said, if they just follow the instructions on the label, correct?

Mr. MIYAMOTO. Correct.

Senator ERNST. Correct. OK.

And Director and Mr. Yates, both of your testimoneys made pretty compelling cases as to why the CERCLA reporting requirement is unnecessary and why Congress never intended for emergency air emissions to apply to day-to-day practices on ag operations. Do you think the documentation and process under CERCLA for reporting routine low-level animal manure emissions on a farm to the Coast Guard's National Response Center is the best use of Federal, State, and local tax dollars?

Mr. MIYAMOTO. Mr. Chairman, Senator, again, thank you for the question. When I hear the term Superfund, that brings a lot to mind, and the expense associated with cleanup of Superfund undoubtedly is expensive. I have no idea what those expenses might be.

But when it comes to CERCLA, I am quite certain that both EPA and the Coast Guard have better things to do with limited resources to address those sites that really are hazardous and a threat to human health. I don't even know how to begin to tell producers how to estimate emissions from an individual head of livestock, so not only do I think that it is not, the regulation, aimed in the right direction; I don't have anything to tell my producers about how to accurately comply. I can't ethically give them a formula that I think that they could defend.

Senator ERNST. Thank you.

Mr. Yates.

Mr. YATES. Certainly, I would be in agreement. I think EPA has recognized that low-level continuous emissions of ammonia and hydrogen sulfide from livestock are not releases that Congress intended to be regulated under CERCLA; and I think when you start looking at the numbers, the numbers that we have received over the last 8 years, the annual phone calls to the National Response Center have averaged about 28,000 reports a year for the last 8 years.

Looking at an additional 200,000 reports from farmers and ranchers, I don't think it is a great use of taxpayer dollars. Frankly, I think the NRC really should be focused on its true mission, and not receiving reports from farmers and ranchers trying to be in compliance with CERCLA.

Senator ERNST. Thank you very much. I struggle to understand how we would measure some of those emissions from the rancher and farmer standpoint, but also what exactly is the Coast Guard going to do when they respond? I don't think that is spelled out anywhere.

Anyway, thank you, Mr. Chairman.

Senator BARRASSO. Thank you very much, Senator Ernst.

Senator CARDIN.

Senator CARDIN. Thank you, Mr. Chairman.

Mr. Lyons, welcome. It is always nice to have a Marylander here, so I am glad to see you.

Mr. LYONS. Thank you, Senator.

Senator CARDIN. I appreciate your testimony. And I just really, first, want to underscore the point that you made about farmers and the importance to our environment that farmers understand, that has certainly been true in Maryland, recognizing that a clean environment is in their best interest and part of their responsi-

bility, as they see it, is to leave the land in better shape for the next generation, which includes the environment and clean water, et cetera, so I thank you for making that point.

I want to sort of delve into the pesticide issue and insecticides, and the impact on the Chesapeake Bay, impact on clean water. We have made a real commitment to clean up the Chesapeake Bay, and all stakeholders are part of the process, including our farmers. They practice the best practices in order to minimize the concerns of pollution getting into the Bay. We very much appreciate all the work that they do.

I want to talk about the FIFRA statute and its regulations as to whether it is duplicative of what EPA would be doing in regards to protecting our environment from insecticides, and get your view as to whether in fact this is duplicative or whether there is a different concern in regards to water quality.

Mr. LYONS. Well, thank you, Senator, for the opportunity to address that, and I want to thank you for your leadership particularly in helping to protect the Chesapeake Bay, in spite of efforts to cut funding for the important programs there, so really appreciate that.

I actually don't think that the duplication that is presented here between the Clean Water Act and FIFRA is completely accurate. FIFRA is designed to regulate the use and application of pesticides in general, and set standards, and certainly it sets standards for applications in relation to aqueous situations, in addition to land applications. But, really, the Clean Water Act serves a different purpose; it is really designed to protect our Nation's water quality by minimizing discharges of pesticides and other pollutants.

So, I think, particularly in a place like the Chesapeake Bay, where we have a high water table and much of the landscape is vulnerable to stormwater runoff and other impacts, that the provisions of the Clean Water Act and the requirements that are associated with it provide an added element of assurance that pesticides are not going to get into the waterways and have adverse impacts on those water bodies.

Senator CARDIN. I thank you for that because the FIFRA statute deals with labeling, deals with other issues and the Clean Water Act deals with the quality of water in our Nation, so they have different standards to judge the regulatory activities. And we know that farming activities is the largest single source of pollutants entering the Bay. It is not the largest increase that comes from runoff, but the largest single source is from farming, so, therefore, it is critically important we try to minimize the best that we can, and the Clean Water Act certainly has been important in doing that. Would you agree with that?

Mr. LYONS. Yes, I certainly do, Senator. I think it played an important role and I think we are seeing the benefits of that. I might mention, if I could actually put in the record, a recent Washington Post opinion by the editorial board, March 7th, that says why the Chesapeake Bay is the best in the world. It talks to the improvements that have been made over many years of effort to improving water quality and the health of the Chesapeake Bay, and I think it is a reflection of the fact that proper application of tools. I see

the Clean Water Act as a tool for addressing water quality concerns as well as other standards, is important.

Senator BARRASSO. Without objection.

[The referenced information follows:]

The Washington Post

The Post's View • Opinion

Why the Chesapeake Bay is the best in the world

Correction: *An earlier version of this editorial incorrectly reported that Chesapeake Bay "nutrient trading" was already taking place. Pollution trading is still in the planning stages in Maryland. This version has been updated.*

By Editorial Board March 7

NOT SO long ago, the Chesapeake Bay seemed unsaveable. Punished by years of population growth and polluted runoff, the bay's waters were murky. Crucial species were dying off, and oxygen had become so scarce that toxic "dead zones" proliferated. Because water flowed from so many states into the largest watershed on the Eastern Seaboard, an effective response was hard to imagine.

Yet now, nearly a decade after the federal government stepped in with a not-particularly-onerous conservation effort, the bay is rebounding in a record-setting way. "We provide conclusive evidence that reducing discharges of nitrogen, phosphorus and other pollutants into the bay has produced the largest resurgence of underwater grasses ever recorded anywhere," the authors of a new study write. "This success shows that coastal ecosystems are resilient and that concerted efforts to reduce nutrient pollution can result in substantial improvements."

The study reported that bay grasses have rebounded fourfold since 1984, including in areas that have not hosted submerged vegetation in years. Underwater grasses provide a crucial habitat for a wide range of aquatic life, from seahorses to snails. Maryland's famous blue crabs feed on the life that the grasses support.

The resurgence in underwater vegetation is just one benefit of the "pollution diet" the Environmental Protection Agency created for the bay's watershed, which includes six states and the District. By also altering urban surfaces to prevent excessive runoff and upgrading wastewater treatment plants, the plan has helped cut nitrogen pollution 23 percent and phosphorus pollution 8 percent. "Nutrients overfertilize the bay,

creating huge blooms of algae that die and deplete oxygen from the water," the authors explained. These nutrients also contribute to murkiness that blocks the sunlight grasses need.

Part of what makes the Chesapeake Bay program distinct from more traditional pollution control efforts is its proposed idea of "nutrient trading," a flexible approach to meeting the watershed's pollution diet. This allows, say, a wastewater plant that would have to spend a great deal of money complying with pollution limits to pay farmers to plant cover crops that reduce their nutrients instead. In this way, the easiest pollution reductions come first and the expensive ones are given more time.

President Trump has repeatedly insisted that he wants "crystal clear water." The Chesapeake Bay's cleanup program is beginning to produce just that, and it promises to demonstrate the value of efficient, market-based pollution controls, too. Yet Mr. Trump zeroed out the program in his budget. Thankfully, Congress appears poised to maintain funding.

Notwithstanding its recent progress, the bay still suffers from significant oxygen-depleted dead zones, excessive nitrogen runoff and other problems. Farm pollution from fertilizer and manure continues to be a major challenge. A sustained federal commitment is essential.

Read more:

The Post's View: The Trump administration's attack on the Chesapeake Bay

Steve Kline: The Trump administration's dismal forecast for the Chesapeake Bay

Brian E. Frosh, Mark R. Herring and Karl A. Racine: A poison pill for the Chesapeake Bay

Letters to the Editor: It's about autonomy, not thwarting progress on the Chesapeake Bay

The Post's View: Don't ignore a major threat to the Chesapeake Bay

12 Comments

Senator CARDIN. Always appreciate the opportunity of including the Chesapeake Bay in our record.

Let me ask you one last question, which sometimes the reason for trying to get an exemption from the Clean Water Act deals with emergency situations where you have urgent issues that need to be dealt with quickly because of the health concerns that are brought about by some insects or invasions, things like that.

Do you see the Clean Water Act regulations and the current applications of the law inconsistent with emergency response?

Mr. LYONS. No, absolutely not, Senator. In fact, EPA developed a program to deal with emergency situations. I mean, zika would be a great example of that. Under those circumstances, an applicator can perform its pest control activities without having to wait for EPA approval for the application, so there is no inconsistency there.

Senator CARDIN. Thank you.

Appreciate it, Mr. Chairman.

Senator BARRASSO. Senator Fischer.

Senator FISCHER. Thank you, Mr. Chairman. I thank you for calling this hearing today and I appreciate all of the witnesses coming to share your time and your expertise with us on these important issues.

This bill encompasses a variety of priorities that I and many members of this Committee have labored over for, in some cases, many years, and I am glad to see the Committee recognizes that these commonsense solutions do need to move forward.

The ACRE Act represents relief for ag producers from burdensome regulations, relief from regulations that do not offer more environmental protection and relief from regulations that have become duplicative and unnecessarily tie the hands of our producers.

I am especially pleased to see included in this legislation policies that I have championed in this Committee for many years, and this includes addressing what I believe is a duplicative permitting of pesticides under FIFRA and the Clean Water Act. I would remind my colleagues that this is an issue I agreed with the Obama administration's EPA on, and it continues to be a concern in farm country.

Additionally, the ACRE Act also includes my legislation to provide regulatory relief for farmers and ranchers with above-ground, on-farm fuel storage. Intended for major oil refineries, the Spill Prevention, Control, and Countermeasure, or the SPCC, Rule would affect the amount of fuel producers can store on their land. And I certainly appreciate that the last WRDA bill included flexibility for producers, but more does need to be done.

Finally, the ACRE Act includes the Fair Agricultural Reporting Method, or the FARM Act, which would provide greater certainty for ag producers by eliminating the burdensome reporting requirements for animal waste emissions under CERCLA.

As of this morning, there are 37 cosponsors, Democrats and Republicans, on this stand-alone legislation. Our farm and ranch communities are in tough economic climates, and this bill before us does cut through the cumbersome red tape and enables our ag producers to continue to support their families and also to feed this hungry world.

Director, it is my understanding that reporting animal waste emissions under CERCLA provides no environmental benefit. Do you agree with that?

Mr. MIYAMOTO. Mr. Chairman, Senator, I do. We have operated regulatory frameworks for agriculture for quite some time now. The Clean Air Act is available to address air quality concerns. CERCLA was never a part of this until very recently, and the simple act of reporting does nothing to address any environmental concern.

Senator FISCHER. Thank you. Can you please explain to the Committee the current regulatory framework livestock producers must comply under, and specifically under the bill before us, the ACRE Act and, subsequently, the FARM Act, do certain providers still have to comply with EPCRA reporting requirements?

Mr. MIYAMOTO. Mr. Chairman, Senator, they do. In confined animal feeding operations, they would still have a duty to report under EPCRA and comply with the regulatory requirements there.

Senator FISCHER. So, just to be clear, producers and our large animal feeding operations, they still must comply with EPCRA, the Clean Water Act, and State regulations?

Mr. MIYAMOTO. Mr. Chairman, Senator, that is correct.

Senator FISCHER. Thank you.

Director, in your testimony, you discuss the duplicative permitting process of pesticides under FIFRA and the Clean Water Act, and this process creates unnecessary resource burdens and challenges for pesticides, registrants, and users, including the agriculture community. This is why I have cosponsored legislation that would clarify the intent of the law and eliminate the Clean Water Act permit requirement. Can you please speak to the impact on farmers that are subjected to acquire a Clean Water Act permit?

Mr. MIYAMOTO. Mr. Chairman, Senator, again, thank you for the question. I can speak to that to a degree. We have been operating our pesticide application regulatory program in conjunction with NPDES since 2009 or 2010, and it has just required a whole bunch more training. In that entire amount of time, I do not believe that our State partners at the Department of Environmental Quality have regulated pesticide applicators under NPDES permit requirements, meaning I don't think they have taken regulatory action against any of those applicators.

We, on the other hand, have taken regulatory action against applicators that are not following the appropriate label. So, in essence, what it has become for us is just an exercise that we go through; make sure that you have your certified pesticide applicator's license, make sure that you are in line with either your major or minor NPDES pesticide general permit, make sure you have everything in order, and then go out and do your work. But when it comes to the regulation, FIFRA and the Department of Ag is where that resides.

Senator FISCHER. Thank you, sir.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Fischer.

I am going to ask unanimous consent to enter for the record a number of letters of support and written testimony from groups who support various elements of the ACRE Act, including the National Agriculture Aviation Association, Wyoming Stock Growers

Association, Agriculture Retailers Association, American Mosquito Control Association, National Pest Management Association, which includes more than 7,000 member companies.

Without objection, they are admitted to the record.

[The referenced information follows:]

April 5, 2018

The Honorable John Barrasso
Chairman Senate Committee
on Environment & Public Works
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tom Carper
Ranking Member Senate Committee
on Environment & Public Works
456 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper,

On behalf of the undersigned organizations, we would like to convey our support for critical provisions within the *Agriculture Creates Real Employment* "ACRE" Act, relating to duplicative environmental permitting under the National Pollutant Discharge Elimination System (NPDES). This vital measure affects our nation's farmers and ranchers, environmental resources, and the protection of public health.

As you are aware, for almost forty years, the Environmental Protection Agency (EPA) and pesticide applicators operated exclusively under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) with pesticides reviewed and regulated for use with strict instructions on the EPA approved product label, reflecting a thorough EPA review and accounting of impacts to water quality and aquatic species.

The ACRE Act would address a 2009 court ruling mandating Clean Water Act NPDES permits for pesticide applications already regulated by FIFRA for water quality and aquatic effects. As such, Section 6 of the ACRE Act prohibits the EPA from requiring such additional permits under NPDES for a pesticide application from a point source, as long as the application is already approved under FIFRA.

As the Director of the Wyoming Department of Agriculture noted at the March 14 Committee on Environment & Public Works March 14 hearing, "*After experiencing pesticide regulation under FIFRA alone compared to regulation under FIFRA with the additional requirements of the NPDES program, it is clear that the NPDES program adds nothing for environmental protection... Pesticides are effectively regulated at every step from formulation to on-the-ground application by FIFRA.*"

While the NPDES pesticide general permit burden lacks any meaningful environmental benefit, it does impose costs on thousands of small pesticide applicator businesses and farms, as well as the municipal, county, state and federal agencies responsible for protecting natural resources and public health. This was noted by representatives of the American Farm Bureau Federation who testified at the March 14 hearing stating that *"The general permits are now in place for over 360,000 new permittees brought within the purview of EPA's NPDES program. This program carries significant regulatory and administrative burdens for states and the regulated community beyond merely developing and then issuing permits.*" For example, in Wyoming alone, permit requirements have redirected up to 5 % of Mosquito District funds annually from their public health mission, and costs for applications have increased 5 to 10-fold for some Districts.

Furthermore, the NPDES permitting processes may impact or delay treatments in situations involving communities adversely impacted by acute or sporadic outbreaks of mosquitoes. NPDES processes would hinder those areas from initiating a timely response to effectively protect the public's health and welfare in situations in which there is no officially declared public health emergency.

In summary, the current NPDES general pesticide permit program adversely impacts the use of critical pesticides in protecting human health and the food supply from destructive and disease-carrying pests, and in managing invasive weeds to keep open waterways and shipping lanes, to maintain rights of way for transportation and power generation, and in preventing damage to forests and recreation areas.

The time and funds expended on redundant permit compliance drains public and private resources while providing no measurable benefit to the environment.

In an effort to address unnecessary, duplicative regulations and provide certainty to impacted natural resources, public health, and our nation's farmers and ranchers, we strongly endorse these NPDES provisions within the *Agriculture Creates Real Employment* "ACRE" Act. We look forward to the Committee's timely approval of this measure so it may be favorably acted on by the U.S. Senate. Thank you for your consideration.

Sincerely,

Agricultural Retailers Association
American Farm Bureau Federation
American Mosquito Control Association
American Soybean Association
Aquatic Plant Management Society
Associated Executives of Mosquito Control (NJ)
Association of Equipment Manufacturers
California Specialty Crops Council
CropLife America
Council of Producers and Distributors of Agrotechnology
Dairy Producers of New Mexico
Delaware Mosquito Control Section
Exotic Wildlife Association
Georgia Mosquito Control Association
Golf Course Superintendents Association of America
Idaho Mosquito and Vector Control Association
Illinois Mosquito & Vector Control Association
Louisiana Mosquito Control Association
Montana Mosquito and Vector Control Association
Mosquito & Vector Control Association of CA
National Alliance of Forest Owners
National Alliance of Independent Crop Consultants (NAICC)
National Association of Landscape Professionals
National Association of Wheat Growers
National Agricultural Aviation Association
National Cotton Council
National Corn Growers Association
National Council of Farmer Cooperatives
National Onion Association
National Pest Management Association
National Potato Council
National Sorghum Producers.
New Jersey Mosquito Control Association
North Carolina Mosquito and Vector Control Association
North Central Weed Science Society
Northeastern Mosquito Control Association
Northeastern Weed Science Society
Northwest Mosquito and Vector Control Association
Ohio Mosquito & Vector Control Association
Oregon Mosquito and Vector Control Association
Pennsylvania Vector Control Association
Professional Dairy Managers of Pennsylvania
Responsible Industry for a Sound Environment (RISE)
Southern Weed Science Society
Texas Mosquito Control Association
Upstate Niagara Cooperative, Inc.
USA Rice
USApple Association
Utah County Mosquito Abatement
Washington State Potato Commission
Weed Science Society of America
Western Society of Weed Science
Wyoming Mosquito Management Association

Mosquito Abatement Districts

Ada County Mosquito Abatement (ID)

Adams County Mosquito Control (WA)

Alameda County Mosquito Abatement District (CA)

Alamosa Mosquito Control District (CO)

Anastasia Mosquito Control District (FL)

Animas Mosquito Control District (CO)

Antelope Valley Mosquito & Vector Control District (CA)

Ascension Parish Mosquito Control (LA)

Atlantic County Office of Mosquito Control (NJ)

Bannock County Mosquito and Vector Control Assoc. (ID)

Bay County Mosquito Control (MI)

Beach Mosquito Control District (FL)

Bear Lake Mosquito Control, LLC (ID)

Benton County Mosquito Control District, (WA)

Bergen County Mosquito Control New Jersey

Box Elder Mosquito Abatement District (UT)

Burney Basin Mosquito Abatement District (CA)

Butte County Mosquito and Vector Control District (CA)

Cache Mosquito Abatement District (UT)

Caddo Parish Mosquito Control (LA)

Calvert County Mosquito Control (MD)

Camano Island Mosquito Control (WA)

Camden County Mosquito Extermination Commission (NJ)

Cameron Parish Mosquito Abatement District (LA)

Canyon County Mosquito Abatement District (ID)

Cascade County Weed & Mosquito Division (MT)

Chambers County Mosquito Control (TX)

Charlotte County Mosquito & Aquatic Weed Control (FL)

Chatham County Mosquito Control (GA)

Churchill County Mosquito, Vector and Noxious Weed Abatement District (NV)

Clark County Mosquito Control District (WA)

Coachella Valley Mosquito & Vector Control District (CA)

Colusa Mosquito Abatement District (CA)

Compton Creek Mosquito Abatement District (CA)

Consolidated Mosquito Abatement District (CA)

Contra Costa Mosquito and Vector Control District (CA)

Cumberland County Mosquito Control Division (NJ)

Curlew Mosquito Control District (WA)

Douglas County Mosquito Abatement District (NV)

East Side Mosquito Abatement District (CA)

Edwards Mosquito Abatement District (ID)

Essex County Mosquito Control (NJ)

Florida Keys Mosquito Control District (FL)

Fort Henry Mosquito Abatement District (ID)

Franklin County Mosquito Control District (WA)

Fresno Mosquito and Vector Control District (CA)

Gainesville Mosquito Control (FL)

Gem County Mosquito Abatement District (ID)

Glenn County Mosquito & Vector Control District (CA)

Gloucester County Mosquito Control (NJ)

Grand River Mosquito Control District (CO)

Grant County Mosquito Control District (NJ)

Hill County Weed & Mosquito District, Montana (MT)

Iberia Parish Mosquito Abatement District (LA)

Indian River Mosquito Control District (FL)

Kings Mosquito Abatement District (CA)

Lee County Mosquito Control District (FL)

Madera County Mosquito & Vector Control District (CA)

Manatee County Mosquito Control District (FL)

Marin/Sonoma Mosquito & Vector Control District (CA)

Mason Valley Mosquito Abatement District (NV)

Master Mosquito Control, LLC (NH)

Merced County Mosquito Abatement District (CA)

Mercer County Mosquito Control (NJ)

Metropolitan Mosquito Control District (MN)

Miami Dade County Mosquito Control (FL)

Michigan Mosquito Control Association (MI)

Middlesex County Mosquito Extermination Comm. (NJ)

Mosquito Control Services, LLC (LA)

Municipal Mosquito (TX)

Napa County Mosquito Abatement District (CA)

Nassau County Mosquito Control Unit (NY)

North Shore Mosquito Abatement District (IL)

Northern Salinas Valley Mosquito Abatement District (CA)

Ouachita Parish Mosquito Abatement District (LA)

Orange County Mosquito & Vector Control District (CA)

Orange County Florida Mosquito Control (FL)

Owens Valley Mosquito Abatement Program (CA)

Pasco County Mosquito Control District (FL)

Pine Grove Mosquito Abatement District (CA)

Placer Mosquito and Vector Control District (CA)

Prince William Mosquito Forest Pest Management (VA)

Sacramento County -Yolo County Mosquito & Vector Control District (CA)

Saginaw County Mosquito Abatement Commission (MI)

Salt Lake City Mosquito Abatement District (UT)

San Gabriel Valley Mosquito & Vector Control Dist. (CA)

San Joaquin County Mosquito & Vector Control Dist. (CA)

San Mateo County Mosquito & Vector Control Dist. (CA)

Shasta Mosquito and Vector Control District (CA)

South Salt Lake Valley Mosquito Abatement District (UT)

South Walton County Mosquito Control District (FL)

SouthLake Mosquito Abatement District (IL)

Southwest Mosquito Abatement & Control District (UT)

St. Tammany Parish Mosquito Abatement (LA)

Sussex County Office of Mosquito Control (NJ)

Sutter-Yuba Mosquito & Vector Control District (CA)

Tehama County Mosquito & Vector Control District (CA)

Tulare Mosquito Abatement District (CA)

Turlock Mosquito Abatement District (CA)

Uintah Mosquito Abatement District (UT)

Vermilion Parish Mosquito Control (LA)

Warren County Mosquito Extermination Commission (NJ)

Weber Mosquito Abatement District (Ogden, Utah)

West Baton Rouge Mosquito Control (LA)

West Side Mosquito & Vector Control District (CA)

West Umatilla Mosquito Control District (OR)

Yakima County Mosquito Control District (WA)

March 13, 2018

RE: More than 50 Organizations Oppose the "Agriculture Creates Real Employment (ACRE) Act"

Dear Chairman Barrasso and Ranking Member Carper,

Our organizations, along with the millions of members and supporters we represent, write to register our strong opposition to the so-called "Agriculture Creates Real Employment (ACRE) Act". This package of damaging bills would not support small farmers. Instead, it is an obvious giveaway to wealthy agribusinesses and other large corporations at the expense of the health of nearby communities, important environmental safeguards, and imperiled species. The ACRE Act's provisions are individually and collectively dangerous. Many drew strong opposition when they were introduced in the past, just as they do now. Not every organization signed on to this letter has worked on nor has a position on each of these sections, but we are all opposed to the overall package.

Specifically, this bill includes the following harmful provisions:

Section 3 exempts even the largest industrial animal production facilities from reporting enormous amounts dangerous substances, such as ammonia and hydrogen sulfide, under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Other industrial facilities must report these emissions. CERCLA requires industrial sources of harmful air pollution to report their emissions when threshold amounts are reached. This exemption makes no sense when these harmful substances have the same effect on human health, whether emitted from an industrial livestock operation or some other large facility.

Section 4 exempts sea urchins and sea cucumbers from export licensing requirements under the Endangered Species Act (ESA). This would undermine the U.S. Fish and Wildlife Service's efforts to monitor and ensure that these species are not overexploited and would hamper the Service's ability to enforce reporting requirements under the Convention on International Trade in Endangered Species (CITES). At a time when the United States must continue to represent the gold standard for fulfilling this vital treaty, this amendment threatens to severely handicap our ability to monitor trade in highly coveted ocean species.

Section 5 alters the rules for the baiting of migratory birds to reduce liability that can result from certain agricultural practices such as mowing, discing, or rolling fields. In conjunction with hunting on these fields, these practices can be considered baiting under current rules. Any conflict or uncertainty surrounding agricultural practices and hunting should be addressed in a way that does not risk subverting longstanding efforts to control unlawful baiting and advance migratory bird conservation.

Section 6 would gut important Clean Water Act safeguards that protect our streams, rivers, and lakes from excessive pesticide pollution. This "Poison Our Waters" provision would allow pesticides to be sprayed into water bodies without any meaningful oversight due to the fact that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not require tracking of such pesticide spraying. There is no need to change these existing, commonsense Clean Water Act protections

because the system has been working well since the safeguards were put in place six years ago and alarmist predictions from pesticides manufacturers have failed to bear any fruit.

Section 7 bars the U.S. Environmental Protection Agency (EPA) from sharing basic information about large-scale industrial agricultural operations that generate significant loads of pollution. The bill would attempt to conceal information about waste management and facilities' proximity to waterways, making it difficult for states and their residents to understand where health-harming pollution is coming from. The bill's new secrecy provision would require EPA to hide already publicly available information that is vital for protecting the surrounding communities against environmental hazards. Large livestock facilities generate an enormous amount of waste – sometimes as much waste as an entire city. The waste, which may contaminate nearby waters, contains bacteria and viruses, pharmaceuticals, and nitrogen and phosphorus that can cause oxygen-depleting and toxic algal outbreaks. The public has a right to know if these threats are lurking in the waters on which we depend.

Section 8 bars the EPA from using a readily-available and cost-effective method (aerial surveillance) to investigate pollution discharges that violate health-and-safety related pollution controls, unless EPA first obtains a federal court order or permission from the facility. There is no reason to believe that aerial photography is unreliable evidence that operations are violating their clean water obligations. The bill's sweeping language is so broad, it could even prevent EPA enforcement staff from using Google Maps' satellite photos to look for huge livestock factories that are polluting nearby waterways and fail to obtain proper permits for their discharge. This will increase burdens on the courts, hinder enforcement, and make it easier for large-scale industrial agricultural operations to pollute waters with impunity.

Section 9 aims to reinstate a depredation order for Double-crested Cormorants, a native fish-eating bird, overriding a federal court ruling that revoked the order due to a lack of proper environmental review. The order, in effect since 1998 for thirteen states, allowed for broad takes of cormorants through lethal culls in fish farms and hatcheries without a permit. The U.S. Fish and Wildlife Service extended the order every five years, but without monitoring the status of cormorants or seriously considering updated scientific information and environmental impacts.

Section 10 would make it even more difficult for the EPA to enforce oil spill prevention and response requirements on large-scale industrial agriculture operations. The Clean Water Act requires EPA to establish rules specifying the steps that many facilities must take to prevent and respond to oil spills. And under current regulations, farms are already treated more leniently than other industrial operations. For instance, farms are allowed to handle more oil than other facilities before having to comply with EPA's precautionary rules even though farms are not inherently safer than other facilities. And there is also no evidence that oil spilled by farms is somehow less damaging to human health and the environment than oil spilled by other polluters. Yet this provision ignores the findings of a congressionally-mandated study and would enable even larger agricultural operations to qualify for an exemption from the protections against oil spills that other facilities must follow. This wholly irresponsible provision will undoubtedly lead to more oil spills in our waterways.

Section 11 seemingly seeks to give the U.S. Fish and Wildlife Service (FWS) a new legal obligation to expedite taking permits requested by the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) for eagles, migratory birds, and other "nuisance species". This could require FWS to prioritize facilitating APHIS's lethal response requests over FWS's other conservation duties including advancing wildlife conflict avoidance measures and wildlife conservation.

Instead of actually helping farmers and farming communities, this bill would make it easier for industrial agriculture operations and others to ignore laws meant to protect communities and the environment from the toxic pollution and contamination. We strongly urge the committee to reject this legislation.

Thank you for your consideration.

Sincerely,

NATIONAL ORGANIZATIONS:
Natural Resources Defense Council
Earthjustice
League of Conservation Voters
Sierra Club
Alliance of Nurses for Healthy Environments
National Latino Farmers & Ranchers Trade Association
Hip Hop Caucus
Waterkeeper Alliance
Clean Water Action
National Audubon Society
Endangered Species Coalition
American Bird Conservancy
Power Shift Network
Center for Biological Diversity
Natural Heritage Institute
Friends of the Earth
Born Free USA
Wolf Conservation Center
Save EPA
Animal Welfare Institute

REGIONAL ORGANIZATIONS:
Endangered Habitats League
Southern Environmental Law Center
Gulf Restoration Network
WildEarth Guardians
League of Women Voters Upper Mississippi River Region Interleague Organization (ILO)
Western Watersheds Project
Maryland Latino Farmers & Ranchers Trade Association

Bluestem Communications
Save the Manatee Club

STATE-BASED ORGANIZATIONS (listed by state):
Cahaba River Society – Alabama
Environmental Protection Information Center – California
Klamath Forest Alliance – California
Turtle Island Restoration Network – California
Endangered Habitats League – California
Delaware Ecumenical Council on Children and Families – Delaware
Prairie Rivers Network – Illinois
Illinois Stewardship Alliance – Illinois
The Land Connection – Illinois
Illinois Council of Trout Unlimited – Illinois
Kentucky Waterways Alliance – Kentucky
Passaic River Coalition – New Jersey
Save The River / Upper St. Lawrence Riverkeeper – New York
WE ACT for Environmental Justice – New York
Pennsylvania Council of Churches – Pennsylvania
Tennessee Clean Water Network – Tennessee
TN Environmental Council – Tennessee
Puget Soundkeeper – Washington
OVEC-Ohio Valley Environmental Coalition – West Virginia
Friends of Blackwater, Inc. – West Virginia

WYOMING STOCK GROWERS ASSOCIATION
Guardian of Wyoming's Cow Country since 1872

President- Dennis Sun, *Casper*
First Vice President- Scott Sims, *McFadden*
Region I Vice President- JD Hill, *Ranchester*
Region II Vice President- Steve Paisley, *Wheatland*
Region III Vice President- Mantha Philips, *Casper*
Region IV Vice President- Brad Mead, *Jackson*
Region V Vice President- Reg Philips, *Dubois*
Executive Vice President- Jim Magagna, *Cheyenne*
Young Producers Assembly- Kendall Roberts, *Cheyenne*

March 10, 2018

TO: Senator John Barrasso, Chairman
Senator Thomas Carper, Ranking Member
Senate Committee on Environment & Public Works

FROM: Jim Magagna, Executive Vice President, Wyoming Stock Growers Association

RE: Agriculture Creates Real Employment Act (ACRE)

TESTIMONY

Chairman Barrasso, Ranking Member Carper and Members of the EPW Committee:

The Wyoming Stock Growers Association (WSGA) appreciates this opportunity to provide testimony on the Agriculture Creates Real Employment Act. WSGA is generally supportive of all sections of the bill. However, we will focus our testimony on Section 3 (CERCLA), Section 10 (SPCC) and Section 11 (Predatory Animals) as these three Sections have the greatest impact on Wyoming ranchers and the most urgent need for Congressional action.

WSGA, with a current membership of over 1100, has represented the livestock industry in the state since 1872. Throughout our history we have responded to both major events impacting the ranching industry while seizing upon opportunities to enhance the economy and sustainability of our producers. While historically weather and cattle rustling may have been the greatest threats faced by our members, today our most pervasive threat is excessive government regulation.

SECTION 3. Exemption from Certain Notice Requirements and Penalties.

This Section would release the Environmental Protection Agency (EPA) from the current Court mandate making continuous emissions reporting requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) applicable to releases of animal waste from our farms and ranches.

When Congress enacted CERCLA in 1980, it clearly did not intend for family farms to be treated as hazardous waste cleanup sites. CERCLA was enacted to provide for cleanup of severe industrial chemical toxic waste dumps and spills, like oil spills and chemical tank explosions. With this in mind, in 2008, the EPA finalized a rule to exempt most agricultural operations from CERCLA reporting, recognizing that low-level continuous emissions of ammonia and hydrogen sulfide from livestock are not "releases" that Congress intended to regulate. Moreover, upon

being sued in 2009, the Obama Administration spent eight years defending this Bush-era exemption.

However, in April 2017, the D.C. Circuit Court vacated EPA's 2008 exemption, concluding that the statutes are unambiguous and that EPA did not have the authority to issue the exemption rule. Since that time, we have had to rely on the Court for delay in issuing a final Order to preclude the immediate need for filings.

By one suggested measure, this continuous reporting requirement would apply to all livestock operations involving two hundred six (206) or more head of cattle. This standard would incorporate the vast majority of commercial livestock operations in Wyoming. As you would clearly understand Mr. Chairman, the task of measuring the toxic release from hundreds of cattle dispersed across thousands of acres on the typical Wyoming ranch defies reality.

In addition, given the diverse patterns of private state and federal land ownership, the pasturing of non-owned livestock on leased or permitted lands and the intermingling of livestock ownership on common allotments, there is real question as to which entity is responsible for the reporting. To date, EPA has been unable to answer that question for us.

Congressional relief from the application of CERCLA as provided for in Senator Fisher's S 2421 and the ACRE Act is of the utmost urgency. We are currently at the mercy of the willingness of the Court to continue to delay issuance of a final order.

SECTION 10. Applicability of Spill Prevention, Control and Counter Measure Rule

In our sparsely populated state, farm and ranch sites necessitating on-site fuel storage are often based in locations at great distances from fuel sources. Our members are dependent on being able to store adequate fuel supplies. While a few ranches have large underground storage capacities, most rely on above ground storage in 500 or 1000 gallon tanks. Several such tanks are often co-located in order to make it economical for fuel suppliers to deliver to these distant operations.

Our industry has been dealing with this issue since 2002. While the Water Resources Reform and Development Act of 2014 provided significant relief from costly requirement for certification by a professional engineer, allowing self-certification for many storage facilities, remaining requirements are still disproportionate to the risks of a spill in many rural areas.

SECTION 11. Predatory and other Wild Animals

Current practices and policies of the FWS and APHIS regarding the issuance of permits for removal or harassment of avian species have become increasingly burdensome for livestock managers. Two particular examples illustrate the challenges that we face.

It was a long-standing practice for APHIS Wildlife Services to obtain a permit for the harassment of eagles interfering with livestock operations in semi-confinement situations. APHIS-WS would then authorize individual ranchers to conduct necessary harassment activities under this permit. Within the past year Wildlife Services has advised us that they are no longer willing to authorize private parties to undertake actions under such permits due to the liability that this imposes on WS. They have suggested that private entities such as WSGA apply directly to FWS for a permit and become liable for any actions taken by our members who are authorized to operate under our permits. I can only describe this to you as "passing the buck." This is not an acceptable solution to addressing this pressing issue.

A second example involves the taking of ravens. These abundant avian predators are one of the major threats to our western sage-grouse populations. They are often also a significant predator on small lambs. Currently, FWS permits limited takes in Wyoming under a permit to Wildlife Services. In 2015 the Wyoming Game & Fish Department submitted a request to FWS to liberalize the take of ravens. Specifically, the G&F requested consideration of "allowing the public to handle common raven damage/depredation on private land without the need for a permit". The G&F further expressed interest in a sport hunting season for ravens similar to the sport hunting season for crows and blackbirds.

The FWS responded to our G&F over a year later. They indicated that adding ravens to the crow depredation order would require formal rule-making and NEPA analysis. WSGA and other western states have requested that FWS and APHIS-WS jointly undertake the preparation of an EIS for such authorization. There has been no action on this request.

WSGA thanks you for your commitment to addressing these issues. We stand ready to assist you in moving appropriate legislation through the ACRE act or any other vehicle.

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March 6, 2018

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Pruitt:

PMI Board of Directors

Peter Jahrling
Sloan Valve Company
President

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LSP

Todd Teter
Moen, Incorporated

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Lavelle Industries, Inc.

Imants Stiebris
Speakman Company

On behalf of Plumbing Manufacturers International (PMI), I am writing to urge you to continue to maintain and support the U.S. Environmental Protection Agency's highly successful **WaterSense® program**, a voluntary, public-private partnership that encourages voluntary reduction of water consumption by consumers and businesses. We were disappointed that the President's recent Fiscal Year 2019 budget calls for the program's elimination.

EPA's **WaterSense® program** is an example of an effective collaboration between industry and the government in determining voluntary water efficient performance measures that can be used by consumers, industry, as well as states and local governments, and it is not duplicated by any other organization, private or public. It is universally supported by manufacturers and the public and private agencies charged with supplying water to American households and businesses.

Plumbing products bearing the WaterSense label are 20 percent more water-efficient than standard products; provide measurable water savings results; and require independent, third-party certification. Over the past decade, WaterSense products have helped consumers save a cumulative 2.1 trillion gallons of water and over $14.2 billion in water and energy bills by using WaterSense-labeled products. The WaterSense label is critical to consumers seeking to identify and purchase a water-efficient plumbing product.

PMI is the nation's leading trade association for plumbing product manufacturers. Its members produce 90 percent of the plumbing products sold in the United States and employ thousands of workers in over 70 locations in 25 states. Our member companies' plumbing products are found in the majority of homes, commercial buildings, schools, restaurants, manufacturing facilities, hospitals, and hotels across the nation. Examples of these products include, but are not limited to showerheads, kitchen and bathroom faucets, toilets, urinals, fixture fittings, sinks, tubs, and waste disposal systems. PMI member companies design and produce water-efficient products, without sacrificing performance, and continue to raise the bar in developing the most advanced water-efficient plumbing products.

WaterSense Provides Benefits to Manufacturers and Consumers

PMI and its members have proudly participated in the WaterSense program since its inception, when it was created during the George W. Bush Administration 2006. As a

result of the program, plumbing manufacturers have developed more than 20,000 models of WaterSense-labeled products for bathrooms (toilets, showerheads, faucets, and urinals) and commercial kitchens. Today, more than 1,700 WaterSense partners, including manufacturers, water utilities, building groups, retailers, associations, and communities, collaborate with EPA to make this program successful.

EPA's Role is Critical to WaterSense's Success

- The WaterSense program has created a new water efficiency benchmark for plumbing products that has allowed our members to confidently invest millions of dollars in product development and marketing initiatives, knowing that there will be a market for these products.
- The continued existence of the WaterSense program will continue to help create markets for future generations of water-efficient products and market opportunities for manufacturing and retail partners.
- Rather than having local officials make their own determination on the maximum amount of water used per flush by toilets and urinals and water used per minute by faucets and showerheads, WaterSense provides the national specifications agreed to by industry and guaranteed by the federal government. This has helped prevent states and municipalities from creating their own patchwork of new specifications that manufacturers and other industry stakeholders would have to meet, which would add to the costs of implementing and complying with such efforts.
- WaterSense serves as a de facto **voluntary** national standard that has allowed states to adopt more water efficient standards and be assured that there are products already available in the marketplace.
- Without the EPA in charge, there would be no national organization to oversee the use of the label that ensures consumers and builders that they're getting a product that works.

WaterSense Enjoys Broad, Bipartisan Congressional Support

The strong congressional support for EPA's WaterSense program is underscored by recent actions taken by the House and Senate Interior/EPA Appropriations subcommittees. Both chambers included the following FY18 appropriations report language rejecting the elimination of this important program:

- Senate report: "*The Committee rejects the proposed elimination of the WaterSense program, and provides not less than the fiscal year 2017 level.*" Dept. of the Interior, Environment, and Related Agencies Senate Appropriations Bill.
- House report: "*The Committee...rejects the proposed elimination of the WaterSense program.*" H. Rep. 115-238 - Dept. of the Interior, Environment, and Related Agencies Appropriations Bill.

We look forward to meeting with you and your staff to discuss this program. In addition, our members would welcome the opportunity to host you at their facilities to see first-hand the ongoing technology research and development, as well as production of thousands of innovative, highly engineered plumbing products.

PMI believes the WaterSense program is one of the most cost-effective nationwide programs geared toward saving money and protecting water resources. Its track record is impressive in promoting successful partnerships between public and private entities that protect and improve our nation's water resources. We urge you to preserve and fund the widely supported WaterSense program in FY19 and beyond.

In the meantime, if you have any questions or need additional information, please contact me or Stephanie Salmon in the PMI Washington Office at ssalmondc@gmail.com or 202-452-7135.

Sincerely,

Kerry Stackpole, FASAE CAE
CEO/Executive Director
Plumbing Manufacturers International
kstackpole@safeplumbing.org

cc: David Ross, Assistant Administrator, EPA Office of Water
Lee Forsgren, Deputy Assistant Administrator, EPA Office of Water
Ryan Jackson, Chief of Staff, EPA
Sarah A. Greenwalt, Senior Counsel, EPA
Andrew Sawyers, Director, EPA Office of Wastewater Management
Veronica Blette, Chief, EPA WaterSense Branch
Senator John Barrasso
Senator Ben Cardin
Representative Greg Walden
Representative Frank Pallone
Representative Ken Calvert
Representative Betty McCollum
Senator Lisa Murkowski
Senator Tom Udall
PMI Board of Directors

PMI Members

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Fisher Manufacturing Company | Fluidmaster, Inc. | Franke | Global OEM | Globe Union Group, Inc. | Hansgrohe, Inc.
Haws Corporation | IAPMO | InSinkErator | International Code Council Evaluation Service | Jing Mei Industrial (USA)
KEROX | Kohler Co | Lavelle Industries, Inc. | LIXIL | LSP | Moen Incorporated |NEOPERL, Inc. | NSF International
Pfister | Reliance Worldwide Corporation | Similor AG | Sloan Valve Company | Speakman Company | Symmons
Industries, Inc. | T & S Brass and Bronze Works, Inc. | TOTO USA | Viega LLC | Water Pik, Inc. | WCM Industries, Inc.

March 9, 2018

The Honorable John Barrasso, Chairman
The Honorable Tom Carper, Ranking Member
Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, DC 2051

Dear Chairman Barrasso and Ranking Member Carper,

On behalf of members of the National Agricultural Aviation Association, I'm writing today to urge your support for the *Agriculture Creates Real Employment Act* (ACRE), which removes the duplicative, unnecessary and burdensome National Pollutant Discharge Elimination System Pesticide General Permit (NPDES PGP) requirements for products already tested for water and environmental safety under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

A thorough environmental review is conducted by the Environmental Protection Agency for every commercial pesticide on the market, as required under FIFRA. These exhaustive reviews include hundreds of comprehensive studies taking many years and millions of dollars to accurately complete. Requiring a NPDES PGP for the application of pesticides over or near the Waters of the U.S. (WOTUS), is a duplicative burden for pesticide applicators and provides no environmental benefit.

To the contrary, the delays, costs and liability involved with obtaining a NPDES PGP can hurt human health by leading to the decreased ability to eliminate threatening mosquitoes and other insects that carry Zika and other viruses. In a briefing held in December by your committee multiple experts—from the EPA, mosquito control districts, state ag departments, etc.—spoke on this subject about the loss of life, unneeded expense and environmental problems that are actually posed by this mandated court, not congressional, duplicative requirement that was passed down in 2009.

This committee passed similar legislation in 114th Congress and the House of Representatives has passed comparable legislation multiple times, including this year. Aerial applicators across the country, who are responsible for treating 71 million acres of cropland each year, look forward to the timely passage of legislation that will eliminate duplicative NPDES PGP burdens.

Thank you, again!

Most sincerely,

Andrew Moore
Executive Director

National Agricultural Aviation Association – 1440 Duke Street – Alexandria, VA 22314
Phone (202) 546-5722 – Fax (202) 546-5726 – www.agaviation.org

March 12, 2018

The Honorable John Barrasso
Chairman
Committee on Environment & Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Tom Carper
Ranking Member
Committee on Environment & Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Barrasso and Ranking Member Carper:

On behalf of members of the Agricultural Retailers Association (ARA), I am writing in support of the "Agriculture Creates Real Employment Act" (ACRE). ARA represents the nation's agricultural retailers, also referred to as farm supply dealers, that provide essential goods and services to farmers and ranchers such as pesticides, fertilizers, seed, fuel, crop scouting, soil testing, commercial applicator services, and the development of comprehensive nutrient management plans.

This legislation includes important provisions to remove duplicative and unnecessary National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit (PGP) requirements for products already heavily regulated by the U.S. Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Under FIFRA, all pesticide products require years of extensive testing to demonstrate they can be safety used and applied according to an EPA approved label in a manner that poses no unreasonable risk to humans or the environment, including impact on water quality and aquatic species.

Requiring NPDES PGPs provides no additional environmental protections beyond those already listed on the pesticide label, yet the regulatory burdens are potentially depriving the public of the economic and health benefits from the use of important pest control products. In addition, this court ordered Clean Water Act (CWA) permit exposes all pesticide applicators, including mosquito control districts, to the potential liability of CWA-based citizen lawsuits. Imposing costs on thousands of small application businesses and farms, as well as local, state, and federal agencies responsible for protecting natural resources and public health can adversely impact and impede efforts to protect human health, the environment, and the nation's food supply from destructive and disease-carrying pests and invasive weeds. This committee passed similar bi-partisan legislation in the 114th Congress. The U.S. House of Representatives has also passed legislation to address this important issue on multiple occasions.

The ACRE proposal also includes a provision to provide additional reforms to the applicability of EPA's Spill Prevention, Control, and Countermeasure (SPCC) regulations. ARA requests the committee modify the SPCC provisions by including farm supply dealers to provide them with similar regulatory relief as being considered for farmers. The fuel or oil storage tanks at a farm supply dealer are generally better maintained than storage tanks located on a farm, include secondary containment, regularly inspected, and not located in environmentally sensitive watershed areas. A

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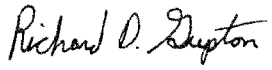
farm supply dealer also has well trained employees that are better equipped to deal with any potential spills. In addition, ARA members typically maintain either general liability insurance coverage, commercial umbrella insurance coverage, or other insurance that would cover property or equipment damage or pollution release.

ARA supports common-sense regulations that will help protect the environment and community. We also want federal regulations being imposed on the agricultural industry to be equitable. We look forward to working with the committee on prompt consideration and passage of this important legislation. Thank you for all your efforts to address these critical issues impacting the nation's agricultural industry.

Sincerely,



Richard D. Gupton
Senior Vice President, Public Policy & Counsel

March 12, 2018

The Honorable John Barrasso
Chairman
Committee on Environment & Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Tom Carper
Ranking Member
Committee on Environment & Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

Re: NPMA Support for the *Agriculture Creates Real Employment (ACRE) Act*

Dear Chairman Barrasso, Ranking Member Carper, and Members of the Senate Committee on the Environment and Public Works:

The National Pest Management Association (NPMA), the only national trade group for professional structural pest management companies, appreciates the opportunity to provide written testimony to the Senate Committee on the Environment & Public Works regarding our support for the proposed ***Agriculture Creates Real Employment (ACRE) Act***, and the inclusion of language that would exempt pesticide applicators from obtaining unnecessary National Pollutant Discharge Elimination System (NPDES) permits when applying EPA approved pesticides.

NPMA, a non-profit organization with more than 7,000-member companies from around the world, including 6,000 U.S. based pest management companies, which account for about 90% of the $7.6 billion U.S. commercial market, was established in 1933 to support the pest management industry. NPMA's member companies manage pests including rodents, ants, cockroaches, bed bugs, mosquitoes, spiders, stinging insects, termites and other pests in countless commercial, residential and institutional settings.

The structural pest management industry views NPDES permitting as unnecessary and a potential impediment to performing valuable services for families and businesses throughout the nation. The structural pest management industry would like to take this opportunity to highlight our continued concerns.

Currently, pest management professionals that apply even small amounts of pesticides in and around lakes, rivers and streams to protect public health and prevent potential disease outbreaks are required to obtain an additional, redundant and burdensome NPDES permit, prior to

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application. NPDES permits are an unpractical and ineffective result of judicial activism and overreach in *Nat'l Cotton Council, et al. v. EPA, 553 F.3d 927 (6th Cir. 2009)*, which overturned existing EPA policy. The court determined that under the Clean Water Act (CWA), pesticide applicators were required to obtain NPDES permits despite prior approval and use restrictions already imposed by the federal pesticide law (FIFRA). EPA strongly objected the courts conclusion and persuasively argued that FIFRA approved products required no additional restrictions or additional regulatory burdens due to FIFRA's statutory authority and the detailed pesticide approval process.

Under FIFRA, all pesticides are reviewed and regulated for use with strict instructions on the EPA approved product label. A thorough review and accounting of impacts to water quality and aquatic species is included in every EPA review. Requiring water permits for pesticide applications is redundant and provides no additional environmental benefit.

Compliance with unnecessary NPDES water permits imposes duplicative resource burdens on thousands of pest management professionals. Pest management professionals are tasked with protecting public health from deadly diseases and vectors transmitted by mosquitos and other pests throughout the nation. Transmitted primarily by mosquitos, Zika virus, West Nile virus, Chikungunya and Dengue Fever effect thousands of American each year, with no known vaccine. Pest management professionals are on the front lines of protecting the public through the use of pesticides. Requiring pest management applicators to obtain an NPDES permit to prevent and react to potential outbreaks wastes valuable time against rapidly moving and potentially deadly pests.

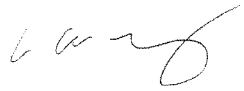
Use patterns relevant to the structural pest management industry that may require an NPDES permit include:

- **Mosquito and Other Flying Insect Pest Control**—to control public health/nuisance and other flying insect pests that develop or are present during a portion of their life cycle in or above standing or flowing water. Public health/nuisance and other flying insect pests in this use category include mosquitoes and black flies.
- **Weed and Algae Pest Control**—to control weeds, algae, and pathogens that are pests in water and at water's edge, including ditches and/or canals.
- **Animal Pest Control**—to control animal pests in water and at water's edge. Animal pests in this use category include fish, lampreys, insects, mollusks, and pathogens.

Even more onerous requirements are triggered if annual applications of pesticides to WOTUS exceed a predetermined threshold level. For the mosquito/flying insects use pattern, the annual threshold is 6,400 acres, and for both weed/algae and animal pest control, the threshold is 20 linear miles or 80 acres. Once the threshold is reached, additional reporting requirements become mandatory, including filing a Notice of Intent (NOI) with the appropriate agency, recordkeeping of all applications to WOTUS and annual reporting.

The *Agriculture Creates Real Employment (ACRE) Act* would clarify that federal law does not require the redundant and unfairly burdensome NPDES permit for already regulated pesticide applications. The pest management industry strongly urges you to remove this regulatory burden by voting YES on the ACRE Act.

Sincerely,



Andrew Bray
Vice President of Public Policy
National Pest Management Association

Senator BARRASSO. Mr. Miyamoto, across the Country, farmers and ranchers acknowledge some of their yield of crops, fish, livestock are going to be lost to predators of many varieties, and you made comment about that in your testimony. Farmer and ranchers depend on management tools like permits to eliminate predators to keep their livestock safe and to prevent excessive losses.

In Wyoming, ranchers lose newborn calves, lambs to ravens, to eagles. Indiana residents grapple with damage to transportation infrastructure from beavers. In Delaware, the State Wildlife Service helps to prevent damage to coastal salt marsh habitat from geese, other migratory waterfowl.

Could you just talk a little bit about the important role that permits play in predator management and the need for the agency to process permit applications efficiently?

Mr. MIYAMOTO. Mr. Chairman, thank you. I think that what permits provide in this whole discussion of depredation and damage caused by it is balance. The permit process allows the regulating agencies to keep track of what is going on out in the landscape. It requires our producers to go in and seek permission for a certain action, to remove or relocate depredating what they would consider nuisance species. But the permitting process makes sure that is all accounted for and so that we can manage to an objective.

Senator BARRASSO. I want to ask Mr. Yates if you have any additional thoughts on that and what you have seen in terms of getting the permits to deal with these issues.

Mr. YATES. Certainly, Senator. Thank you for the question. Controlling wildlife damage is obviously a critical factor in maintaining the success of American agriculture, and permits are important. One example that we cite is the issue of the double-crested cormorant. Many of our commercial fish ponds are stocked at very high densities, from 2,000 to, say, 60,000 catfish per acre, and for bait fish it is 50,000 to almost 200,000 bait fish per acre.

When it comes to the depredation issues with the cormorant, I know a 2014 estimate for the Mississippi Delta Region show that 18 million to 200 million fingerlings per winter are lost to bird depredation. A 1996 USDA survey shows that bird depredation were responsible for 37 percent of catfish losses in the aquaculture industry.

So, certainly, the issue of permitting for depredation for the cormorants is a critical issue that I know our folks in the aquaculture industry are looking for Congress to provide immediate input and oversight on this important issue.

Senator BARRASSO. Mr. Miyamoto, we talked about trying to give relief for farmers and ranchers in weed and pest districts and others who face duplicative permitting requirements. That has been part of the questioning we have had from both sides of the aisle here today.

These permitting requirements are imposed, specifically in weed and pest districts, by the National Pollutant Discharge Elimination System. It requires one permit under the Federal Insecticide, Fungicide and Rodenticide Act, the FIFRA Act, but another under the Clean Water Act to apply a pesticide, even if the pesticide is already approved by the one Act. It just seems that our effort is sup-

ported by aviation groups, agriculture producers, public officials like sanitary districts, mosquito control groups.

And I have a letter that I am going to introduce from the Coalition to talk about that specific thing.

Without objection, that will be submitted for the record.

[The referenced information follows:]

Oil Storage on U.S. Farms: Risks and Opportunities for Protecting Surface Waters

U.S. Environmental Protection Agency
Office of Emergency Management

EPA-530-R-15-002

June 30, 2015

Acknowledgments

The U.S. Environmental Protection Agency developed this report in consultation with the U.S. Department of Agriculture, Natural Resources Conservation Service.

Executive Summary

Motivation for the Study

The U.S. Environmental Protection Agency (EPA) Office of Emergency Management (OEM) prepared this report in response to a provision included in Section 1049[1] of the Water Resources Reform and Development Act (WRRDA) of 2014. The WRRDA provision calls for the Agency to conduct a study to determine the aggregate aboveground oil storage capacity threshold for farms subject to the Spill Prevention Control and Countermeasure (SPCC) regulation at 40 CFR part 112 based on a significant risk of discharge to water.[2]

The WRRDA provisions modify the applicability of the SPCC regulation to facilities defined as farms. For more information about the effects of the WRRDA on SPCC rule applicability, see the Fact Sheet "Farms and the Water Resources Reform and Development Act (WRRDA)."[3]

This report summarizes the research EPA conducted to address the mandate for a study. It provides information regarding the amount of oil stored by farms, oil storage practices, and discharge history. EPA consulted with USDA to gather the most recent and complete information about characteristics of farms, particularly as they pertain to oil storage.

Farms and the SPCC Regulation

Farms meeting the rule applicability criteria have been subject to the SPCC regulation since its inception in 1974. The regulation addresses discharges of oil not otherwise permitted under the Federal Water Pollution Control Act (FWPCA) (aka Clean Water Act). These requirements include preparing a written Plan – which, for most farmers, may be met by completing a simple Plan template and self-certification – ensuring that containers are designed and operated in a way to prevent discharges (such as installing secondary containment), spill response procedures and resources to quickly address spills that affect or threaten navigable waters or adjoining shorelines are identified, and training is conducted for all oil-handling personnel. When it amended the SPCC rule in 2008, EPA estimated that approximately 150,000 farms may have sufficient aggregate oil storage capacity to be subject to the SPCC requirements (based on greater than 1,320 gallons aggregate aboveground oil storage capacity at the time). See *Section 1.2.*

Detailed data on oil storage practices on farms are not readily available. This is in part because the SPCC regulation does not require subject facilities to identify and report to EPA through a registration program. Likewise, USDA does not gather information on oil storage quantities or handling practices.

While national data on oil storage are not available, the USDA compiles data on fuel expenditures, which provide some insight on uses of diesel, gasoline, and other oils on U.S. farms. Additional insight is available from selected states that require registration of oil storage containers on farms. Based on fuel expenditure data compiled by USDA, EPA estimates that the vast majority of U.S. farms – 81 to 96 percent – store less than 2,500 gallons of oil on site (either in aboveground or underground containers),

---

1 Section 1049. Applicability of Spill Prevention, Control, and Countermeasure Rule, Public Law 113-121, June 10, 2014. Paragraph (d) states: "(d) STUDY.— (1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Administrator, in consultation with the Secretary of Agriculture, shall conduct a study to determine the appropriate exemption under paragraphs (2) and (3) of subsection (b), which shall be not more than 6,000 gallons and not less than 2,500 gallons, based on a significant risk of discharge to water."

2 See relevant text from the WRRDA in *Appendix A.*

3 *Appendix B* provides a copy of the fact sheet, also available at http://www2.epa.gov/sites/production/files/2015-06/documents/final_wrrda_fact_sheet_4-24-15.pdf

and only a very small fraction of farms – less than about 1 percent – store more than 20,000 gallons of oil (*Section 2.1*). This is supported by review of tank registration data and by anecdotal information compiled by EPA (*Section 2.2*).

Available information suggests that many farmers are not aware of their obligations under the SPCC regulation and do not provide adequate secondary containment for their oil containers (*Section 2.2*). Given this lack of awareness, many farmers may also not be aware of the federal criteria and reporting requirements for oil spills. State and local regulations (*Section 2.4*) are not necessarily able to fulfill the environmental protection objectives because these regulations often do not cover aboveground oil containers at farms. Some states specifically refer to the federal SPCC rule for pollution prevention requirements that tank owners must comply with. In fact, since 1974, the SPCC regulation has served as the national standard for spill prevention measures at facilities with a reasonable expectation of an oil discharge causing harm to navigable waters or adjoining shorelines.

EPA identified examples of spills from farm bulk storage containers (*Section 3.1*), and ample evidence that discharges of oil – even in the relatively small quantities stored on farms – cause significant harm to the environment (*Section 3.2*).

Threshold Determination

The WRRDA amendments to the SPCC rule call for EPA to study and address the appropriateness (based on a significant risk of discharge to water) of the interim conditional threshold, which provides that farms with aggregate aboveground oil storage capacities greater than 2,500 gallons and less than 6,000 gallons are not subject to SPCC regulation based on aggregate aboveground oil storage capacity so long as they have a clean spill history.

Based on evidence that small discharges cause significant harm and lack of evidence that farms are inherently safer than other types of facilities, this study shows that its existing threshold aggregate aboveground oil storage capacity of 1,320 gallons is appropriate for all facilities in order to provide an adequate level of environmental protection of the nation's waters. This threshold establishes a baseline for the implementation of spill planning and use of rudimentary prevention measures, avoids the regulation of small capacity end users, while addressing the FWPCA mandate that there shall be no oil discharges to waters of the United States. This is also consistent with the Agency's previous findings as discussed in the record supporting amendments to the SPCC regulation that provided relief to farmers and other small facilities (see *Section 1.4*). EPA realizes, however, that the WRRDA amendments create a new minimum regulatory threshold of 2,500 gallons aggregate aboveground oil storage capacity specifically for farms.

Based on this study, which includes the agency's record and the lack of data to support any higher threshold, it is appropriate to set the threshold at the minimum of 2,500 gallons aggregate aboveground oil storage capacity provided by the WRRDA amendments for farms, instead of the interim exemption of up to 6,000 gallons. EPA maintains that requiring simple measures such as adequate containment, periodic inspection of containers, and regular review of oil handling practices, is an appropriate way to address the risk of spills to waters for farms storing even small quantities of oil, such as the 2,500-gallon minimum aggregate aboveground oil storage capacity allowed under the WRRDA amendments.

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List of Abbreviations

AST	Aboveground storage tank
CAFO	Concentrated Animal Feeding Operation
CWA	Federal Water Pollution Control ACT (FWPCA) (aka Clean Water Act)
EPA	United States Environmental Protection Agency
EQIP	Environmental Quality Incentives Program
IFC	International Fire Code
FDA	Food and Drug Administration
FLDEP	Florida Department of Environmental Protection
FR	Federal Register
NAICS	North American Industry Classification System
NFPA	National Fire Protection Association
NRC	National Response Center
NRCS	Natural Resources Conservation Service
NRDA	Natural resource damage assessment
OSLTF	Oil Spill Liability Trust Fund
SPCC	Spill Prevention Control and Countermeasure (40 CFR part 112)
STI	Steel Tank Institute
USDA	United States Department of Agriculture
UST	Underground storage tank
WRRDA	Water Resources Reform and Development Act of 2014

1 Introduction

The Spill Prevention, Control, and Countermeasure (SPCC) regulation at 40 CFR part 112, promulgated under the authority of the Federal Water Pollution Control Act (FWPCA) (also known as the Clean Water Act), aims to prevent oil discharges (spills) into navigable waters or adjoining shorelines. The SPCC rule applies to all facilities, including farms, that store, transfer, use, handle or consume oil or oil products in quantities above a specified threshold and could reasonably be expected to discharge oil to navigable waters or adjoining shorelines. A key element of the SPCC program is the development and implementation of oil spill prevention plans, referred to as SPCC Plans.

On June 10, 2014, the President signed the Water Resources Reform and Development Act (WRRDA) of 2014. The Act amended certain applicability provisions of the SPCC rule for farm facilities and modified the criteria under which a farmer may self-certify a SPCC Plan. Thus, farms that have an aggregate aboveground oil storage capacity of 2,500 gallons or less are no longer subject to SPCC based on aggregate aboveground oil storage capacity, and farmers are allowed to self-certify their Plans if they have an aggregate aboveground oil storage capacity greater than 6,000 gallons and less than 20,000 gallons; no individual container with a capacity greater than 10,000 gallons; and no reportable discharge history. The Act also amends the SPCC rule to establish a temporary exemption for farms that have an aggregate aboveground oil storage capacity of 6,000 gallons or less and no reportable oil discharges. This conditional applicability threshold is meant to be an interim measure until EPA completes a study to determine the appropriate aggregate aboveground oil storage capacity threshold level (between 2,500 and 6,000 gallons), based on a significant risk of discharge to water. *Appendix A* provides relevant text of the WRRDA pertaining to SPCC.

WRRDA provides for EPA to complete the study within one year. Within 18 months of completing this study, EPA is to promulgate a regulation to amend the SPCC requirements for farms to set an appropriate aggregate aboveground oil storage capacity threshold for farms; that threshold must fall within the range of 2,500 to 6,000 gallons.

The purpose of this study is to inform the determination of an appropriate facility threshold for farms, within a range of 2,500 to 6,000 gallons aggregate aboveground oil storage capacity, based on a significant risk of discharge to water. This report summarizes information EPA reviewed, in consultation with USDA, to respond to the WRRDA charge. The study is organized as follows:

- The remainder of this introduction provides additional background on the SPCC regulation and on the scope of the study, specifically on applicable storage thresholds and significant risk of discharge to water.
- *Section* 2 describes oil storage at farms, including discussion of state regulations applicable to oil containers at farms.
- *Section* 3 summarizes findings from EPA's review of oil discharge incidents from farms and discussion of the environmental impacts of discharges of even relatively small quantities of oil.
- *Section* 4 summarizes recommendations and highlight important considerations for evaluating threshold options.

1.1 SPCC Rule Authority and Regulatory History

The FWPCA of 1972, as amended, commonly known as the Clean Water Act (CWA), is the principal federal statute for protecting navigable waters, adjoining shorelines, and the waters of the contiguous zone

from pollution.[4] The Clean Water Rule: Definition of "Waters of the United States", 80 FR 37053, clarifies the waters regulated by the SPCC program ("navigable waters"). Section 311 of the CWA addresses the control of oil and hazardous substance discharges, and provides the authority for promulgation of a regulation to prevent, prepare for, and respond to such discharges. Specifically, CWA §311(j)(1)(C) provides for regulations establishing procedures, methods, equipment, and other requirements to prevent discharges of oil from vessels and facilities and to contain such discharges. Section 311 does not provide a facility specific exemption for farms.[5]

The SPCC rule implements EPA's authority under CWA §311, as delegated through various Executive Orders. Pursuant to Executive Order 11548, EPA was delegated the authority to regulate non-transportation-related onshore and offshore facilities that could reasonably be expected to discharge oil into navigable waters or adjoining shorelines (35 FR 11677, July 22, 1970). Executive Order 11548 was superseded by Executive Orders 11735 and 12777, respectively (38 FR 21243, August 7, 1973; 56 FR 54757, October 22, 1991). These Executive Orders delegated authority to the U.S. Department of Transportation (DOT) over transportation-related onshore facilities, deepwater ports, and vessels, and to the U.S. Department of the Interior (DOI) over specific offshore facilities, including associated pipelines.

The SPCC rule was initially promulgated in 1973 and became effective on January 10, 1974 (38 FR 34164). The regulation established oil discharge prevention procedures, methods, and equipment requirements for non-transportation-related facilities with an aboveground (non-buried) oil storage capacity greater than 1,320 U.S. gallons (or greater than 660 U.S. gallons aboveground in a single container). Regulated facilities were also limited to those that, because of their location, could reasonably be expected to discharge oil into the navigable waters or adjoining shorelines. The rule included sections on general applicability, relevant definitions, and requirements for preparation of SPCC Plans; provisions for SPCC Plan amendments; civil penalty provisions; and requirements for the substance of the SPCC Plans. Farms meeting the SPCC applicability criteria have been subject to its requirements since 1974.

EPA made subsequent revisions and further modifications to the SPCC requirements on several occasions. Some of these modifications were specifically aimed at streamlining the rule requirements for farms and other small facilities.

On July 17, 2002, EPA published a final rule amending the Oil Pollution Prevention regulation (67 FR 47042). The final rule became effective on August 16, 2002, and incorporated revisions EPA proposed in 1991, 1993, and 1997. The 2002 amendments to the performance-based regulation provided flexibility to the regulated community in meeting many of the oil discharge prevention requirements and the overall goal of preventing oil spills that may impact navigable waters or adjoining shorelines. In addition, the final rule included new subparts outlining the requirements for various classes of oil, revised the applicability of the regulation, amended the requirements for completing SPCC Plans, and made other modifications. The final rule also contained a number of provisions designed to decrease regulatory burden on facility owners and operators subject to the rule. For example, the 2002 rule added "environmental equivalence" and "impracticability" provisions to allow facilities to deviate from specified substantive requirements and to implement alternative measures. The amendments also exempted many completely buried underground storage tanks (USTs) and containers that store less than 55 U.S. gallons, and increased the oil capacity threshold for the applicability of the rule, among other changes.

---

4 *See* 33 USC 1321(b)(1) and 33 USC 1362.

5 Section 311 applies to onshore facilities, defined as "(10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land"

In December 2006, EPA amended the SPCC rule to streamline the requirements for a subset of facilities, including farms, in an effort to improve compliance and enhance environmental protection (71 FR 77266, December 26, 2006). The 2006 amendments provided an option to allow the owner or operator of a facility that meets qualifying criteria (i.e., a "qualified facility") to self-certify the facility's SPCC Plan in lieu of review and certification by a licensed Professional Engineer (PE). To qualify for self-certification, the facility must have an aggregate aboveground oil storage capacity of 10,000 U.S. gallons or less and not have reportable discharges. (Note that WRRDA revised this criterion for farms by allowing self-certification for farms with an aggregate aboveground oil storage capacity greater than 6,000 gallons and less than 20,000 gallons; no individual container with a capacity greater than 10,000 gallons; and no reportable discharge history.)

In December 2008, EPA again amended the rule to provide increased clarity, to tailor requirements to particular industry sectors (including farms), and to streamline certain requirements (73 FR 74236, December 5, 2008). Several of the revisions were specifically tailored for farmers. For example, EPA exempted residential heating oil containers such as those found at a farmer's primary residence, further streamlined requirements for a subset of qualified facilities (building on the 2006 amendments above) that have no container greater than 5,000 gallons, clarified the definition of facility as it applies to operations covering different parcels of land, and provided additional flexibility for meeting facility security requirements. As EPA noted at the time in the rule preamble, the revisions provided significant relief to farmers (72 FR 58378-58431):

> *[...] In providing the option for an owner or operator of a facility that stores 10,000 gallons of oil or less and meets other qualifying criteria to self-certify his SPCC Plan in lieu of review and certification by a Professional Engineer, the December 2006 amendments offered relief to an estimated 95 percent of all SPCC-regulated farms.*
>
> *[...]As discussed in Section G of this preamble, EPA is proposing an additional option for a subset of qualified facilities ("Tier I") that have a maximum individual oil storage container capacity of 5,000 gallons, by allowing these facilities to complete a simplified self-certified SPCC Plan template in lieu of a full SPCC Plan. This option would be available to any facility that meets the Tier I qualification criteria, including a farm. EPA expects that at least 128,000 farms (or more than 84% of the farms regulated by the SPCC rule) may be eligible for this proposed option.*
>
> *EPA is also proposing to clarify the definition of "facility" in the SPCC rule, as discussed in Section D of this preamble. The proposed definition would clarify the existing flexibility for a facility owner or operator, particularly for a farmer, to define oil storage areas located on either contiguous or noncontiguous parcels of land (e.g., satellite storage areas) as separate facilities for the purpose of determining SPCC applicability and preparing/implementing an SPCC Plan.*
>
> *Under this proposal (see Section C), EPA would exempt heating oil containers at single-family residences. EPA understands that farms often include, within the geographical confines of the facility, the residence of the owner or operator, and so the Agency believes this proposed amendment also will be of benefit to farms.*
>
> *This proposal (see Section I) also addresses streamlining of the security requirements under §112.7(g) to allow more flexibility in determining how best to secure and control access to the oil handling, processing and storage areas; secure master flow and drain valves; prevent unauthorized access to starter controls on oil pumps; secure out-of-service and loading/unloading connections of oil pipelines; and address the appropriateness of security lighting to both prevent acts of vandalism and assist in the discovery of oil discharges. This amendment will particularly benefit the owner or operator of a farm, because it allows for consideration of site-specific factors in determining how best to design security for the facility to prevent vandalism and detect spills from oil-handling areas. An owner or operator of a farm may also benefit from the currently proposed amendments related to loading/unloading racks (Section F of this preamble) and integrity testing (Section J).*

> *The Agency believes that both the amendments finalized in 2006 and those being proposed in this notice provide significant flexibility to the agricultural sector. In this action, the Agency also is proposing further amendments to the SPCC rule to address concerns specific to the agricultural community regarding pesticide application equipment and related mix containers used at farms.*
>
> *[...] EPA proposes certain tailored requirements benefiting farms. Specifically, EPA proposes to exempt pesticide application equipment and related mix containers used at farms, that may currently be subject to the SPCC rule when crop oil or adjuvant oil are added to formulations. In addition, EPA seeks to clarify that the amendment related to mobile refuelers, as promulgated in the December 2006 rule amendments (71 FR 77266, December 26, 2006), can be used by farmers to address oil spill prevention requirements for fuel nurse tanks.*

EPA promulgated additional revisions to the December 2008 amendments in November 2009 (74 FR 58784, November 13, 2009).

EPA finalized one additional amendment to the SPCC rule in April 2011 to exempt milk and milk product containers, associated piping and appurtenances from the SPCC regulation (76 FR 21652, April 18, 2011).

Throughout these various actions, EPA extended the compliance dates for amending and implementing existing SPCC Plans. EPA also extended the compliance dates for developing and implementing new Plans developed under 40 CFR part 112. Thus, on eight occasions following the 2002 final rule, EPA extended the compliance dates in §112.3 for existing facilities to update (or for new facilities to prepare) and implement an SPCC Plan that complies with the revised requirements. EPA specifically gave farmers more time to prepare or amend and implement the farm's SPCC Plan. All compliance dates have now passed. If the owner or operator of a facility did not comply with the SPCC rule and does not have an SPCC Plan, the owner or operator must develop a Plan immediately in accordance with the amendments to the rule from 2002 forward.

EPA has developed several tools to facilitate development of SPCC Plans by qualified facilities, including farms. The Agency also developed farm-specific outreach material such as Web pages, fact sheets, guidance, templates and other compliance assistance tools, training aids, and other material to help farmers develop SPCC Plans with minimal cost and effort.

1.2 SPCC Aggregate Aboveground Oil Storage Capacity Requirements Applicable to Farm Facilities

SPCC currently applies to a farm[6] that:

- Stores, transfers, uses, or consumes oil or oil products, such as diesel fuel, gasoline, lube oil, hydraulic oil, adjuvant oil, crop oil, vegetable oil, or animal fat; and
- Has containers with a total aggregate aboveground oil storage capacity greater than 2,500 U.S. gallons[7] ; and

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[6] For the purpose of 40 CFR 112, "farm" means a facility on a tract of land devoted to the production of crops or raising of animals, including fish, which produced and sold, or normally would have produced and sold, $1,000 or more of agricultural products during a year.

[7] The 2,500-gallon aggregate aboveground oil storage capacity threshold reflects farm-specific changes made under the WRRDA amendments, relative to a threshold of 1,320 gallons aggregate aboveground oil storage capacity for other types of facilities. Note that WRRDA amendments provide an interim conditional exemption for farms with an aggregate aboveground oil storage capacity less than 6,000 gallons and no reportable oil discharge history.

- Could reasonably be expected to discharge oil to navigable waters or adjoining shorelines, such as interstate waters, intrastate lakes, rivers, and streams.

When calculating the aggregate aboveground oil storage capacity, farmers do not need to count containers on separate parcels that have a capacity that is 1,000 U.S. gallons or less, or containers holding animal feed ingredients approved for use in livestock feed by the Food and Drug Administration (FDA). [8]

Further, farmers may treat adjacent or non-adjacent parcels, either leased or owned, as separate facilities for SPCC purposes. Aggregate aboveground oil storage capacity of containers on separate facilities (as identified based on how they are operated) do not need to be added together in determining whether the 2,500-gallon aggregate aboveground oil storage capacity applicability threshold is met.

Upon determining that their farm is subject to SPCC, farmers must prepare and implement an SPCC Plan. The Plan describes procedures for preventing, containing, and removing oil discharges, as well as critical information to ensure prompt response and reporting in the event of a discharge. Farmers must amend and update their SPCC Plan when implementing changes to their farm that affect the risk of an oil discharge. They must also review their Plan every five years to make sure it reflects the most current information.

Farms required to have an SPCC Plan should already be implementing their Plan and must maintain or amend their existing Plan if needed as soon as possible. For new farms that are not yet operational, the farm owner or operator must prepare and implement a Plan, if one is required, before the start of operations.

A farm can fall into one of three categories depending on the requirement for a Plan and level of certification, as summarized in *Exhibit 1* based on the rule at 40 CFR part 112 and the WRRDA amendments, and as illustrated in the flow chart of *Exhibit 2*.

Note that the streamlining and self-certification option available to almost all (99 percent) farms with a clean spill history have dramatically reduced the cost and effort of preparing and maintaining an SPCC Plan for the very small fraction of farms required to have a Plan.

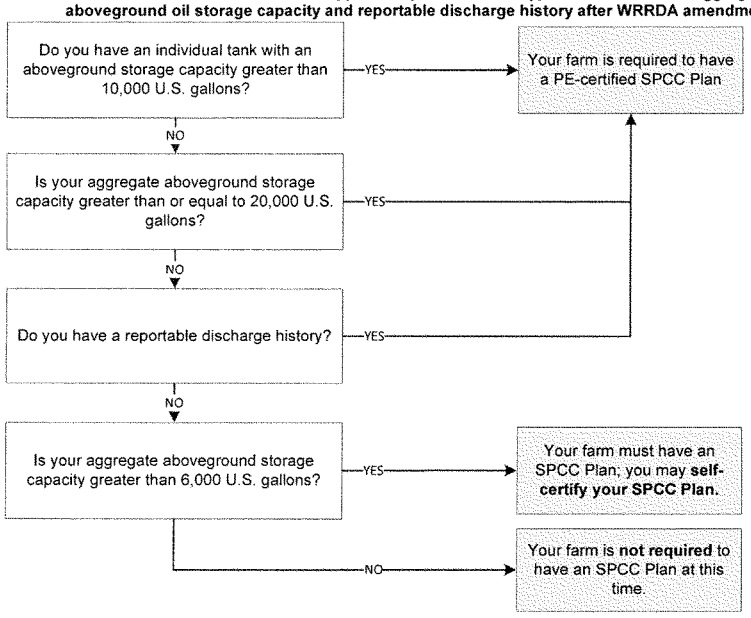
[8] The SPCC rule also provides exemptions for containers storing heating oil used solely at a single-family residence (e.g., the personal residence as the farm owner or operator); pesticide application equipment or related mix containers (with adjuvant oil); any milk and milk product container and associated piping and appurtenance; and completely buried oil tanks and associated piping and equipment that are subject to all of the technical requirements under 40 CFR part 280 or 281.

Exhibit 1: Farm SPCC Plan preparation and certification requirements

Category	*Aggregate Aboveground Oil Storage Capacity and Reportable Discharge Criteria*
Farms that are not required to have an SPCC Plan based on aggregate aboveground oil storage capacity.	• Aggregate aboveground oil storage capacity less 2,500 gallons; OR • Aggregate aboveground oil storage capacity greater than 2,500 gallons and less than 6,000 gallons;[1] and no reportable discharge history.
Farms that can have a self-certified SPCC Plan based on aggregate aboveground oil storage capacity	• Aggregate aboveground oil storage capacity greater than 6,000 gallons and less than 20,000 gallons;[1] • No individual container with a capacity greater than 10,000 gallons; and • No reportable discharge history.[2] Some farmers in this category need to have their Plan certified by a Professional Engineer (PE) if they decide to use certain alternate measures allowed by the SPCC rule
Farms that must have a PE-certified SPCC Plan based on aggregate aboveground oil storage capacity	• An individual container with an aboveground oil storage capacity greater than 10,000 gallons; OR • Aggregate aboveground oil storage capacity greater than or equal to 20,000 gallons; OR • A reportable discharge history[2]

Notes:
[1] 6,000-gallon aggregate aboveground oil storage capacity threshold is subject to revisions; see Appendix B.
[2] WRDDA defines "reportable oil discharge" as: a single oil discharge as described in section 112.1(b) of the SPCC rule that exceeds 1,000 gallons, or 2 oil discharges that each exceed 42 gallons, within any 12-month period—(i) in the 3 years prior to the certification date of the SPCC Plan (as described in section 112.3 of the SPCC rule); or (ii) since becoming subject to the SPCC rule (40 CFR part 112) if the facility has been in operation for less than 3 years.

Exhibit 2: Flowchart to determine current SPCC applicability to farms and type of Plan based on aggregate aboveground oil storage capacity and reportable discharge history after WRRDA amendments.



1.3 Significant Risk of Discharge to Water

In the WRRDA, Congress did not define the term "significant risk." However, the CWA and its implementing regulations provide context for interpreting the meaning and scope for the term. One important consideration is the amount of discharged oil that is defined as "harmful" under the Discharge of Oil regulation at 40 CFR part 110, also referred to as the "sheen rule." The regulation defines harmful quantities as those oil discharges that violate applicable water quality standards; cause a film or "sheen" upon, or discoloration of the surface of the water or adjoining shorelines; or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

The sheen rule has a long history as a reasonable, effective and scientifically based method to determine what quantities of oil may be harmful. For its 1987 amendment to the Discharge of Oil regulation, EPA described some of the harmful effects referenced in the scientific literature, in response to a suggestion by a commenter that volumetric limits, rather than the "sheen" test would provide sufficient water quality protection. For example:

> *EPA has carefully reviewed the recent scientific literature on environmental effects of oil pollution, including documents submitted by commenters and other documents referenced in comment letters or compiled in the public docket during the comment period. EPA believes that the literature clearly demonstrates that discharges of small quantities of oil cause environmental harm.*
>
> *[...] Many types of adverse effects from oil have been extensively documented proving harmful effects from oil spills and chronic pollution in inland waters, in coastal environments, and in waters beyond 12 miles from shore. Evidence from reviews of laboratory studies further demonstrates that very small amounts of oil, e.g., less than 1 mg/L (1 ppm), can have lethal and sublethal effects on a wide variety of organisms. The National Academy of Sciences (NAS), in its 1985 comprehensive review, noted that "low concentrations (less than 1 mg/L) of petroleum hydrocarbons can apparently interfere with the normal behavior of marine organisms, especially the more fragile components such as the larval and juvenile forms of the marine food chain.*
>
> *Moreover, some commenters appear to have defined potential harm as permanent biological harm on a broad scale. There simply is no persuasive indication in the statute that Congress intended this narrow interpretation of the harmful quantity standard. In fact, the Congressional policy expressed in CWA section 311(b)(1) "that there should be no discharges of oil" (emphasis added) suggests just the opposite. Equally important, nothing in the legislative history of the CWA or in judicial interpretations of the Act suggests that a demonstration of permanent harm on a broad scale is required. Congress stated in the 1978 CWA Amendments that a prohibited discharge need only be a quantity that may be harmful. In cases such as U.S. v. Atlantic Richfield Company, 429 F Supp. 830, 837 (E.D. Pa., 1977), the courts have suggested that Congress believed that even transitory pollution of waters was deleterious to the environment. Many of the studies submitted by commenters support the fact that small oil spills do cause harm in certain waters (e.g., spawning grounds, estuaries). Many opponents of the sheen test concede that coastal and inland areas and sensitive habitats may be vulnerable to damage from low levels of oil pollution, and many admit that there may be at least temporary harm. Documents compiled in the public docket clearly show that small amounts of oil are harmful in a variety of locations and circumstances, including spawning grounds and sensitive habitats beyond 12 miles from shore. (April 2, 1987; 52 FR 10714 -17)*

EPA also discussed the deleterious impacts small quantities of oil can have on the environment in the SPCC record. For example:

> *Additionally, the co-location of oil production facilities with other land users, including farmers and ranchers, raises additional concern over potential contamination of water resources that are essential to agricultural production. One comment expressed concern that produced water could contaminate surface waterways, groundwater and drinking water; kill fish, birds, and wildlife; and cause severe health effects*

> *in humans and impact wildlife habitats. The comment also noted that it takes only a small amount of oil to affect a large area of water. EPA agrees with this comment. Under 40 CFR part 110, a discharge of oil in such quantities as "may be harmful" is defined as one that may violate applicable water quality standards; or cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines; or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines. In the Federal Register notice published when EPA provided revisions to 40 CFR part 110, EPA stated that "[e]vidence from reviews of laboratory studies further demonstrates that very small amounts of oil, e.g., less than 1 mg/L (1 ppm) can have lethal and sublethal effects on a wide variety of organisms." (52 FR 10716, April 2, 1987). Therefore, even if a produced water container has a very small amount of oil, the container still holds the potential to cause harm. (November 13, 2009; 74 FR 58803)*

For this study, EPA considers discharges in any amount meeting the harm criteria as potentially "significant" based on the legislative and regulatory record that established that harmful discharges are not necessarily those associated with some specific discharge quantity.[9]

1.4 Oil Storage Thresholds

In developing the SPCC regulation, EPA considered the significant harm that can be caused by small discharges to set a protective regulatory threshold for requiring SPCC Plans. The SPCC regulatory framework is consistent with the policy expressed in section 311 of the FWPCA (see preamble discussion below), which states that there shall be "no discharges of oil… into… waters of the United States [or] adjoining shorelines…", as well as authority provided in section 311 for the President (through EPA for relevant purposes here) to require the development of oil spill prevention plans. As established in the rulemaking record and discussed above, small oil spills (resulting in concentrations in the range of 1 ppm) can cause significant harm to aquatic environments. EPA has set a reasonable applicability threshold by requiring spill prevention plans for facilities that have more than 1,320 gallons in aggregate aboveground oil storage capacity, a volume that is significantly greater than the quantities of oil that may be harmful in the event of discharge.

In response to a comment about the regulatory thresholds and small facilities EPA stated (67 FR 47055; July 17, 2002):

> *Large or small facility regulation, in general. We have decided not to regulate facilities differently based merely on storage capacity, provided that the capacity is above the regulatory threshold of over 1,320 gallons. This decision is based on environmental reasons. Small discharges of oil that reach the environment can cause significant harm. Sensitive environments, such as areas with diverse and/or protected flora and fauna, are vulnerable to small spills. EPA noted in a recent denial of a petition for rulemaking: "Small spills of petroleum and vegetable oils and animal fats can cause significant environmental damage. Real-world examples of oil spills demonstrate that spills of petroleum oils and vegetable oils and animal fats do occur and produce deleterious environmental effects. In some cases, small spills of vegetable oils can produce more environmental harm than numerous large spills of*

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[9] Alternatives to the concept of "harmful quantity" had initially been considered by Congress. The original House bill required the reporting of discharges of oil in "substantial quantities", while the original Senate bill would have prohibited oil discharges in any quantity, except as permitted by regulations. These concepts were found to be impractical, as they would have required further definitions (e.g., what is "substantial"), *a priori* determination of allowable quantities, or the reporting of even *de minimis* discharges. Congress instead gave the President (and in turn EPA) the authority to determine "harmful quantity."

In 40 CFR part 110, EPA established discharge of oil in such quantities as may be harmful pursuant to section 311(b)(4) of the Act as including "discharges of oil that: (a) Violate applicable water quality standards; or (b) Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines."

> *petroleum [*47056] oils." 62 FR 54508, 54530, October 20, 1997. Describing the outcome of one small spill of 400 gallons of rapeseed oil into Vancouver Harbor, we noted that " * * * 88 oiled birds of 14 species were recovered after the spill, and half of them were dead. Oiled birds usually are not recovered for 3 days after a spill, when they become weakened enough to be captured. Of the survivors, half died during treatment. The number of casualties from the rapeseed oil spills was probably higher than the number of birds recovered, because heavily oiled birds sink and dying or dead birds are captured quickly by raptors and scavengers."*

EPA considered the risk posed by facilities with different aggregate quantities of oil on site when amending the SPCC regulation to provide additional flexibility to small facilities and reduce the burden of preparing SPCC Plans. In particular, the Agency considered the risk posed by facilities with less than 10,000 gallons in aggregate aboveground oil storage capacity when it amended the SPCC regulation to allow self-certification of Plans by qualified facilities.

Further, in proposing to extend compliance dates for farms, EPA noted that (70 FR 73542; December 12, 2005):

> *"EPA proposes the 10,000-gallon threshold for farms [for an extension of compliance dates] to be consistent with the threshold quantity used in the NCP to classify oil discharges to inland waters as "major" (40 CFR 300.5). Thus, a facility storing less than 10,000 gallons of oil could not be involved in a major discharge based on the NCP quantitative criterion alone, although use of this numerical criteria [sic] is not meant to imply that smaller discharges are not harmful. This same 10,000-gallon threshold discharge volume is also one factor used in identifying facilities that must prepare and submit a Facility Response Plan (FRP) under § 112.20(f)(1). In addition, 10,000 gallons is a common storage capacity and such a threshold would extend the compliance dates for a significant portion of the farm sector. Data provided by the agricultural industry and the U.S. Department of Agriculture indicate that the average aggregated aboveground oil storage capacity at farms surveyed in 2005 was 5,550 gallons; approximately 83 percent of surveyed farms have aggregated oil storage below 10,000 gallons. Farms with less than 1,000 acres had an average oil storage capacity of less than 2,500 gallons; farms with over 1,000 acres had an average oil storage capacity of almost 8,000 gallons. (See "Fuel/Oil Storage and Delivery for Farmers and Cooperatives," USDA, March 2005, in the docket for today's proposal.)"*

And while EPA has recognized that differentiated requirements may be warranted and is consistent with treatment of different size containers by standard setting organization, EPA has historically maintained that small containers can still pose a risk of a discharge.

> *"EPA believes that a differentiated option for users of smaller amounts of oil has merit as other official bodies, such as standards setting organizations have provided differentiations in their standards for smaller users of oil. For example, the National Fire Protection Association (NFPA) provides differentiated requirements based on type of facility and size of tanks. Specifically, NFPA 30 (Flammable and Combustible Liquids Code, 2000 Edition) applies to tanks that exceed 3,000 liters (793 gallons) and does not apply to facilities storing flammable and combustible liquids as covered by NFPA 395, Standard for the Storage of Flammable and Combustible Liquids at Farms and Isolated Sites." (71 FR 77273; December 26, 2006)*

The EPA SPCC threshold of 1,320 gallons aggregate aboveground oil storage capacity was designed to require even small facilities to develop spill prevention plans if they could cause a harmful discharge.

It is also worth noting that EPA has not used spill history as a basis for applicability of the SPCC rule requirements; rather spill history is a criterion to determine a facility's eligibility for self-certification of its plan (see 71 FR 77271; December 26, 2006):[10]

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[10] Further note that determination of eligibility based on reportable discharge history is made at the time the SPCC Plan is certified. Discharges occurring from a qualified facility after the SPCC Plan has been certified do not impact the eligibility

> *While EPA recognizes that past discharge history does not necessarily translate into a predictor of future performance, the Agency believes that discharge history is a reasonable indicator of a facility owner or operator's ability to develop an SPCC Plan for his smaller oil storage capacity facility without the involvement of a PE.*

The reportable discharge history criterion was intended to limit the option of self-certification to owners and operators of those facilities that had demonstrated an effective implementation of spill prevention measures in the past.

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of an owner or operator of the qualified facility to take advantage of the self-certification option, unless the RA requires an amendment to the SPCC Plan in accordance with §112.4(d) and specifically requires PE certification (see 71 FR 77272).

2 Farm Facilities

The agricultural sector covers a broad spectrum of farming operations, including, but not limited to, oilseeds, grains, vegetables, and other field crops, fruit orchards, greenhouses and nurseries, poultry production and livestock husbandry. In this study, EPA used the most current data from the U.S. Census of Agriculture on the characteristics of farm operations and USDA data on farm expenditures in 2013 to develop a profile of oil use on U.S. farms.[11] EPA also reviewed other relevant data, such as data from a 2005 survey that USDA conducted on fuel storage at farms, site visits EPA conducted at farms between May 2005 and January 2007 to understand oil use and storage practices, and SPCC inspections EPA conducted at agricultural facilities. According to these sources, and as described in more detail in this section, the key characteristics of the U.S. agricultural sector include:

- Ninety-one percent of farms are small farms with less than $250,000 in annual sales.
- Approximately 98 percent of farms are family farms.[12, 13]
- Most farms are small in terms of surface area, with only fifteen percent of all farms having more than 500 acres of land,[14] although certain types of farms tend to be larger in surface area than others. For example, oilseed, grain, and cotton farms tend to have larger acreage than farms growing other types of crop.
- Expenditures on gasoline, fuel, and oil at farms tend to positively correlate with farm acreage.
- Average gasoline, fuel, and oil expenditures per acre further vary by type of crop.
- As of 2005, farmers were often not aware of the SPCC requirements and often did not have secondary containment (i.e., berms, spill kits) to prevent oil discharges.
- Inspected farms store varying quantities of oil, with total capacity ranging from less than 2,000 gallons to upward of 50,000 gallons. These farms often lacked adequate spill containment to prevent the discharge of oil to navigable waters on adjoining shorelines.

2.1 Farm Size

As shown in *Exhibit 3*, approximately 40 percent of the roughly two million farms in the United States are less than 50 acres in size, and about 15 percent of farms are 500 acres or larger.

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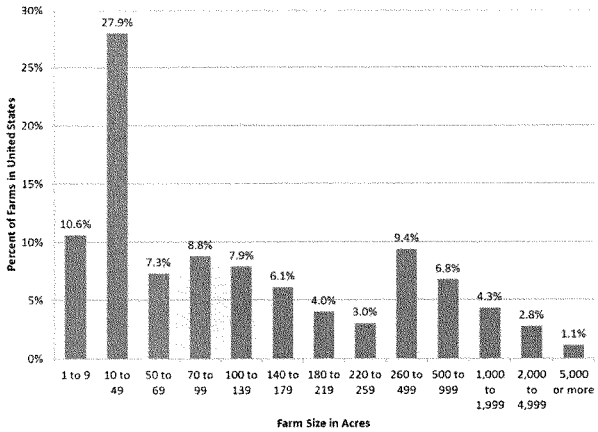
[11] To support this study, USDA provided a breakout of farm production expenses for 2013 that includes fuel expenditures by region (Northeast, Lake States, Corn Belt, Northern Plans, Appalachia, Southeast, Delta, Southern Plains, Mountain, and Pacific), fuel type (gasoline, diesel, natural gas, LP gas, etc.), and economic class (Less than $100,000, $100,000 to $274,999, $275,000 to $499,999, etc.)

[12] USDA defines family farms as "...operations organized as proprietorships, partnerships, or family corporations that do not have hired managers," and classifies small family farms as those with annual sales of less than $250,000. USDA, Economic Research Service, "Structure and Finances of U.S. Farms: 2005 Family Farm Report"/EIB-12, May 2006.

[13] USDA, Economic Research Service, "Structure and Finances of U.S. Farms: 2005 Family Farm Report"/EIB-12, May 2006.

[14] According to USDA, land in farms includes "land owned and operated as well as land rented from others." (Appendix B. General Explanation and Census of Agriculture Report Form. 2012 Census of Agriculture)

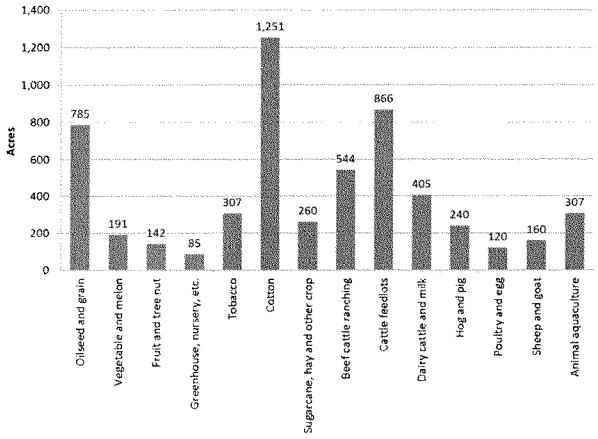
Exhibit 3: Percent of farms by farm size (acres of harvested cropland).



Source: Developed using data from USDA, National Agricultural Statistics Service, 2012 Census of Agriculture.

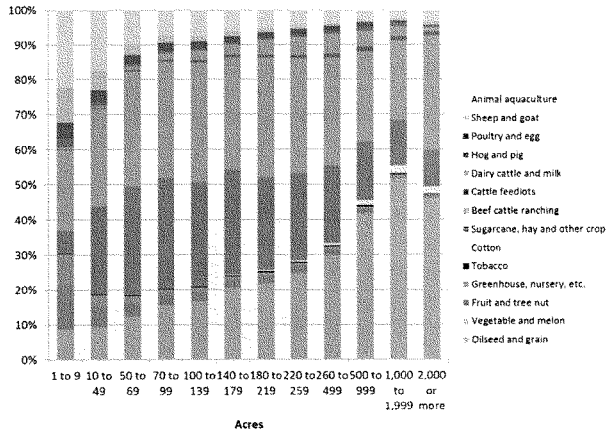
The size of farms in acres varies by type of crop, with cotton, cattle feedlots and oilseed and grain farms having the largest number of acres on average (*Exhibit 4*). *Exhibit 5* shows the distribution of farms of various types across farm size categories. As shown, oilseed and grain farms represent a significant share of the larger farms by size, with cotton farms and cattle feedlots also concentrated in the larger farm size categories. Other farm types such as nursery and fruit and tree nut farms tend to be smaller farms.

Exhibit 4: Average farm size by type (in order of NAICS code).



Source: Developed using data from USDA, National Agricultural Statistics Service, 2012 Census of Agriculture.

Exhibit 5: Distribution of farms by farm size and type.



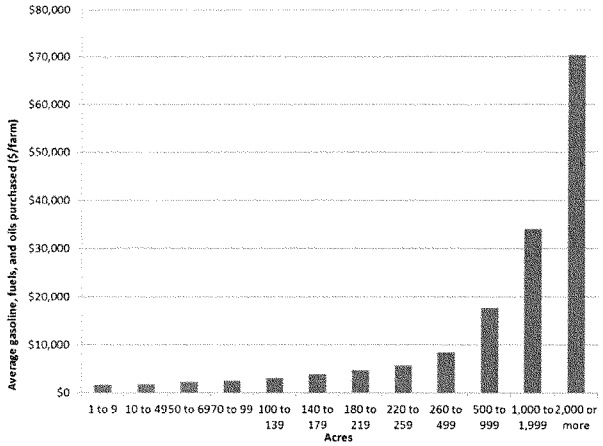
Source: Developed using data from USDA, National Agricultural Statistics Service, 2012 Census of Agriculture.

2.1.1 Gasoline, Fuel, and Oil Expenditures at Farms

SPCC applicability is determined, in part, by a facility's aggregate oil storage capacity. While data on the size and location of individual oil storage containers on farms are not available, USDA collects data on fuels expenditure. For example, data from the 2012 U.S. Census of Agriculture presented in *Exhibit 6* suggest that average expenditures on gasoline, fuel, and other oils increase with increasing farm size. *Exhibit 7* shows that these expenditures per acre also vary across farm types. Greenhouses and nurseries and vegetable farms tend to spend the most on gasoline, fuel, and oil per acre of operation, while beef cattle ranching tend to spend the least. At the farm level, however, total expenditures vary according to both the type and size of operations, with cotton farms having the highest average expenditures (*Exhibit 8*). Overall, expenditures on gasoline, fuel and oil represented approximately 4 percent of total sales in 2012.

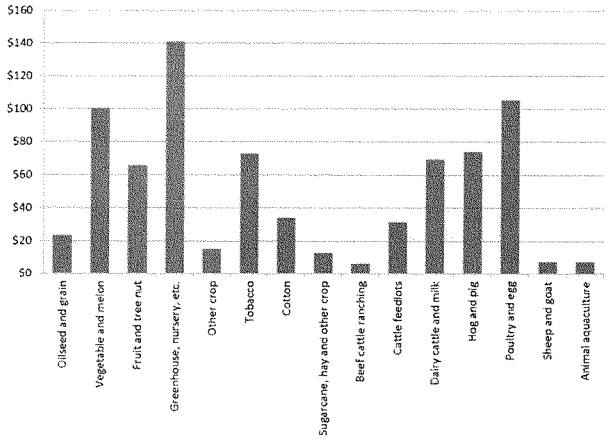
These fuel expenditure data may be used as an indicator of the quantity of fuel (and therefore the quantity of certain types of oil) that may be stored on farms.

Exhibit 6: Average expenditure on gasoline, fuel, and oil by farm size.



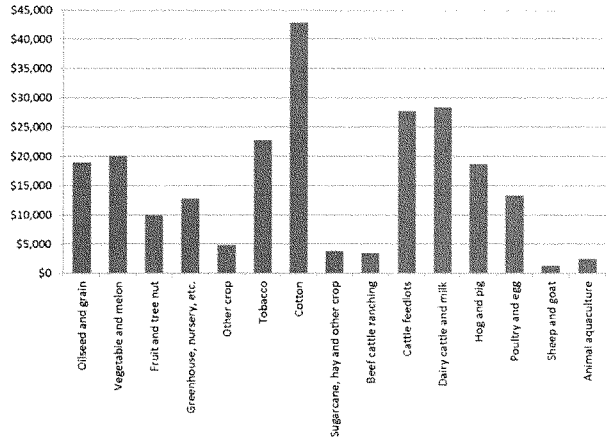
Source: Developed using data from USDA, National Agricultural Statistics Service, 2012 Census of Agriculture.

Exhibit 7: Average per acre gasoline, fuel, and oil expenditure by farm type (in order of NAICS code).



Source: Developed using data from USDA, National Agricultural Statistics Service, 2012 Census of Agriculture.

Exhibit 8: Average gasoline, fuel, and oil expenditure by farm type.



Source: Developed using data from USDA, National Agricultural Statistics Service, 2012 Census of Agriculture.

2.1.2 Estimates of the Number of SPCC-Regulated Farms

In the Regulatory Impact Analysis (RIA) supporting the final amendment to the SPCC rule (U.S. EPA, 2008), EPA estimated that there were approximately 150,000 farms subject to the SPCC rule. In developing this estimate, EPA relied on data from the U.S. Census of Agriculture data on farm fuel expenditures and on assumptions regarding the quantity of fuel corresponding to reported fuel expenditures and the fraction of that fuel that is stored on site.[15] For the purpose of this study, EPA used a similar approach to estimate the quantities of fuel used by farms and infer aggregate storage capacity, based on more detailed data provided by USDA for 2013.

Exhibit 8 presents the distribution of farms by economic class, as well as their estimated aggregate oil storage capacity. *Exhibit 10* shows the estimated distribution of farms by oil storage capacity. The ranges in the tables reflect different assumptions regarding the average number of fuel deliveries received by farms in a given year. While there is considerable variability across farms, the fuel expenditure data suggest that the vast majority of farms (81 to 89 percent) have an aggregate storage capacity below 1,320 gallons of oil, 81 to 96 percent have less than 2,500 gallons, and 92 to 99 percent have less than 6,000 gallons. An estimated 99 to 99.9 percent of farms have aggregate storage capacity below

[15] The SPCC rule does not have a notification requirement that would identify the existence and storage characteristics of each SPCC-regulated facility. Therefore, estimates of the number of facilities that are regulated under the SPCC rule are usually developed from census figures of the number of establishments operating in oil-related industry sectors, and reasonable assumptions on the characteristics of these facilities. The U.S. Census of Agriculture provides a count of the number of farms operating in the United States. To accurately estimate the number of SPCC-regulated farms, additional data on the size and location of oil storage tanks on all farms in the United States would be required; however, these data are not readily available. As discussed above, while data on farm fuel expenditures are available, these data do not typically provide details on the proportion of oil purchased that is stored on the farm. For these reasons, estimates of the number of SPCC-regulated farms are based on various assumptions regarding oil consumption and storage that contribute to uncertainty in the estimates.

20,000 gallons and may be eligible to self-certify their SPCC Plan, provided they meet the other qualified facility criteria, including a clean spill history.

Exhibit 9: Number and aggregate storage capacity of farms by economic class in 2013

		$10M or more	*$5M to $9.99M*	*$3M to $4.99M*	*$1M to $2.99 M*	*$500,000 to $999,999*	*$275,000 to $499,999*	*$100,000 to $274,999*	*Less than $100,000*
Number of farms		2,643	6,926	11,979	70,235	68,887	80,408	156,421	1,697,970
Estimated average aggregate storage capacity (gallons/farm)	Low[1]	26,105	13,609	7,246	4,069	2,340	1,652	898	154
	High[1]	87,570	44,522	25,160	14,116	7,876	5,551	2,920	463

Based on 2013 data from USDA on fuel expenditures by fuel type and by farms in different revenue categories (USDA NASS, personal communication).

[1] Range represents different assumptions of the number of fuel deliveries. For low bound (smaller storage capacity), EPA assumed 2 deliveries for gasoline and 4 deliveries for diesel per year; for high bound (greater storage capacity), EPA assumed 1 delivery each for gasoline and diesel per year.

Exhibit 10: Distribution of farms by aggregate storage capacity range in 2013

		Less than 1,320 gallons	**1,320-2,500 gallons**	**2,500-6,000 gallons**	**6,000-10,000 gallons**	**10,000-20,000 gallons**	**20,000 gallons or higher**
Number of farms	Low[1]	1,854,391	149,295	70,235	11,979	6,926	2,643
	High[1]	1,697,970	0[2]	236,829	68,887	70,235	21,548
% of farms	Low[1]	88.5%	7.1%	3.4%	0.6%	0.3%	0.1%
	High[1]	81.0%	0.0%	11.3%	3.3%	3.4%	1.0%

Based on 2013 data from USDA on fuel expenditures by fuel type and by farms in different revenue categories (USDA NASS, personal communication).

[1] Range represents different assumptions of the number of fuel deliveries. For low bound (smaller storage capacity), EPA assumed 2 deliveries for gasoline and 4 deliveries for diesel; for high bound (greater storage capacity), EPA assumed 1 delivery each for gasoline and diesel.

[2] USDA provides average annual fuel expenditures by economic class. As shown in Exhibit 9 above, the estimated average aggregate storage capacities for farms with expenditures in the two smallest fuel expenditure categories fall either below (463 gallons) or above (2,920 gallons) the 1,320- to 2,500-gallon range.

2.2 Oil Storage Practices on Farms

Since the 1920s, many farmers in the United States have relied on agricultural cooperatives for fuel supply and distribution, and some cooperatives have incorporated wholesale, refining, and even exploration and production of petroleum to guarantee a reasonably priced supply of fuel to their members. Local cooperatives typically handle retailing and farm facility delivery, while larger regional cooperatives handle other aspects of agricultural petroleum supply (USDA, 2011). According to the USDA, seven regional and 2,500 local cooperatives distributed petroleum products to farmers in 1993 (USDA, 1996). Cooperatives represented approximately 41 percent of the total fuel sold for U.S. farm production, with 90 percent of the 2,500 local agricultural cooperatives delivering petroleum products to farms (USDA, 1996).

In 2006, EPA reviewed information on farm oil storage provided by USDA and by local agricultural cooperatives that deliver fuel to farm facilities to characterize oil storage at farms. The characteristics

included bulk storage container types, fuel types, container sizes, location and distribution within the farm facility (e.g., central vs. satellite oil storage areas), and frequency of fuel deliveries.[16]

Sources consulted in researching farm oil storage practices included the USDA report *Fuel/Oil Storage and Delivery for Farmers and Cooperatives* (USDA, 2005), a USDA study on cooperative petroleum operations (USDA, 1996), information provided by the Steel Tank Institute (STI) in response to EPA questions, and eight telephone interviews — six with representatives from local farm cooperatives from different states and two with individual fuel/oil delivery companies in states where no local farm cooperatives that deliver fuel could be identified.[17,18] These sources provide detailed data on oil storage practices on farms. For this study, EPA augmented the information with data provided by USDA, reports of SPCC inspections EPA conducted at farm facilities, EPA site visits at selected cotton ginning operations, dairy farms, and rice farms, and state tank registration data. The following sections summarize the findings.

Note that given the lack of a comprehensive national database of oil containers at farms, the information provided below is necessarily anecdotal and based on a small subset of the very large and diverse number of farm operations in the United States. Additionally, while some of the information is based on data and interviews from the early to mid-2000s, EPA expects that the information still provides relevant insight on oil storage practices given the expected life of oil storage containers, although the Agency also recognizes that farmers may have changed their oil storage practices following amendments to the SPCC rule requirements for farms, multiple extensions to compliance dates, and outreach and compliance assistance by EPA and USDA.

2.2.1 Aboveground and Underground Oil Storage on Farms

Farms store fuel in both aboveground and underground storage containers.

In interviews EPA conducted in 2006 with farm cooperatives and fuel delivery companies, cooperatives from Minnesota, Iowa, Kansas, Nebraska, the Eastern Region, and Florida noted that they delivered exclusively to aboveground tanks on farms (although EPA's review of Florida Department of Environmental Protection (FLDEP) tank registration data discussed further in *Section 2.2.3* did reveal the presence of underground storage tanks at farms).

2.2.2 Types of Fuel Stored on Farms

Farms typically have more than one oil storage container to accommodate different types of fuel (diesel or gasoline), and the type of fuel stored may influence the container size.

The interviewees suggested that the type of fuel stored influence the size of storage tanks farmers used. For example, two interviewees noted that dyed diesel (off-road) tanks typically had at least twice the storage tank capacity of clear (on-road) diesel and gasoline tanks. Because most farms store more than one type of fuel, interviewees estimated that 90 to 95 percent of farms have more than one storage tank

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[16] While EPA's review focused on the storage of fuels used in farming operations, other types of oils may also be present at farm facilities (e.g., lubricants, animal fats and vegetable oils). EPA is assuming that these other oils would generally represent a small fraction of a farm's total oil storage capacity.

[17] The 2005 USDA Survey collected data from 1,712 farmers and 387 farmer cooperatives regarding oil storage tank capacity and location; the 1996 USDA Report is an industry overview of cooperative petroleum operations, including the history of the farmer cooperative petroleum system and summary statistics.

[18] EPA identified eight geographically diverse areas and found local cooperatives or fuel delivery companies that delivered fuel to farms. The term "interviewees" in this discussion refers to the eight representatives EPA contacted in 2006.

for fuel products. One interviewee, however, noted that only large operations have all three types of fuel on site, and that smaller farm operations typically only have dyed diesel and gasoline. For farms with relatively larger tanks (over 5,000 gallons storage capacity), the largest tank is typically used to store diesel for agricultural use. Interviewees from Pennsylvania and Florida and the Eastern Region indicated that all farms have dyed diesel, and a small percentage of farms store additional types of fuel (an estimated five percent in Eastern states, and one percent in Pennsylvania).

EPA's review of the FLDEP tank registration data (see *Section 2.2.3* for more details) provides a more nuanced picture of oil used on Florida farms, with relative storage capacities of different types of oils seeming to vary depending on the type of farms. While most farms store diesel, many nurseries and citrus groves also have significant quantities of fuel oil for onsite heat.

All 28 Concentrated Animal Feeding Operation (CAFO) facilities EPA inspected between 2001 and 2005 stored diesel and/or gasoline on site, with some facilities also storing waste oil.[19]

2.2.3 Oil Storage Container Size on Farms

The 1996 USDA report cited the typical on-farm storage tank capacity as 250 to 1,000 gallons.[20] But there is considerable variation across farms depending on the region, type of operations and size.

With one exception, all interviewees contacted in 2006 agreed that 1,000-gallon tanks are typical on farms; however, large farm operations commonly have tanks between 7,000 and 10,000 gallons according to the interviewees, or between 10,000 and 12,000 gallons according to STI.[21] All interviewees agreed that large farm operations (defined by the interviewees as farms covering over 2,500 acres) have larger tanks, with storage tank capacities ranging from 7,000 to 10,000 gallons. For example, interviewees from the local cooperatives and STI noted that a 1,000-gallon tank size was typical, and added that the overall trend has been towards increasing tank storage capacity. One interviewee noted that farms with storage tank capacities less than 1,000 gallons were typically farms of only a "few hundred acres" in size. Most interviewees represented regions with row crops (corn, soybean, wheat), which, as noted in *Section 2.1*, tend to be larger farm operations in terms of acreage. Interviewees from states with significant shares of non-row crops such as Oregon and Pennsylvania, however, noted similar capacity ranges and relationship to farm size. Information provided by STI noted a higher average tank size at farms of between 10,000 and 12,000 gallons. According to STI, tanks of this size are vertical, single-walled with emergency vents, whereas 1,000-gallon tanks do not have emergency vents.

In contrast, the interviewee from Florida estimated the average farm AST capacity at 500 gallons, and noted that the average has been decreasing in recent years, which the interviewee indicated was due to state registration requirements for containers with storage capacity of 1,000 gallons or greater (see *Section 2.4* for a discussion of state requirements applicable to ASTs at farms in Florida). This observation is confirmed by EPA's separate review of FLDEP petroleum storage system data conducted in January 2015. Specifically, EPA obtained registration data for active aboveground storage tanks at facilities

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[19] Personal communication, Melissa Payan, EPA Region 8, November 26, 2014.

[20] The 2005 USDA Survey gathered data on aggregate oil storage capacity for farm operations, and did not include questions about storage container capacity.

[21] Farm cooperatives and fuel delivery companies from Minnesota, Iowa, Kansas, Nebraska, the Eastern Region, and Florida noted that they delivered exclusively to aboveground tanks on farms. Interviewees from Oregon and Pennsylvania suggested that as many as half of the farms receiving fuel deliveries did so to underground storage tanks, with the interviewee from Pennsylvania indicating that underground storage tanks are primarily for greenhouses and mushroom farms, whereas open crop farms typically have aboveground storage tanks.

categorized by FLDEP as "agricultural". These facilities include various types of farms such as citrus groves, nurseries, cattle farms and ranches, tomato and other vegetable farms, and dairies. *Exhibit 11* summarizes farm AST registrations from a sample of counties that include the three Florida counties with the largest number of farm operations, according to the 2012 U.S. Census of Agriculture, as well as a random sample of four other counties among the total of 67 counties in the state. The county with the largest number of farms in the state, Marion County with 3,870 operations, has only 24 facilities with ASTs registered with FLDEP. Of these, only three farms have at least 2,500 gallons in aggregate capacity, two have at least 6,000 gallons in aggregate capacity and none exceed 20,000-gallon threshold. Therefore, farms in that county are either exempt from SPCC altogether (the vast majority), or can self-certify their plan, provided they meet other criteria such as a clean spill history. A somewhat larger number of farms have registered ASTs in Hillsboro County (87 farms), but this is still a very small subset (4 percent) of the total farms operating in the County, and 82 percent of the farms have less than 2,500 gallons of oil in registered ASTs and are therefore exempt from SPCC altogether.

Exhibit 11: Distribution of farm aggregate storage capacity in selected counties in Florida.

Florida County	2012 Census of Agriculture		Number of farms with registered ASTs	Number of farms by registered AST capacity range[1]			
	Number of farms	County ranking		Less than 2,500 gallons	2,500-6,000 gallons	6,000-20,000 gallons	20,000 gallons or greater
Brevard	513	34	3	0	0	1	2
Broward	615	29	1	1	0	0	0
Clay	402	42	1	0	1	0	0
Collier	319	48	7	0	3	2	2
Dade	2,954	2	12	7	3	2	0
Hillsboro	2,466	3	87	71	6	6	4
Marion	3,870	1	24	21	1	2	0
State Total	47,740	N/A	Information not available				

1 Florida regulations at Chapter 62-762 require only AST systems with individual storage tank capacity greater than 550 gallons to be registered with the state. EPA notes, however, that the registration database lists individual ASTs with capacity below this threshold.
Source: U.S. EPA Analysis of FLDEP data, 2015

Site visits EPA conducted at three different types of farm operations in May 2005 (cotton ginning operations in North Carolina), June 2006 (dairy farms in Western New York) and January 2007 (rice farms in Arkansas) provide additional insight on oil use and storage on these types of farms. Cotton ginning used oil in hydraulically powered bale presses. Dairy farms tended to use diesel, as well as small quantities of other oils (e.g., lubricants). Rice farms used diesel-powered wellhead and re-lift pumps to flood or drain the fields. Containers at rice farms tended to be distributed across the farm, with close to half of the total storage capacity at satellite locations.

As summarized in *Exhibit 12*, of the six cotton ginning operations EPA visited, four had more than 2,500 gallons in aggregate oil storage and only one had more than 6,000 gallons. As shown in *Exhibit 13*, two of the seven dairy farms EPA visited had less than 2,500 gallons of oil (primarily diesel, but also gasoline, waste oil, and lubricants, excluding milk containers) on site, one dairy farm had less than 6,000 gallons, and one farm had more than the 20,000-gallon threshold for self-certification. Both rice farms had more than 20,000 gallons of aggregate oil storage on site.

Exhibit 12: Oil storage capacity for cotton ginning operations.

Type of Facility and Location	Farm Production *(cotton bales per year)*	Number of bulk storage containers	Oil Storage Capacity (gallons)		
			Bulk storage containers	Oil-Filled Equipment	Total
Cotton gins, NC	60,000	6	6,500	2,350	8,850
	40,000	8	2,555	1,750	4,305
	30,000	2	1,055	850	1,905
	28,000	2	2,000	840	2,840
	25,000	3	2,305	1,640	3,945
	25,000	2	500	1,410	1,910

Source: U.S. EPA, 2005

Exhibit 13: Oil storage capacity for dairy and rice farms.

Type of Facility and Location	Farm Production	Number of bulk storage containers	Oil Storage Capacity (gallons)	
			Largest tank	Total
Dairy farms, NY	Dairy and crop: 3,200 acres, 1,600 cows	4	14,000	15,000
	Dairy and crop: 2,500 acres	15	15,000	30,660
	Dairy only: 2,500 acres, 750 cows	5	10,000	16,050
	Dairy only: Unknown acres, 1,000 cows	3	10,000	12,300
	Dairy and crop: 1,200 acres, 800 cows	3	3,500	4,500
	Dairy only: 550 acres, 170 cows	5	500	915
	Dairy only: 200 acres, 600 cows	3	500	610
Other farms, NY	Hog and vegetables: 1,200 acres	2	2,000	2,500
	Orchard	2	500	1,000
Rice farms, AR	3,500 acres	18	15,000	30,350
	2,300 acres	23	12,000	42,000

Source: U.S. EPA, 2006 and 2007

Finally, other information obtained from EPA regional staff reveals similar variations across regions. EPA inspectors in Region 7 typically see 1,000- to 10,000-gallon single- and double-walled ASTs, drums and totes for reuse, and 200- to 1,000-gallon nurse tanks at farms. CAFO facilities EPA inspected between 2001 and 2005 in Region 8 had container sizes ranging from less than 200 gallons to over 12,000 gallons. Almost all the facilities had several containers, with an average slightly below three containers per facility; for example, one inspected facility had one 4,200-gallon container for gasoline, one 500-gallon container for diesel, and one 300-gallon container for waste oil. Farms inspected in EPA Region 10 between 2008 and 2012 had similar varying characteristics, with container sizes ranging between 660 gallons and 10,000 gallons, number of containers ranging from 2 to 11, and total storage capacity ranging from 1,320 gallons (a vegetable/melon farm) to over 50,000 gallons (a dairy farm).[22]

2.2.4 Oil Storage Container Distribution on Farms

Inquiries into the distribution of storage containers on farms yielded mixed results. Interviewees contacted in 2006 suggested that 10 to 30 percent of farms have more than one fuel storage tank location. This proportion is lower than suggested in the 2005 USDA Survey, in which 47 percent of farmers had storage tanks in more than one location. All sources indicated that farms with storage capacities of 7,000 to

[22] Personal communication from inspectors in EPA regions, 2014.

10,000 gallons typically have storage in one central location, presumably because they may be using a single larger storage tank.

Six of eight interviewees, and all interviewees from local cooperatives, agreed that the majority of farms have centralized storage locations, and, when asked how many farmers have more than one fuel storage tank location, their responses ranged from 10 to 30 percent. Six out of seven interviewees agreed that all larger farms have centralized fuel storage in one location. One interviewee who stated that large farm operations had storage in more than one location noted that large farm operations still comprised only 25 to 30 percent of farms with multiple oil storage locations, citing the existence of multiple farmsteads as the primary reason for larger farms to have several fuel storage locations. Interviewees noted that farms with multiple storage locations were typically 1,000 to 2,000 acres in size, citing distance between farm parcels as the primary reason for farms having multiple oil storage location. Interviewees also noted that farms with multiple storage locations typically have smaller storage tanks that are less than 1,000 gallons each at the satellite locations. The fuel delivery service interviewees from Pennsylvania and Florida were the exceptions. The Pennsylvania interviewee indicated typically delivering fuel in multiple locations for greenhouses, the type of farm serviced by this particular delivery company. The Florida interviewee indicated that almost all citrus farmers have dispersed fuel storage because diesel engines are needed to pump water from wells around the farm for irrigation purposes. The Florida interviewee noted that storage for other farm equipment was centralized (e.g., in the barn). The interviewee further noted that while farmers typically have two or three diesel tanks around wells, one large farm operation had 50 tanks dispersed throughout the facility.

Exhibit 14: Excerpted results of 2005 USDA Survey: Farmer questionnaire responses to Questions 9a and 9b.

			Total Aggregate Oil Storage Capacity (gallons)									
Response	**All Respondents**		< 1,320		1,320-5,000		5,001-12,000		12,001-29,999		> 30,000	
	#	%	#	%	#	%	#	%	#	%	#	%
Question 9a. Are storage tanks in one location?												
YES	**810**	**53%**	331	72%	304	47%	105	50%	63	36%	3	6%
NO	**717**	**47%**	131	28%	338	53%	103	50%	114	64%	29	94%
Question 9b. How many tank sites exist?[1]												
Number	**4,174**	-	334	8%	2,489	60%	462	11%	559	13%	330	8%

Notes:
[1] Responses to this question indicate the number of tank sites for all 1,527 farmers responding to this question, and the total number of tank sites at farms by total aggregate oil storage capacity. For example, there were 4,174 total tank sites reported for all 1,527 farmers responding to the questions.
Source: USDA, 2005 (Table 1).

Data presented in *Exhibit 14* suggest that the proportion of farms with multiple storage locations increases with total storage capacity. In contrast, the interviewees indicated that larger farms tend to centralize fuel storage. While this disparity may result from the small number of interviewees relative to the diversity of farm operations, a closer look at the 2005 USDA Survey data shows some similarity between the two data sources.

Interviewees indicated that large farm operations typically had tanks of 7,000 to 10,000 gallon capacities centralized in one location. The trend of larger tank sizes at larger farms would mean that farms with a total fuel storage capacity of 5,001 to 12,000 gallons would most likely purchase a larger tank, and therefore more readily centralize fuel storage to one location.

While the overall trend in the 2005 USDA Survey indicates that larger farms have an increasing likelihood of storage in more than one location, the survey data also show a lower number of farms with multiple storage sites (Survey Question 9a) and number of tank sites (Survey Question 9b) in the 5,001- to 12,000-gallon category. In addition, the USDA Survey shows a slightly lower incidence of multiple storage locations (three percent decrease) between the 1,320 to 5,000 and 5,001 to 12,000-gallon ranges. Moreover, responses to Question 9b indicated that the number of other storage tank sites for farms in the 1,320 to 5,000-gallon range represented 60 percent of the other storage tank sites, a significantly higher proportion than any other storage capacity category. This is consistent with information provided by the interviewees, who indicated that farms with total fuel storage between 1,320 and 5,000 gallons are more likely to purchase multiple tanks of a readily available size (500 or 1,000 gallons). These multiple tanks are then more easily distributed among multiple fuel storage locations.

2.2.5 Frequency of Fuel Delivery to Farms

All interviewees EPA contacted in 2006 agreed that commonly sized fuel storage tanks (1,000 gallons) are typically refilled three to four times per year, and that larger tanks (7,000 to 10,000 gallons) require less frequent deliveries — typically one per year. This delivery frequency suggests that fuel demand for larger farms (with larger storage tanks) may be 14,000 to 20,000 gallons per tank per year. At the other extreme, one interviewee noted that about ten percent of farmers have oil deliveries 10 to 15 times per year. Farmers with frequent deliveries typically have tanks of 500 gallons or less, or high fuel consumption. The Florida interviewee noted that most farms receive delivery to their 500-gallon tanks weekly during the peak season. Another interviewee stated that some farmers have extremely frequent delivery, sometimes twice a week, and noted that these farms are the highest priority for "right-sizing," or matching tank capacity with farm fuel needs in order to reduce the frequency of fuel deliveries.[23]

Apart from the fuel delivery cost savings associated with increasing storage tank capacity, one interviewee noted that it is more opportunistic to purchase fuel at certain times during the year, outside the peak season when prices are higher. This interviewee noted that the cost savings that result from buying off-peak, as well as the possibility of fuel supply disruption, may explain why some farmers, especially large operations, increase storage tank capacity.

2.2.6 Spill Containment Structures

Spill containment is one of the most effective methods for preventing discharges of oil to navigable waters or adjoining shorelines and is a core element of the SPCC Plan.

Inadequate secondary containment is often noted as a contributing factor in discharges of oil to navigable waters or adjoining shorelines, from a wide range of facilities, including farms (see *Section 3.1*). Yet, of the 28 CAFOs EPA inspected between 2001 and 2005, more than half (16 facilities) lacked SPCC-mandated secondary containment for bulk storage containers at the time of the inspection.[24] Further, inspectors noted evidence of past or active oil discharges at several of these facilities,[25] highlighting the potential for oil to reach waters of the United States.

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[23] The interviewee from Florida stated that farmers are specifically down-sizing storage capacity and purchasing 500-gallon tanks due to state registration requirements for tanks 1,000 gallons or larger. The interviewee noted that while this trend goes against the fuel needs for these farms (citrus growers), farmers may purposely not "right-size" due to state regulatory concerns.

[24] Personal communication, Melissa Payan, EPA Region 8, November 26, 2014.

[25] In their inspection notes, EPA inspectors noted one farm that had reported a discharge 100 to 300 gallons due to an overfill, and another five farms showing signs of past discharges such as large areas of contaminated soil around the tanks.

These findings are consistent with the 2005 USDA survey[26] which indicated that over 90 percent of the surveyed facilities lacked adequate containment. The need to address current inadequacy of containment is one reason cited for farmers to want to remove tanks they no longer use as these tanks are not compliant with spill prevention and control requirements (KWCH12 News, 2014).

As discussed in *Section 2.4*, secondary containment is required not only under the SPCC rule, but also by state regulations and local ordinances that follow the fire code. Preparation of an SPCC Plan may be what prompts farmers to consider the potential spill risk from their facility and to address that risk before they incur the potentially higher costs of cleaning a spill. However, correcting inadequate secondary containment is likely the most significant cost to a farmer of complying with the SPCC rule, as compared to the relatively low cost of preparing the actual Plan, particularly in the case of a self-certified Plan.[27]

The USDA Natural Resources Conservation Service (NRCS) conducted a pilot program to assist producers in developing SPCC Plans and construct adequate secondary containment. The pilot program ran for three years during 2011, 2012, and 2013. Under the Pilot, farmers that were required to have a plan prepared and certified by a registered PE (i.e., farms exceeding 10,000 gallons aggregate above-ground storage capacity) could receive funding through the Environmental Quality Incentives Program (EQIP) to develop a plan and/or install secondary containment.[28] Farmers requesting assistance to construct secondary containment for their tanks had to provide an SPCC Plan (either PE-certified or self-certified) indicating the need for such containment. The NRCS Pilot was carried out in eight states (Idaho, Louisiana, Montana, North Carolina, North Dakota, New York, Oklahoma, and Texas), and of the plans produced, 93 percent came from three states (North Dakota, Louisiana, and Montana) with 79 percent coming from North Dakota alone. Additionally, the plans were all for facilities with greater than 10,000 gallons of aboveground aggregate storage capacity, so these plans do not provide information on the characteristics of farms with aggregate above ground storage between 2,500 and 6,000 gallons.

As of September 2014, NRCS has released a new national conservation practice standard for On-Farm Secondary Containment Facility (Code 319).[29] *Exhibit 15* shows the typical cost of secondary containment estimated by NRCS to calculate incentive payment rates for Farm Bill programs for Fiscal Year 2015. The typical cost of secondary containment is expected to vary depending on the region, containment approach (e.g., replace single walled tanks with double walled tanks, add concrete wall enclosure, add earthen storage lined with a flexible membrane), and storage volume. The Payment Share Rate depends on the state.[30] Note that the typical facility cost estimates in *Exhibit 15* are speculative given

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[26] Fuel/Oil Storage and Delivery for Farmers and Cooperatives (USDA, 2005)

[27] In the 2008 RIA, EPA estimated that small facilities such as farms (Tier 1 qualified storage facility) spend $1,320 to $19,800 (2007 dollars) on installing secondary containment for their bulk storage containers, depending on berm dimensions and material, as compared to less than $200 on Plan preparation when following the template (U.S. EPA, 2008).

[28] A primary purpose of EQIP is to assist agricultural producers comply with environmental regulation and permit requirements. Under the Pilot, NRCS defined two interim EQIP practices: SPCC Conservation Activity Plan (Code 150) and Agricultural Secondary Containment Facility (Code 710).

[29] Description of the practice is available at http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1263508.pdf (accessed January 20, 2015)

[30] The payment rate is a percentage of the determined typical cost. The percentage is determined on a state to state basis and may also vary from year to year. The payment rate can be higher for Historically Underserved (HU) groups including socially disadvantaged, beginning and limited resource farmers, Indian tribes and veterans. For example, in Delaware the payment rate in FY 2015 for Practice 319 was 75 percent (90 percent for HU) of the estimated average cost, or $100.76 per cubic yard ($120.91/cubic yard for HU) for earthen containment. Idaho's payment rate was $21.22 per cubic yard ($31.83/cubic yard for HU) for earthen containment. State by state information is available at http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/financial/eqip/?&cid=nrcs143_008223 (accessed May 14, 2015)

the very limited experience of NRCS State Offices with this practice so far. Data are not yet available on the number of farmers receiving funding for the practice and the amount received.

Exhibit 15: Approximate cost of on-farm secondary containment facility EQIP practice

Capacity (gallons)	*Estimated typical cost*
1,000	$2,400 - $6,000
3,000	$3,700 - $6,000
4,700	$3,200 - $11,200
10,000	$6,600 - $15,000

Source: USDA, 2015 (personal communication)

2.3 Uniqueness of Farms and Similarity in Storage Practices to Other Facilities

As reflected in the farm profile of *Section 2.2*, farms share similar characteristics with other types of SPCC-regulated facilities with respect to the types of oil products stored on site, the number and size of oil tanks, and oil storage practices. EPA evaluated these storage practices as part of its rulemakings to streamline the rule requirements for facilities with smaller aboveground storage capacities, including farms (see *Section 1.1*).

As noted in the regulatory record, after reviewing the information provided by the agricultural industry on proposed rulemakings, EPA concluded that there was insufficient evidence to provide an exemption specific to farms or make changes to regulatory thresholds since the types of tanks and oil storage conditions at farms were generally similar to those of other facilities, with similar potential for discharge (see relevant excerpts below). EPA did recognize some unique characteristics of farms in terms of geographic scale, configuration, land ownership and lease structure, and on-farm activities, and provided flexible rule provisions that benefit all small facilities and specifically farmers. For example, as described in *Section 1.1*, EPA considered the characteristics of farms when it amended the SPCC regulation to provide additional flexibility for a number of the regulatory requirements (see 72 FR 58383, October 15, 2007) or to define farms for the purpose of the SPCC regulation. It also considered the need of the agricultural industry in providing farm-specific extensions to the compliance dates.

EPA concluded that while farming operations may be unique, the storage tanks found at farms are similar in function and design as those found at other types of facilities, and therefore have a similar potential for discharge (see 73 FR 74242, December 5, 2008). Specifically, as stated at 73 FR 74242:

> *EPA continues to believe that there is insufficient data to support an outright exemption exclusively for farms beyond the existing aboveground storage capacity threshold of 1,320 U.S. gallons that applies to all facilities (§ 112.1(d)(2)(ii)). As noted previously, no data was provided by the commenters to support such an exemption.*
>
> *[...] Commenters did not provide sufficient data to support an increase in the Tier I threshold for farms higher than proposed. For more information on Tier I and Tier II qualified facilities, see Section V.G of this notice. EPA also disagrees that the amendments to the SPCC rule in December 2006 provide "special treatment" to any eligible facility. Farmers, small businesses, and other small oil storage facilities may be eligible to self-certify their SPCC Plans if they meet the eligibility criteria for qualified facilities in §112.3(g). In providing this option for facilities handling smaller amounts of oil, the Agency sought to focus on those smaller, less complex operations that may be concerned about the impact of using a PE on their limited budget. Some of the current noncompliance with the SPCC regulation may be attributed to those concerns. The Agency believes that providing a streamlined option for owners and operators of these smaller, less complex facilities should improve the overall compliance for the SPCC regulation, ultimately resulting in greater environmental protection (71 FR 77270, December 26, 2006). The owners and*

operators of farms, small businesses and other small oil storage facilities may be eligible to self-certify their SPCC Plans if they meet the eligibility criteria for qualified facilities in §112.3(g).

[...]With respect to an alternative "qualified facility" threshold, EPA considered the commenters' suggestions for modifying the existing qualified facilities threshold of 10,000 U.S. gallons total aboveground storage capacity. However, the agricultural community did not provide information that would lead the Agency to conclude that farms are sufficiently different to warrant further differentiation from other facilities that store oil. In fact, EPA believes that many non-farm facilities could have similar needs to purchase identical storage needs as identified by agricultural stakeholders. Thus, EPA is not persuaded by these comments to raise the existing qualified facilities threshold solely for farms beyond 10,000 U.S. gallons. In setting the qualified facilities threshold at 10,000 U.S. gallons in the December 2006 amendments, EPA sought to provide an alternative for facilities, among other things, with simple oil storage configurations and smaller quantities of oil handled (see 71 FR 77271, December 26, 2006). EPA continues to maintain that the focus of the qualified facilities alternative should be on simple configurations and small quantities of oil stored or handled. It should also be noted that, as described in Section V.G of this notice, EPA is finalizing a multi-tiered approach to allow the owner or operator of a facility that meets the eligibility criteria for a qualified facility to self certify his SPCC Plan, and allow the owners or operators of a subset of qualified facilities (i.e., "Tier I qualified facilities") to complete the SPCC Plan template in Appendix G of this part in lieu of preparing a full SPCC Plan. EPA believes that the Tier I qualified facility alternative should focus on facilities with the simplest configurations and smallest oil storage containers.

2.4 State Regulations of Oil Storage at Farms

This section summarizes state AST programs and discusses the applicability of these programs to oil tanks at farms.[31] *Appendix A* provides a state-by-state summary of requirements applicable to farm tanks, based on EPA review of program information and regulations in each state.

A unified format for state AST programs does not exist. Two primary state agencies regulate ASTs: state fire marshals and state environmental departments. Of the 44 states that operate formal AST programs,[32] 24 states have AST programs administered by the environmental department (or its equivalent). In the other 20 states, the State Fire Marshal has authority over ASTs through implementation of a fire code, such as the National Fire Protection Association (NFPA)[33] Uniform Fire Code or the International Fire Code (IFC), both of which have guidelines for flammable and combustible liquid storage and handling.[34] Specific requirements and thresholds for state AST program regulatory applicability vary. Several states

[31] States also typically have programs specific for USTs but these containers are of lower interest for this study given the focus on farms that store between 2,500 and 6,000 gallons of oil in aboveground containers.

[32] For the purpose of this report, a "formal" state AST program consists, at a minimum, of a registration or permitting requirement for ASTs with a state agency. Note that the seven states without a formal state AST program still regulate ASTs through the fire code, but registration and permitting (if any) is done through county or local governments.

[33] NFPA is an international nonprofit that serves as an advocate of fire prevention primarily through NFPA codes and standards, which number over 300 and address building, process, service, design, and installation. NFPA codes are referenced in many state fire codes, frequently with state deferral to NFPA standards.

[34] The fire codes contain requirements for tanks containing flammable liquids by specifying design and construction standards (e.g., material, design, venting), installation requirements (e.g., location including separation from buildings, public ways and other tanks, signage), overfill protection, and requirements for dispensing equipment. Note that states regulations may have additional requirements beyond those in the fire codes, for example regarding secondary containment for fuel storage areas.

require permitting and/or registration of ASTs that exceed a specified individual or aggregate capacity.[35] States may also have additional requirements such as inspection and secondary containment for tanks above a specified capacity.

Exhibit 16 summarizes state AST programs. Nine states, identified separately in the table (i.e., Arkansas, Colorado, Kentucky, Minnesota, New Mexico, Oklahoma, South Dakota, Vermont, and Wyoming), exempt farms from AST requirements applicable to other types of facilities. As discussed later in this section, other states may provide specific exemptions for farm tanks below a specified individual or aggregate capacity threshold. These exemptions do not necessarily mean that farm tanks have no requirements. Farmers still need to comply with any applicable fire safety ordinances, but they are not required to register the tanks, obtain a permit, etc. under the state-wide program that otherwise applies to other types of ASTs.[36]

Exhibit 16: Summary of state AST programs (States with specific farm exemptions underlined)

Agency Administering State AST Program	*Number of States*	*States*
Programs administered by Environment Protection Department or Equivalent	16	AL, DE, FL, KS, LA, MD, NC, NH, NJ, NY, PA, RI, TX, VA, WI, WV
... but exempt farm tanks	**8**	**AR, CO, MN, NM, OK, SD, VT, WY**
Programs administered by State Fire Marshal or equivalent	19	AK, AZ, CA, IL, IA, IN, GA, MA, ME, MI, MO, MT, NE, ND, NV, OH, OR, SC, WA
... but exempt farm tanks	**1**	**KY**
Subtotal – States with AST Program	44	
No State AST Program (Requirements administered by local/county governments)	6	CT, HI, ID, MS, TN, UT

Exhibit 17 summarizes the oil storage capacity thresholds for farms tanks covered under state AST programs. As shown, the thresholds for farm tank storage capacity vary by state, and tend to mirror other federal regulations, such as the SPCC Rule (1,320-gallon threshold) and the UST rule at 40 CFR part 280 and 281 (1,100-gallon threshold). EPA identified 29 states that include applicability capacity thresholds for ASTs, of which seven states specify a different, higher threshold for farm tanks. The remaining states either do not have thresholds for farm tanks, or exempt farm tanks from state AST regulation altogether.

Exhibit 17: Farm AST Capacity Thresholds

AST Threshold for Farm Tanks (Gallons)	*Number of States*	*States*
>60	2	GA, ME
>110	2	IL, WI
>500	1	RI
>550	1	FL

[35] Where oil storage tanks must comply with flammable and combustible liquid storage and handling sections of state and local fire codes, the absence of more formally organized state AST programs, such as those administered by state environmental agencies or the State Fire Marshal, does not preclude ASTs from regulation.

[36] Note that other types of ASTs (e.g., ASTs at construction sites) may also be exempted from state programs or have higher applicability thresholds. Further, some state programs apply only to certain ASTS. For example, Wyoming requires registration of ASTs used to dispense fuel for retail sales, which excludes, by definition, farm tanks and ASTs that store fuel for on-site use.

Exhibit 17: Farm AST Capacity Thresholds

AST Threshold for Farm Tanks (Gallons)	*Number of States*	*States*
>660	2	LA[1], NH[1]
>1,000	1	OR
>1,100	4	IA, MI[2], NY, TX
>1,100 (specific to farms)	7	AL, DE, KS, MA, ND, PA, VA
>1,320	5	AK, CA, LA[1], NH[1], WV
>10,000	1	MD
>21,000	1	NC
>30,000	1	MT[3]
>200,000	1	NJ
Subtotal, State AST Programs with Thresholds for Farms	29	
No Threshold Located	6	AZ, IN, MO, NE, SC, WA
All Farm Tanks Exempt	9	AR, CO, KY, MN, NM, OK, SD, VT, WY
Subtotal, State AST Programs without Thresholds for Farms or Exempting Farms	15	
Total, State AST Programs	44	

Notes:
[1] State has an aggregate threshold as well as a tank threshold.
[2] Michigan limits tanks holding Class I liquids to 6,000 gallons and tank systems holding Class II or IIIA liquids to 15,000 gallons per tank or 30,000 gallons in the aggregate.
[3] Maximum capacity for compensation fund eligibility.

Beyond the type of state or local program to which farm tanks are subject, and any applicable threshold, there may also be differences in the level of attention farm tanks receive from state or local authorities charged with ensuring compliance with environmental protection or safety requirements. EPA's review of public information on local Fire Ordinances and Fire Department programs suggests that the level of inspection and compliance enforcement varies depending on the jurisdiction. California's Health and Safety Code specifically calls for the triennial inspection of each farm to verify compliance with hazardous material (including gasoline and diesel) storage requirements for quantities above 55 gallons.[37] Other jurisdictions specifically exclude farms from their inspection program.[38]

[37] The program started in 2001 after an audit performed by the State of California in 1999 revealed that implementation of the hazardous material disclosure program on farms was incomplete. http://www.solanocounty.com/depts/rm/environmental_health/hazmat/farm_hazmat_faq.asp

[38] For example, the City of Baraboo, WI specifically excludes farms from inspections conducted either once or twice a year at other types of commercial facilities within the City Fire Department's jurisdiction. (http://www.cityofbaraboo.com/index.asp?Type=B_BASIC&SEC=%7BB55D077F-2005-4BE3-AABC-7447CCA3F2C6%7D&DE=%7BB3073C9F-4670-4183-A5B6-0646FA271A5C%7D)

3 Oil Discharges

The 2005 USDA Study cited in *Section 2.2* asked respondents to indicate whether they had experienced a fuel spill in excess of 1,320 gallons.[39] Of the six respondents that had experienced this size spill (less than 1 percent of the farmers surveyed), five had aggregate oil storage capacity of 5,000 gallons or less. Based on these responses, USDA concluded that the data suggest that the frequency of spills of that size from farms is small. However, these data also reveal that facilities with relatively small storage capacity may still be the source of discharges to navigable waters or adjoining shorelines well in excess of quantities that may be harmful. Further, the study did not address discharges of less than 1,320 gallons of oil.

The sections below describe past incidents from farm facilities (*Section 3.1*) and highlight the harmful effects that even small amounts of fuel oil discharges can have on receiving ecosystems (*Section 3.2*).

3.1 Reported Discharges

The National Response Center (NRC) is the federal government's national communications center and the sole federal point of contact for reporting hazardous substances releases and oil discharges that trigger federal notification requirements under several laws. Under 40 CFR part 110, the quantity of oil which causes harm and is reportable is a sheen (note that there are other triggering criteria other than a sheen, 40 CFR part 110). Upon receipt of an incident report, NRC ensures the deployment of appropriate response capabilities. NRC maintains a database of all incidents reported to the Center and publishes the data on its website.

EPA reviewed the NRC data for the period of 2010 through 2014 to identify reported oil spills that may be attributable to farms. An initial search focused on incidents where the responsible party or the incident description recorded by the NRC mentioned a farm or agricultural activities, but excluded those incidents that did not relate to farming activities (e.g., releases from a pipeline crossing farm land or from co-located oil production site), involved oils not typically used by farmers (e.g., crude oil, transformer oil), or for which the description of the incident did not enable EPA to conclusively determine that the incident was, in fact, farm-related.[40] EPA then conducted additional searches to get more information about incidents reported to the NRC and to identify additional incidents not identified during the NRC data review. For example, EPA reviewed information from Pollution Reports prepared by EPA On-Scene Coordinators (OSCs) participating in response activities prompting expenditures from the National Oil Spill Liability Trust Fund (OSLTF) resources, and information provided by EPA regional staff who responded to, or were informed of, spills from farm facilities. This second search revealed additional incidents that were either not reported to the NRC or for which the information provided in the NRC report was not sufficiently detailed to flag the incident in the first search (i.e., the report did not identify the responsible party, type of oil spilled, or otherwise provide any indication that it was related to a farm).

This approach highlights the significant limitations of using the NRC data to evaluate spill risk. Spill incidents are not always reported due to lack of awareness of the reporting requirements or the information provided is preliminary and incomplete, making it difficult to conclusively establish the

[39] The survey did not solicit information on the location of the spills to determine whether the discharges affected waters or adjoining shorelines, nor did the survey address smaller spills that may also reach waters.

[40] For example, EPA did not include NRC incident #1024352 since it could not conclusively establish that the incident was, in fact, due to the farm operations ("caller stated that there is an unknown amount of diesel fuel discharging from the river embankment from a farm field into the Kalamazoo River. Caller stated that this has been ongoing for several days and they discovered spontaneous sheening at this location.")

source, cause, and impacts of the discharge. For example, a spill may be reported to the NRC and described only as a "mystery sheen" that upon further investigation turns out to have originated from a tank at a facility. The NRC report will not reflect the latter information. Incidents that do not prompt activation of state or federal government responders may not get investigated or recorded in other sources (e.g., newspaper, state or Federal emergency response reports), making it difficult to confirm the circumstances, magnitude, and impacts of a discharge. As discussed in *Section 2.2*, since available information suggests that many farmers are not aware of their obligations under the SPCC regulation and do not provide adequate secondary containment for their oil containers, many farmers may also not be aware of the federal criteria and reporting requirements for oil spills.

The following example incidents are indicative of the types of spills originating from farms. In EPA's experience, the causes and circumstances of incidents from farms are similar to those from other types of facilities. These causes include overfills, tank settling, equipment failures (e.g., piping, appurtenances), and operator errors. In several cases, the lack of secondary containment contributed to the discharge reaching waters or adjoining shorelines. A good prevention plan helps to avoid spills in the first place, and lessens environmental impacts caused when accidents occur. Spill prevention regulations require non-transportation-related facilities that store large amounts of oil to have a spill prevention plan that addresses the facility's design, operation, and maintenance procedures to prevent spills from occurring. The plan must also include countermeasures to control, contain, clean up, and mitigate the effects of oil spills on waterways. Note that the examples below do not include the costs incurred responding to the discharge, nor do they include the costs for restoration, rehabilitation, or replacement of injured natural resources, unless noted).

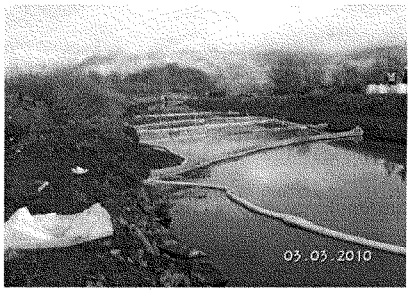
- On January 5, 2002 approximately 564 gallons of diesel oil drained from an Arizona farm's storage tank and reached the Colorado River 30 feet away. The farm operates an irrigation pumping facility in connection with farming activities. The facility had three storage tanks holding a total capacity of 11,000 gallons of diesel oil. Two hunters noticed a strong odor of fuel coming from the Colorado River and notified the California Department of Fish and Game and the La Paz county sheriff's office, who discovered that the piping connecting the diesel tanks and the irrigation pump was disconnected. EPA officials responded to the spill, arranged for soil cleanup, and set up booms along the river to protect the local drinking water supplies and the Cibola Wildlife Refuge downstream. The responsible parties claimed that the spill was a result of vandalism. The farm did not have an oil spill response plan. EPA fined the landowner and the operator $11,000 for violations stemming from the incident. Following the spill, the responsible party replaced its tanks with a new tank located within secondary containment, and installed a new fuel line within the piping. The farm also prepared a spill response plan.[41]
- On June 30, 2006, a diesel-powered pump, located on the bank of the Cuivre River, used to pump irrigation water to a nearby sod farm, developed a leak and released an estimated 80 to 100 gallons of diesel fuel to the Cuivre River. EPA and the Missouri Department of Natural Resources (MDNR) responded. The EPA activated the OSLTF to pay for response costs in the event the responsible party did not cooperate in the clean-up efforts. The EPA and MDNR monitored the clean-up. The pump was about 15 feet above the river on a bench, walled with concrete and filled with gravel. The gravel was stained with diesel fuel under the pump motor. The pump was off when responders arrived and no fuel was leaking from it at that time.

[41] Sources : http://yosemite.epa.gov/opa/admpress.nsf/6427a6b7538955c585257359003f0230/1d737bb67d4296ac852570d8005e1593!OpenDocument&Start=12.10&Count=5&Expand=12.11

Responders observed diesel leaching into the river. The Old Monroe Fire Department reported that the day before they had seen a sheen with pools as far as a mile downstream of the spill site. Absorbent booms and hard booms were placed to secure the area of release. The pump base was excavated and diesel-contaminated gravel was removed for disposal.[42]

- On March 9, 2009, MDNR requested assistance from EPA concerning a diesel fuel spill that threatened the Chariton River. A relatively new 10,000-gallon AST at a farm had apparently settled due to heavy rains causing a pipe to fracture releasing almost all of the tanks' 7,000-gallon content. The material traversed a crop field and reached the Chariton River. A contractor was secured to assist with the cleanup with MDNR remaining on scene to document recovery of the material. By March 16, 2009, the contractor had recovered 15,000 gallons of water that had an oil sheen, 5,300 gallons of diesel water mixture, and two 40-cubic-yard roll off boxes of contaminated boom and sorbent material. EPA assessed a civil penalty of $18,750 to the responsible party.[43]
- On February 23, 2010, a caller reported a spill of approximately 2,500 gallons of diesel from an aboveground storage tank at a farm to an irrigation canal that is a tributary of the Owyhee River near Nyssa, Oregon to the NRC (*Exhibit 18*). The spill occurred as a tanker truck was transferring fuel into an already nearly-full 10,000-gallon bulk storage tank. The spill was controlled by deploying a boom and pads to divert the flow of the irrigation canal. Information from the local chamber of commerce describes the farm as consisting of about 1,300 acres of land, organized into four distinct areas. They mostly raise onions, but also some corn, wheat, hay, and mint. The farm had a total oil storage capacity of 16,000 gallons, of which the largest of three tanks was 10,000 gallons. All tanks were housed in buildings. The farm and trucking company involved in the discharge agreed to pay a penalty of $34,000 for the discharge. EPA noted that the spill could have been prevented had the farm had an SPCC Plan and provisions in place to ensure the safe storage of oil. Notably, the farm did not have adequate secondary containment to prevent the migration of the spilled oil some 200 feet from the tank. Further, the farm could not provide records indicating that the tank had been inspected, or that employees were trained in how to prevent and respond to a spill.[44]

Exhibit 18: Booms deployed to contain and collect diesel spilled by a farm in Oregon in February 2010.



[42] Sources: EPA Pollution/Situation Report, available at http://epaosc.org/site/site_profile.aspx?site_id=2338

[43] Sources: EPA Pollution/Situation Report, available at http://epaosc.org/site/site_profile.aspx?site_id=4844; http://www.epa.gov/region7/public_notices/CWA/2011/brownfield_oil_moberly_mo_and_grisby_farms_elmer_mo.htm

[44] Sources: EPA Pollution/Situation Report, available at http://epaosc.org/site/site_profile.aspx?site_id=5847; NRC Report ID 932146; http://www.argusobserver.com/news/nyssa-chamber-of-commerce-honors-local-residents---larry/article_10514273-eb92-5f6d-9990-29bc27f31624.html?mode=jqm; http://yosemite.epa.gov/opa/admpress.nsf/6427a6b7538955c585257359003f0230/9efe7b30cea0b3568525784e006df898!OpenDocument

- On July 14, 2010, California Office of Emergency Services responded to a 2,000-gallon spill of diesel from a 10,000-gallon aboveground storage tank at an orchid nursery. The discharge affected a tributary to Frenchmans Creek. The spill had started about two weeks earlier (around June 30th) when a pipe linking the tank to an abandoned boiler room was inadvertently perforated by a backhoe, causing diesel to discharge unnoticed into an adjacent small creek that is a tributary to Frenchmans Creek. Neighbors reported the spill to the state authorities on July 11th, after having observed diesel in Frenchmans Creek as early as July 8th. Emergency response personnel, including San Mateo County and California Department of Fish and Game staff, contained the spill and did not observe any impacts to wildlife, although they reported over an inch of floating product over an emulsified layer in the small creek, immediately upstream of its confluence with Frenchmans Creek. The responsible party retained an environmental contractor to clean the spill under the County's supervision. The cleanup involved flushing the small creek and removing soil. The County later oversaw the removal of the facility's three 10,000-gallons aboveground tanks and their content. The responsible party agreed to pay $139,000 in civil penalties for violations stemming in part from the incident and as reimbursement of costs incurred by the county ($5,700).[45]
- On January 1, 2011, a spill was reported to the NRC from a farm in Arkansas. The cause of the spill was operator error; the nozzle from a diesel tank was left outside of the secondary containment. Approximately 5,000 gallons of diesel were discharged, of which 4,000 gallons reached water.[46]
- On September 13, 2012, possibly as much as 5,000 gallons (later estimated as potentially up to 15,000 gallons) of used oil was discharged from an AST that leaked from a faulty valve at a plant nursery into the North Raccoon River in Iowa. Reportedly, some time on September 12 or 13, 2012, the facility realized the tank was leaking but did not notify anyone or attempt to stop the leak because it was raining. According to personnel on the scene, the spilled material was heavy with some of it sinking and covering the stream bed. The sheen reportedly extended several miles downstream.[47]
- On November 29, 2012, approximately 7,000 gallons of Off-Road Diesel was released at a farm in Donalsonville, Georgia (*Exhibit 19*). The EPA OSC in charge of the case noted the cause of the release as human error; a farmhand left the pump running while filling up a piece of equipment at the end of the day, but failed to remember to come back and turn off the pump.[48]

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[45] Sources: http://www.waterboards.ca.gov/sanfranciscobay/board_info/agendas/2010/August/EO_Report.pdf; http://w3.calema.ca.gov/operational/malhaz.nsf/eeeb9c701ac0f14688257ac60077383d/2745f8799c4e5add882577610003b831?OpenDocument; http://patch.com/california/belmont-ca/hmb-orchids-to-pay-damages-for-environmental-pollutio927d1f4f8a. The company was also fined for diverting or obstructing a stream without prior authorization from the Department of Fish and Game and failing to immediately report the release of hazardous materials to the proper authorities, obtain a project permit from CalOSHA, and protect employees in an excavation from cave-ins by an adequate protective system.

[46] Source: NRC report ID 963479

[47] Sources: EPA Pollution/Situation Report, available at http://epaosc.org/site/site_profile.aspx?site_id=8173.

[48] Sources: EPA Pollution/Situation Report, available at http://epaosc.org/site/site_profile.aspx?site_id=8321; NRC report ID: 1031830; Personal communication with EPA OSC responsible for the case (Personal communication, 1/26/2015).

- On March 4, 2012, a caller reported a spill of diesel fuel from a storage tank on a farm in Louisiana. The cause of the release was unknown but the discharge reached an irrigation ditch and affected an unnamed creek. The caller estimated the quantity released at several hundred gallons.[49]
- On December 28, 2012, a caller reported two spills to the NRC involving two tanks at a farm in North Carolina. One tank contained diesel (7,000 gallons spilled) and the other containing liquid nitrogen fertilizer (unknown amount spilled). The incident occurred when valves on the two tanks were opened, releasing the content onto the ground. Given the proximity of a wetland/swamp, cleanup actions were undertaken by the responsible party.[50]

Exhibit 19: Discharge of off-road (red dyed) diesel from a farm in Georgia in November 2012.

- On April 3, 2013, there was a release of fuel through the tank vent on a 5,000-gallon double-walled storage tank at a farm in Alabama. The first report of the incident to the NRC attributed the cause of the release to operator error, with the fuel coming through the tank vent and causing the discharge of approximately 200 gallons of diesel fuel. A second report to the NRC updated the quantity discharged to 4,800 gallons (which is almost the entire capacity of the tank) and the cause to over-pressurization which resulted in a pipe break.[51]
- On January 27, 2015, EPA received a report of a discharge from a farm irrigation fuel tank that released into the Salt Bayou in Arkansas. The spill was estimated to be less than 100 gallons based on visual evaluation, but may have been several days old.

Other incidents potentially relevant to characterizing the risk posed by oil discharges from farms include discharges from other types of facilities involving tanks of a similar size and service as those used on farms. Each year, the NRC receives hundreds of reports of discharges from storage tanks and fixed facilities. Unfortunately, the information provided in the NRC reports is generally not sufficiently detailed to ascertain the size of the container or circumstances of the release and conclude whether similar discharges may occur on farms. Additionally, as noted above, NRC reports often provide only preliminary information on the discharges to allow the prompt notification of authorities and deployment of cleanup resources, as needed. What the NRC data indicate, however, is that causes of discharges described above are fairly common across sources. For example, of the 1,690 incidents reported to the NRC between 2010 and 2013 involving the release of diesel from fixed facilities or storage tanks, 28 percent were reportedly due to equipment failure, 16 percent were due to operator error, and 25 percent were due to other causes (the remaining 31 percent had an unknown cause).

[49] Sources: NRC report ID 1004739

[50] Sources: NRC report ID 1034368

[51] Sources: NRC report IDs 1042818 and 1042879

3.2 Environmental Impacts of Oil Discharges

The impacts of oil discharges depend on the type of oil, quantities, spill circumstances (e.g., weather conditions, speed and effectiveness of the response) and ecosystem-specific characteristics (e.g., land, small stream, large river, pond, wetland). There is ample evidence that discharges of even relatively small quantities of fuel oil, such as the quantities commonly stored on farms, into waters or adjoining shorelines can have significant adverse impacts on soil, vegetation, and wildlife. For example, *Exhibit 20* summarizes selected cases that illustrate the type and the significant magnitude of natural damages assessed for fuel spills ranging between 2,000 and 30,000 gallons, which are within the range of farm fuel storage capacities.[52] As shown by these cases and assessed natural resource damages ranging from thousands to millions of dollars, such spills can affect miles of rivers and acres of wetlands and terrestrial habitats, and cause significant injury to aquatic and terrestrial habitats and wildlife. In particular four of the seven cases involved discharges of less than 6,000 gallons, and therefore could occur at a farm storing up to 6,000 gallons of oil. The settlement values for damages from these four spills ranged from $145,000 to $418,000. Such values are two orders of magnitude the costs that a farmer may incur to provide adequate secondary containment to prevent an oil discharge from reaching waters of the United States or adjoining shorelines, and an even greater multiplier of the relatively small costs of preparing an SPCC Plan.[53]

Exhibit 20: Example natural resource damages from fuel spills between 2,000 and 30,000 gallons

Case	Date	Spill volume, oil type, and source	Summary of damages (from Department of Interior description of the case)	Settlement Value[1]
Pilot Diesel Spill, Bill Williams River National Wildlife Refuge	12/7/2000	6,000 gallons; diesel, tanker truck	Contaminated soils adjacent to the highway and overlooking the Bill Williams River just 300 feet from the waters' edge, directly impacting soil, vegetation, and wildlife	$145,000
Texmo Oil Co. tanker truck accident diesel spill	7/28/2006	7,600 to 7,800 gallons; diesel fuel; tanker truck	The spilled, burning diesel ignited the cattails in the marsh below the bridge and the fire eventually spread to include woody riparian and upland vegetation along the shoreline and the riparian forest upstream of the bridge. Approximately 348 acres of marsh and terrestrial habitats were burned or partially burned by the fire.	$1,217,383
East Walker River fuel oil spill	12/30/2000	3,600 gallons; #6 fuel oil; tanker truck	The spill impacted at least 15 miles of river. The oil cleanup was complicated by cold weather and ice in the river. The resources impacted included Instream habitat and wildlife (fish, macroinvertebrates); human recreational uses (fishing); and other wildlife (1 Virginia rail, 2 dippers, 1 mink, and 6 beavers collected dead).	$418,000 ($358,000 for NRDA)

[52] EPA's case selection focused on fuel spills to land and reaching waters or adjoining shorelines. EPA excluded cases involving historical pollution (e.g., NPL sites), crude oil and other chemical substances, and vessels.

[53] In the 2008 RIA, EPA estimated that small facilities such as farms (Tier 1 qualified storage facility) spend $1,320 to $19,800 (2007 dollars) on installing secondary containment for their bulk storage containers, depending on berm dimensions and material, and less than $200 on Plan preparation, when following the template EPA developed (U.S. EPA, 2008).

Exhibit 20: Example natural resource damages from fuel spills between 2,000 and 30,000 gallons

Case	Date	Spill volume, oil type, and source	Summary of damages (from Department of Interior description of the case)	Settlement Value[1]
Fish Creek	9/15/1993	30,000 gallons; diesel; pipeline	Diesel was spilled into a crop field in DeKalb County Indiana. The fuel made its way into a small drainage ditch that discharges to Fish Creek. This oil entered Fish Creek and spread downstream, crossing into Williams County, Ohio, exposing the lower 7 miles of the creek to contamination. Mortality of mammals, migratory birds, fish, reptiles, amphibians, and mussels was observed from the spill plume area of Fish Creek following the discharge.	$2,507,500
Marathon Oil Co. jet fuel/kerosene and slop oil spills	11/25/199, 2/15/1992	3,000 gallons of jet fuel / kerosene (1990); 1,470 gallons of slop oil (1992); facility	The spills entered Oil Creek, Crooked Creek and other Waters of the United States and the State of Indiana. In total, approximately 9.24 miles of riverine habitat and 50 acres of wetland habitat were impacted.	$304,630
Farmland Industries oil discharge	7/23/2001	2,000 gallons; oil; pipe	The discharged oil flowed into the unnamed intermittent creek bed and subsequently flowed approximately 1,000 feet to Cedar Creek (an intermittent stream) and then flowed approximately 2 miles to Buck Creek (a perennial stream). The potential pathway of discharged oil, should it have continued downstream another 2 miles from Buck Creek to Sand Creek (a perennial creek) and then another 5 to 6 miles into the Caney River, would have threatened this navigable-in-fact body of water. The USFWS calculated the actual extent of habitat affected by the discharge as approximately 15 miles of streams and adjacent banks along Cedar Creek,	Not available
Puget Sound Energy-Crystal Mountain diesel spill	11/3/2006	18,000 gallons, an undetermined fraction of while entered waters; diesel; facility	Diesel fuel flowed to the ground and groundwater, and an undetermined amount of diesel fuel entered Silver Creek and flowed towards the confluence with the White River, approximately four miles downstream.	$49,614

Source: U.S. Department of Interior NRDAR Case Documents, Available at http://www.cerc.usgs.gov/orda_docs/DamageCases.aspx (accessed 1/14/2015)

[1] Value shown is in the dollar year of the settlement date, not adjusted for inflation.

EPA is aware of other examples of spills involving what may seem as small amounts of oil causing significant environmental damages. For example, in March 1, 2015, the release of 1,500 to 2,200 gallons of used oil from an aboveground storage tank at a former farm (feedlot) in Washington State caused heavy oiling of Sulphur Creek and a sheen of the Yakima River downstream. The tank had no secondary containment. The oil left the facility, entered a ditch leading to Sulphur Creek and flowed through about seven miles of irrigation ditches and canals and about 12 miles down the Yakima River. Responders deployed absorbent pads, protective booms and collection equipment to contain and recover the oil. A final report on oiled wildlife noted that 22 oiled wild mallards were captured, of which 6 died in care,

16 oiled mallards were observed already dead in the wild, and 57 oiled greylag domestic geese were captured, one of which had to be euthanized.[54]

[54] Washington Department of Ecology. Final update on Sulphur Creek Oil Spill (available at http://www.ecy.wa.gov/programs/spills/incidents/SulphurCreekSpill/ accessed March 25, 2015) and Associated Press, March 3, 2015.

4 Conclusions

The exact number of farms subject to the SPCC rule is uncertain, since EPA does not collect registration data for SPCC facilities, but fuel expenditure data compiled by USDA suggests that the vast majority of U.S. farms – 81 to 96 percent – store less than 2,500 gallons of oil on site, and only a very small fraction of farms – less than about 1 percent – store more than 20,000 gallons of oil. Based on capacity alone, therefore, the vast majority of farms are already exempt from the SPCC requirements following the WRRDA amendments to the SPCC rule, which provided an exemption for farms with an aggregate aboveground oil storage capacity of less than 2,500 gallons. This is supported by review of tank registration data, site visits, and other information presented in this report (see *Section* 2).

Further, a vast majority of the small subset of farms that are subject to the SPCC requirements are eligible to self-certify their plan. Over the last decade, EPA has promulgated several changes to the SPCC rule that specifically streamlined the rule requirements and provided significant regulatory flexibility and cost reductions for farms, including providing most farmers the option of using an EPA provided self-certification template to develop their plan. The WRRDA amendments expanded the eligibility of the self-certification option to farms with an aggregate aboveground oil storage capacity up to 20,000 gallons (provided they also meet other criteria), further reducing the SPCC burden for the small fraction of farms that must prepare a plan. Preparation of a self-certified SPCC Plan represents a small burden to a facility owner and is primarily aimed at ensuring that the oil containers are designed, installed, and operated to ensure safe storage of oil, including, at a minimum, by providing appropriate secondary containment to prevent spills from reaching the navigable waters or adjoining shorelines, regularly inspecting the tanks and appurtenances, and outlining procedures to be followed in the event of a spill. Moreover, the cost of developing an SPCC Plan is relatively small in comparison to the costs associated with spill cleanup and environmental damages (*Section 3.2*).

Data on the characteristics of oil storage at farms (e.g., types of containers, container locations, and secondary containment) are limited. As stated in the regulatory record, EPA asked for data during notice and comment rulemaking related to farms to determine how farms differ from other facilities of similar storage capacities. EPA did not receive information to justify exempting farms or otherwise treating oil storage at farms any differently than oil storage at other businesses with similar storage capacities. Data from the 2005 USDA survey discussed in *Section 2.2* suggested that many farmers were not aware of their obligations under the SPCC regulation and did not provide adequate secondary containment of their oil containers. State regulations (*Section 2.4*) may not cover farm tanks, or when they do, they may focus on fire hazards rather than spill prevention and environmental protection. In fact, several states specifically refer tank owners to the SPCC rule at 40 CFR part 112 when describing required preventive measures applicable to facilities that store oil and have the potential to cause a discharge to navigable waters or adjoining shorelines. In fact, the storage threshold applicable to state AST programs often parallel those in 40 CFR part 112 with 25 states having aggregate aboveground oil storage capacity thresholds of 1,320 gallons or less. As discussed in *Section 2.4*, however, requirements applicable to these containers differ across the states, from simple registration of the containers with state agencies, to more extensive pollution prevention requirements that more closely follow those of the SPCC rule.

The data reviewed by EPA show that farms are sources of oil spills. EPA highlighted multiple examples of spills from farm tanks (*Section 3.1*), and there is ample evidence that discharges of oil – even in the relatively small quantities stored on farms – cause significant damage to the environment (*Section 3.2*). Under the WRRDA amendments, the SPCC regulation currently provides an exemption for farms with aggregate aboveground oil storage capacity less than 2,500 gallons, with an interim conditional exemption for farms with up to 6,000 gallons aggregate aboveground oil storage capacity. This is several

orders of magnitude greater than the long-established criteria for discharges of oil that may be harmful, which were based on evidence of significant harm at concentrations in the range of parts per million.

Given the number of farms with significant quantities of oil on-site, past discharges from farms, and environmental harm posed by even small discharges of oil, EPA maintains that requiring simple measures such as adequate containment, periodic inspection of containers, and regular review of oil handling practices, is an appropriate way to address the risk of spills to waters for farms storing even small quantities of oil, such as the 2,500-gallon minimum aggregate aboveground oil storage capacity provided for under the WRRDA.

Review of the data led EPA in the past to conclude that oil storage on farms is not unique. As explained in the rulemaking record, EPA has received no data or found any rationale to treat farm-related oil storage differently than other sector oil storage. EPA has provided targeted rulemaking and guidance for farms and several compliance date extensions that reduced the SPCC burden for farms where appropriate. The new regulatory threshold established by the WRRDA, which exempts farms with less than 2,500 gallons in aggregate aboveground oil storage capacity, means that 81 percent to 96 percent of U.S. farms are not subject to the SPCC rule on the basis of aggregate aboveground oil storage capacity. The new self-certification tiers established by the WRRDA amendments currently allow an estimated 99 to 99.9 percent of the remaining farms with aggregate aboveground oil storage capacities greater than 2,500 gallons but less than 20,000 gallons to self-certify their SPCC Plan (assuming a clean history and no container greater than 10,000 gallons). Additional farms may not be subject to the rule's requirements because they do not pose a reasonable expectation of discharge to waters of the United States or adjoining shorelines.

For the few farms still subject to the SPCC rule, the cost and burden of developing an SPCC plan has been partially addressed with the regulatory streamlining efforts. EPA recognizes, however, that many farms (90 percent according to USDA data, as of 2005) lack secondary containment required under the SPCC regulation and by state and/or local ordinances, and the cost of secondary containment may remain a concern for farmers. Containment is the simplest passive method of spill prevention and the cornerstone of the Federal spill prevention program. EPA believes that it is possible to provide effective containment at low cost, for example by placing the farm oil storage tanks in an earthen berm constructed using equipment typically found on a farm (which, in some instances, could require moving tanks), thereby addressing farmers concerns with complying with the SPCC rule. This change, when implemented in the context of a facility-specific spill prevention strategy contained in the SPCC Plan provides essential protection of the nation's waters.

The WRRDA provides for EPA to study and address the appropriateness (based on a significant risk of discharge to water) of the interim conditional threshold, which currently exempts farms from the SPCC rule with aboveground storage capacity greater than 2,500 gallons and less than 6,000 gallons, provided they have a clean spill history. The study shows that it is appropriate to maintain its existing threshold of 1,320 gallons for all facilities in order to maintain adequate level of environmental protection of the nation's waters. This is consistent with the Agency's previous findings as discussed in the record supporting amendments to the SPCC regulation that provided relief to farmers and other small facilities. EPA realizes, however, that the WRRDA amendments create a new minimum regulatory threshold of 2,500 gallons aggregate aboveground oil storage capacity specifically for farms.

Given the information presented in this study, the agency's record and the lack of data to support any higher threshold, it is appropriate to set the threshold for farms at the minimum aggregate aboveground oil storage capacity of 2,500 gallons established under the WRRDA amendments. EPA maintains that requiring measures such as adequate containment, periodic inspection of containers, and regular review of

oil handling practices, is an appropriate way to address the risk of spills to waters for farms within the 2,500 to 6,000-gallon aggregate aboveground oil storage capacity range.

Appendix A: Relevant Text from the Water Resources Reform and Development Act (WRRDA)

SEC. 1049. APPLICABILITY OF SPILL PREVENTION, CONTROL, AND COUNTERMEASURE RULE.

(a) DEFINITIONS.— In this section:

(1) ADMINISTRATOR.— The term ''Administrator'' means the Administrator of the Environmental Protection Agency.

(2) FARM.— The term ''farm'' has the meaning given the term in section 112.2 of title 40, Code of Federal Regulations (or successor regulations).

(3) GALLON.— The term ''gallon'' means a United States gallon.

(4) OIL.— The term ''oil'' has the meaning given the term in section 112.2 of title 40, Code of Federal Regulations (or successor regulations).

(5) OIL DISCHARGE.— The term ''oil discharge'' has the meaning given the term ''discharge'' in section 112.2 of title 40, Code of Federal Regulations (or successor regulations).

(6) REPORTABLE OIL DISCHARGE HISTORY.—
(A) IN GENERAL.—Subject to subparagraph (B), the term ''reportable oil discharge history'' means a single oil discharge, as described in section 112.1(b) of title 40, Code of Federal Regulations (including successor regulations), that exceeds 1,000 gallons or 2 oil discharges, as described in section 112.1(b) of title 40, Code of Federal Regulations (including successor regulations), that each exceed 42 gallons within any 12-month period—
(i) in the 3 years prior to the certification date of the Spill Prevention, Control, and Countermeasure plan (as described in section 112.3 of title 40, Code of Federal Regulations (including successor regulations); or
(ii) since becoming subject to part 112 of title 40, Code of Federal Regulations, if the facility has been in operation for less than 3 years.

(B) EXCLUSIONS.—The term ''reportable oil discharge history'' does not include an oil discharge, as described in section 112.1(b) of title 40, Code of Federal Regulations (including successor regulations), that is the result of a natural disaster, an act of war, or terrorism.

(7) SPILL PREVENTION, CONTROL, AND COUNTERMEASURE RULE.—The term ''Spill Prevention, Control, and Countermeasure rule'' means the regulation, including amendments, promulgated by the Administrator under part 112 of title 40, Code of Federal Regulations (or successor regulations).

(b) CERTIFICATION.—In implementing the Spill Prevention, Control, and Countermeasure rule with respect to any farm, the Administrator shall—

(1) require certification by a professional engineer for a farm with—

(A) an individual tank with an aboveground storage capacity greater than 10,000 gallons;
(B) an aggregate aboveground storage capacity greater than or equal to 20,000 gallons; or
(C) a reportable oil discharge history; or

(2) allow certification by the owner or operator of the farm (via self-certification) for a farm with—
(A) an aggregate aboveground storage capacity less than 20,000 gallons and greater than the lesser of—
(i) 6,000 gallons; and
(ii) the adjustment quantity established under subsection (d)(2); and
(B) no reportable oil discharge history; and

(3) not require compliance with the rule by any farm—
(A) with an aggregate aboveground storage capacity greater than 2,500 gallons and less than the lesser of—
(i) 6,000 gallons; and
(ii) the adjustment quantity established under subsection (d)(2); and
(B) no reportable oil discharge history; and

(4) not require compliance with the rule by any farm with an aggregate aboveground storage capacity of less than 2,500 gallons.

(c) CALCULATION OF AGGREGATE ABOVEGROUND STORAGE CAPACITY.—For purposes of subsection (b), the aggregate aboveground storage capacity of a farm excludes—

(1) all containers on separate parcels that have a capacity that is 1,000 gallons or less; and
(2) all containers holding animal feed ingredients approved for use in livestock feed by the Commissioner of Food and Drugs.

(d) STUDY.—
(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Administrator, in consultation with the Secretary of Agriculture, shall conduct a study to determine the appropriate exemption under paragraphs (2) and (3) of subsection (b), which shall be not more than 6,000 gallons and not less than 2,500 gallons, based on a significant risk of discharge to water.

(2) ADJUSTMENT.—Not later than 18 months after the date on which the study described in paragraph (1) is complete, the Administrator, in consultation with the Secretary of Agriculture, shall promulgate a rule to adjust the exemption levels described in paragraphs (2) and (3) of subsection (b) in accordance with the study.

Appendix B: EPA Fact Sheet – Farms and the Water Resources Reform and Development Act (WRRDA)

[See next page]

United States Environmental Protection Agency | Office of Solid Waste and Emergency Response | April 24, 2015 www.epa.gov/emergencies

Oil Spill Prevention, Control, and Countermeasures (SPCC Program): Farms and the Water Resources Reform and Development Act (WRRDA)

This fact sheet explains impacts of the Water Resources Reform and Development Act (WRRDA) of 2014, as signed by the President on June 10, 2014, on the SPCC rule and farms. In addition, EPA anticipates revising the SPCC rule consistent with the WRRDA amendments through a future rulemaking.

What is SPCC?
The goal of the Spill Prevention, Control, and Countermeasure (SPCC) program is to prevent oil spills into waters of the United States and adjoining shorelines. A key element of this program calls for farmers and other oil storage and handling facilities to have an oil spill prevention plan, called an ***SPCC Plan***. These Plans can help farmers prevent oil spills which can damage water resources needed for farming operations.

What is considered a farm under SPCC?
Under the SPCC rule, a farm is: "a facility on a tract of land devoted to the production of crops or raising of animals, including fish, which produced and sold, or normally would have produced and sold, $1,000 or more of agricultural products during a year."

How does WRRDA affect SPCC for farms?
Section 1049 of the Act changes certain applicability provisions of the SPCC rule for farms, and modifies the criteria under which a farmer may self-certify an SPCC Plan.

Is my farm covered by SPCC?

SPCC applies to a farm that:

- Stores, transfers, uses, or consumes **oil** or **oil products**, such as diesel fuel, gasoline, lube oil, hydraulic oil, adjuvant oil, crop oil, vegetable oil, or animal fat; and
- Stores more than **2,500 U.S. gallons** in aboveground containers; and
- Could **reasonably be expected to discharge oil to waters** of the United States or adjoining shorelines, such as interstate waters, intrastate lakes, rivers, and streams.

If your farm meets all of these criteria, then your farm is covered by SPCC. Use this fact sheet to determine the kind of Plan you need.

Under WRRDA, a farm is not required to have an SPCC Plan if it has:

- An aggregate aboveground storage capacity less than 2,500 gallons

OR

- An aggregate aboveground storage capacity greater than 2,500 gallons and less than 6,000* gallons; and
- No reportable discharge history.

A farmer can self-certify the SPCC Plan if the farm has:

- An aggregate aboveground storage capacity greater than 6,000* gallons but less than 20,000 gallons;
- No individual tank with a capacity greater than 10,000 gallons; and
- No reportable discharge history.

*This 6,000-gallon threshold may be adjusted by EPA, following a study to determine the appropriate exemption.

What is 'reportable discharge history'?
WRRDA defines "reportable oil discharge history" as: a single oil discharge as described in section 112.1(b) of the SPCC rule that exceeds 1,000 gallons, or 2 oil discharges, that each exceed 42 gallons within any 12-month period—
(i) in the 3 years prior to the certification date of the SPCC Plan (as described in section 112.3 of the SPCC rule); or
(ii) since becoming subject to the SPCC rule (40 CFR part 112), if the facility has been in operation for less than 3 years.

A farmer must have a licensed Professional Engineer (PE) certify the SPCC Plan if the farm has:

- An individual tank with an aboveground storage capacity greater than 10,000 gallons; **OR**
- An aggregate aboveground storage capacity greater than or equal to 20,000 gallons; **OR**
- A reportable discharge history.

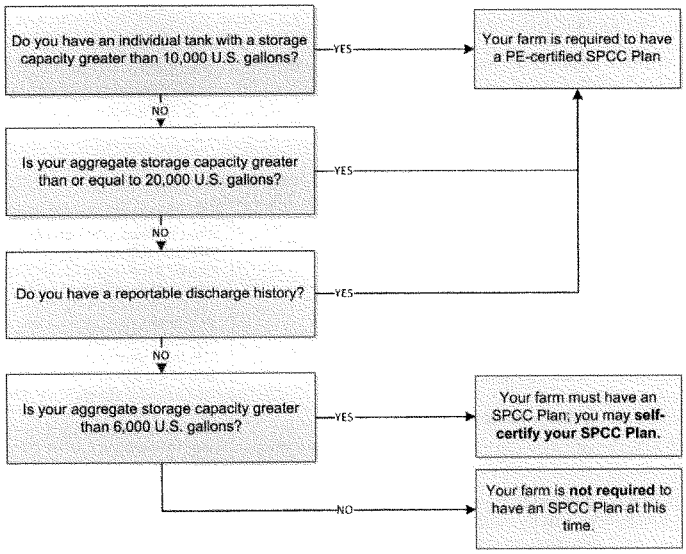
Will these thresholds change in the future?
WRRDA provides for EPA to work with USDA to conduct a study to determine the appropriate applicability threshold for farms, based on a significant risk of discharge to water. The threshold quantity must be not more than 6,000 gallons and not less than 2,500 gallons. The study is scheduled to be completed by June 2015. EPA will then promulgate a rule amending the SPCC requirements to adjust the applicability thresholds.

Under WRRDA, how do I determine what certification is required for my farm's SPCC Plan?
If your farm is subject to the SPCC rule (see the *"Is my farm covered by SPCC?"* text box on the previous page for applicability criteria):

1. Calculate your *aggregate aboveground oil storage capacity*:
   Do not count:
   - All containers on separate parcels that have a capacity that is 1,000 gallons or less;
   - Containers storing heating oil used solely at a single-family residence (e.g., your personal residence as the farm owner or operator);
   - Pesticide application equipment or related mix containers (with adjuvant oil);
   - Any milk and milk product container and associated piping and appurtenance;
   - Completely buried oil tanks (underground storage tanks or USTs) and associated piping and equipment that are subject to all of the technical requirements under EPA's underground storage tank regulations at 40 CFR part 280 or 281;
   - Containers holding animal feed ingredients approved for use in livestock feed by the Commissioner of the Food and Drug Administration (FDA).

2. Review your *reportable discharge history*. (See the *"What is 'reportable discharge history'?"* text box on the previous page)

3. Use the following flowchart to determine what kind of certification is needed for your farm's SPCC Plan.



For More Information

Read the SPCC rule and additional resources: http://www.epa.gov/emergencies/spcc

- **Revised *SPCC Guidance for Regional Inspectors*:**
  http://www.epa.gov/emergencies/content/spcc/spcc_guidance.htm
- **EPA's *SPCC for Agriculture* webpage:**
  http://www.epa.gov/emergencies/content/spcc/spcc_ag.htm

Call the Superfund, TRI, EPCRA, RMP, and Oil Information Center: (800) 424-9346 or (703) 412-9810
TDD (800) 553-7672 or (703) 412-3323
http://www2.epa.gov/epcra/superfund-tri-epcra-rmp-oil-information-center

Appendix C: Summary of State Regulations and Programs for Oil Storage on Farms

Table A-1: Summary of State Regulations and Programs for Oil Storage on Farms

State	*AST Regulation and Applicable Requirements*
States with State-Specific AST Program that Exempt Farm Tanks (Regulations Specifically Exempt Farm Tanks)	
Arkansas	Regulation No. 12; Storage Tanks; June 27, 2014 generally requires that ASTs be inspected and registered under the state program **but farm tanks are exempt.** *"Reg.12.201 Registration Requirement (C) The provisions of this Regulation shall not apply to aboveground storage tanks located on farms, the contents of which are used for agricultural purposes and not held for resale."* Arkansas pollution Control and Ecology Commission (https://www.adeq.state.ar.us/regs/files/reg12_final_20140714.pdf)
Colorado	Storage Tank Regulations at 7 C.C.R. 1101-14 generally apply to tanks greater than 660 gallons capacity and less than 40,000 gallons. Regulations require permits, registration and facility inspection. The regulation specifically **exempts "farm and residential tanks** or tanks used for horticultural or floricultural operations" where farm tanks are defined as "tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property. "Farm" includes fish hatcheries, rangeland and nurseries with growing operations." Department of Labor & Employment; Oil Inspection Section (https://www.colorado.gov/pacific/sites/default/files/PetroleumRegulations101514.pdf)
Kentucky	In accordance with 815 KAR 7:120(3)(7)(i), a permit must be obtained for the installation or repair of an aboveground, or underground storage tank of flammables, combustible liquids, or gases. Tanks in excess of 25 gallons inside of a building & excess of 100 gallons outside a building for Class IA, IB, IC, II & IIIA liquids require a permit. However, **farm tanks are generally exempt from permit requirements**: "in accordance with the Kentucky Building Code, tanks for the use on farms located which are incidental to the operation of farm and located outside the boundary of a municipality but only if they are not used in the business of retail trade, as a regular place of work for 10 or more people or for the processing or storage of timber products." State Fire Marshal's Office (http://dhbc.ky.gov/sfm/Informational%20Bulletins/Bulletin%20August%202011%20Permit%20Fees%20Permit%20Requirements%20Aboveground%20and%20Underground%20Storage%20Tanks%20%20AGST%20%20UGST%20permit.pdf)
Minnesota	ASTs which store liquid substances that may pollute the waters of the state are regulated by Minnesota Rules, Chapter 7151: Aboveground Storage of Liquid Substances. (https://www.revisor.mn.gov/rules/?id=7151&version=2014-01-18T09:33:03-06:00&format=pdf) **Farm tanks are exempt**: "Subp.2. Exclusions. The following aboveground storage tank systems are excluded from the requirements of this chapter... K. an aboveground storage tank, located on a farm, in which the contents of the tank are used by the tank owner or operator for farming purposes, and the contents are not being commercially distributed" Minnesota Pollution Control Agency
New Mexico	New Mexico Petroleum Storage Tank Regulations (20.5 NMAC) apply to ASTs that are 1,320 gallons or more, and less than 55,000 gallons. The general requirements include registration, design, construction and installation standards, release detection, record-keeping and financial responsibility. ASTs as defined in the regulation **specifically excludes: (a) farm, ranch or residential tank** used for storing motor fuel for noncommercial purposes; Department of Environment
Oklahoma	**Farm and ranch tanks are exempt from all requirements.**

Table A-1: Summary of State Regulations and Programs for Oil Storage on Farms

State	***AST Regulation and Applicable Requirements***
	Other aboveground petroleum storage tanks (110 gallons or greater at retail, public airports, marinas, and emergency generators or 2100 gallons or greater at fleet and commercial facilities) must be registered and have notification, fees, containment, overfill protection, design, security, inspection and release reporting requirements. Oklahoma Corporation Commission (http://www.occeweb.com/ps/Forms/ABC's%20of%20AST's/The%20ABC's%20of%20AST's.pdf)
South Dakota	**All farm or residential tanks that store motor fuel for noncommercial purposes are exempt from all AST regulations** under Codified Law of South Dakota, chapter 34A-2-100 . Department of Environment and Natural Resources (http://denr.sd.gov/des/gw/tanks/ASTbrochure.pdf)
Vermont	ASTs are regulated under 10 V.S.A. Chapter 59 Section 1929a and 10 V.S.A. Chapter 159. The regulation establishes general requirements for ASTs. The requirements include siting, design and installation standards. Additional requirements apply to ASTs at bulk facilities (i.e., facilities that store fuel for sale or distribution) and to fuel suppliers. While farms are not explicitly exempted from the rule, the **definition of bulk storage tank facility does not cover farms** since they do not further distribute or sell fuel. Agency of Natural Resources (http://www.anr.state.vt.us/dec/wastediv/ust/regs/ASTRules.pdf)
Wyoming	State requires registering and fees **only for ASTs used by dealers to dispense gasoline and diesel fuels**. There is no state program for other types of ASTs, but the state presumably applies requirements under the adopted state fire code (IFC). State Fire Marshal's Office
States with State-Specific Program – Environmental Department or Equivalent (Regulations Generally Apply to Farm Tanks, but with Potential Exceptions)	
Alabama	State notification program. Each facility with an AST is required to complete a form with information on location, tank capacity, substance and usage. For owners of ASTs to be eligible to the Trust Fund, they must register their tanks, comply with state ADEM Admin. Code rs. 335-6-6-.03 and 335-6-6-.12(r) and Code of Federal Regulations (CFR) Title 40 Part 112 (40 CFR 112), and maintain financial responsibility. The definition of AST in the regulation specifically excludes "**Farm or residential tank of 1,100 gallons or less capacity** used for storing "motor fuel" for noncommercial purposes." Department of Environmental Management (http://www.adem.state.al.us/alEnviroReglaws/files/Division6Vol2.pdf)
Delaware	Delaware Administrative Code, Title 7/1000/1300 Section 1352: Aboveground Storage Tanks. All ASTs greater than 250 gallons must register, **except farm tanks less than 1,100 gallons**. Additional requirements may apply depending on tank size: • Signage (ASTs greater than 1,100 gallons) • Secondary containment • Fees (ASTs greater than 12,500 gallons) • Other technical requirements inspection, monitoring, release detection, prevention and corrective action (ASTs greater than 40,000 gallons). Department of Natural Resources and Environmental Control, Division of Air and Waste Management (http://regulations.delaware.gov/AdminCode/title7/1000/1300/1352.shtml#TopOfPage)
Florida	FAC Chapter 62-762: Aboveground Storage Tank Systems ASTs with **greater than 550 gallons capacity** storing petroleum products and hazardous substances are regulated and required to have inspections and secondary containment Department of Environmental Protection
Kansas	Permanent Administrative Regulations, Article 44 – Aboveground Storage Tanks State regulations for tanks 660 gallons or greater of capacity or **1,100 gallons capacity at farms or residences used for non-commercial purposes**. Owners of tanks below the threshold may register their tank if they desire, but no permit or fee are needed. Other tanks are subject to requirements that include:

Table A-1: Summary of State Regulations and Programs for Oil Storage on Farms

State	***AST Regulation and Applicable Requirements***
	• Registration and AST permit • Siting • Secondary containment (110 percent of largest tank volume) Department of Health and Environment (http://www.kdheks.gov/tanks/download/ast_overview.pdf)
Louisiana	LAC Title 33 Chapter 9 establishes requirements for contingency planning and implementation of operating procedures and best management practices to prevent and control the discharge of pollutants resulting from spill events. The requirements apply to facilities with **minimum aboveground storage capacity of 1,320 U.S. gallons** for two or more individual containers in aggregate within a common storage area (counting only containers with a capacity of 55 gallons or greater), **or 660 U.S. gallons for an individual container.** The requirements for the plan are very similar to those contained in 40 CFR part 112. Department of Environmental Quality
Maryland	Regulations at COMAR 26.10.01, Oil Pollution and Tank Management requires that facilities with aboveground oil storage capacities of **10,000 gallons or more** obtain oil operations permits issued by the Oil Control Program. All regulated ASTs are required to have secondary containment, such as dikes. Facilities with less than 10,000 gallons or more of oil capacity are permitted by right under a general oil operations permit, provided that they meet the general requirements in other sections of the regulations (which pertain primarily to USTs). Department of Environment (http://www.dsd.state.md.us/comar/subtitle_chapters/26_Chapters.aspx#Subtitle10)
New Hampshire	NH's Aboveground Storage Tank Program (Env-Or 300) is designed to prevent releases of oil from aboveground Petroleum Storage Tanks (ASTs) in New Hampshire. Petroleum ASTs are regulated by both the Department of Environmental Services (DES) and the New Hampshire Fire Marshal's Office. The rules apply to facilities with a single AST system having a **capacity greater than 660 gallons or facilities with two or more ASTs that have a total storage capacity greater than 1,320 gallons.** Requirements include registration, construction standards, release detection and prevention, secondary containment, and SPCC Plan (certified by PE licensed in NH). Department of Environmental Services and State Fire Marshal's Office
New Jersey	N.J.A.C. 7:1E – Discharges of Petroleum and Other Hazardous Substances Rules sets requirements for "major facilities", which include facilities with **200,000 gallons or more** of hazardous substances (including petroleum) in total aggregate oil storage capacity; the threshold is 20,000 gallons for non-petroleum hazardous substances. The rule includes design, installation (including facility drainage and secondary containment), operation (including inspection, training, security, integrity testing, etc.), and planning requirements. Department of Environmental Protection
New York	Article 17, Title 10 of the Environmental Conservation Law, entitled "Control of the Bulk Storage of Petroleum" applies both to USTs and ASTs, or groupings of such tanks with a **combined storage capacity of more than 1,100 gallons.** The regulations includes: • Tank registration (every five years) • Notification for modifications • Use of color coding of fill ports, shutoff valves, gauges and check valves. • Secondary containment (i.e., berms or other devices to contain spills). • Monthly visual inspections. • Every 10 years, clean out tanks that are resting on grade, remove the sludge from the bottom, inspect for structural integrity and test for tightness. • New ASTs must be constructed of steel. If their bottom rests on the ground, the tank must have cathodic protection. An impermeable barrier must be installed under the tank bottom, with monitoring between the barrier and the bottom. Additional requirements apply to "major oil storage facilities" with storage capacity of 400,000 gallons or

Table A-1: Summary of State Regulations and Programs for Oil Storage on Farms

State	*AST Regulation and Applicable Requirements*
	more under New York's Oil Spill Prevention, Control and Compensation Act" (Article 12 of the Navigation Law). These facilities must: Obtain an operating license from DEC; Pay a license fee of up to 12 1/4 cents per barrel of throughput at the facility; Submit data to DEC on operating activities, such as average daily throughput and storage capacity; Implement a spill prevention (SPCC) plan; Comply with license conditions and State petroleum bulk storage regulations, 6NYCRR Parts 613 and 614; and Report discharges to DEC. Department of Environmental Conservation (http://www.dec.ny.gov/chemical/2642.html)
North Carolina	NC Department of Environment and Natural Resources (DENR) only regulates ASTs if they meet the definition of an oil terminal facility, i.e., capable of being used for the purpose of transferring, transporting, storing, processing, or refining oil; have 21,000 gallons or higher in storage capacity; and not a retail gasoline dispensing operation serving the motoring public. Oil terminal facilities must register with the NC DENR within 30 days of beginning of operations, and include site plan and description of procedures for the prevention of oil spills. ASTs are also covered by the North Carolina Fire Code (follows NFPA Standard 30 and 30A), administered by the Office of State Fire Marshal. There is no state-wide AST registration or permitting. More specific requirements may be in place at the local and/or county levels. Department of Environment and Natural Resources (http://portal.ncdenr.org/web/wm/ust/otfmain); Office of State Fire Marshal
Pennsylvania	The Storage Tank and Spill Prevention Act of Jul. 6, 1989 (P.L. 169, No. 32) applies to systems with storage greater than 250 gallons. The requirements include tank registration, permitting, inspections (tanks >5,000 gallons) and establishment of technical, operational and closure standards for ASTs and for reporting releases. A state certified tank handler must perform work on these tanks and inspections must be by a certified inspector. The regulatory definition of aboveground storage tank specifically exempts "(12) **A tank of 1,100 gallons or less in capacity located on a farm** used solely to store or contain substances that are used to facilitate the production of crops, livestock and livestock products on such farm." Department of Environmental Protection, Bureau of Environmental Cleanup and Brownfields, Division of Storage Tanks (http://files.dep.state.pa.us/EnvironmentalCleanupBrownfields/StorageTanks/StorageTanksPortalFiles/act32of1989.pdf)
Rhode Island	Registration is required for AST(s) with a single or combined capacity of 500 gallons or greater (owners of ASTs with a combined capacity of less than 500 gallons are exempt). The regulation establishes requirements for AST facilities with a combined storage capacity over 500 gallons, including • Overfill protection • Secondary containment to contain 110 percent of the tank volume. • Inspections. The owner/operator must inspect the facility at least monthly. Additionally, if the tank is 10,000 gallons or more, the owner must conduct a detailed inspection within 10 years of the tank installation (with some exceptions for tanks meeting specified criteria). Department of Environmental Management (http://www.dem.ri.gov/pubs/regs/regs/compinsp/oilpollu.pdf)
Texas	Regulated ASTs include those which have a capacity of more than 1,100 gallons and which store a petroleum substance capable of being used as a motor fuel. Requires registration of regulated tanks as well as notification of changes in operational status, product stored, and ownership. Texas Commission on Environmental Quality (http://www.tceq.texas.gov/permitting/registration/pst/Am_I_Regulated.html)
Virginia	The State Water Control Board in adopted 9 VAC 25-91-10 et seq. in 1998, which consolidated three previous regulations (i) Oil Discharge Contingency Plans and Administrative Fees for Approval, 9 VAC 25-90-10 et seq. (VR 680-14-07), (ii) Facility and Aboveground Storage Tank Registration Requirements, 9 VAC 25-130-10 et seq. (VR 680-14-12), and (iii) Aboveground Storage Tanks Pollution Prevention Requirements, 9 VAC 25-140-10 et seq. (VR 680-14-13), relating to facilities and ASTs located in the Commonwealth that have an aboveground storage capacity of 25,000 gallons or more of oil into a single

Table A-1: Summary of State Regulations and Programs for Oil Storage on Farms

State	***AST Regulation and Applicable Requirements***
	regulation. The requirements under the Chapter do not apply to... (3) an **AST with a storage capacity of 660 gallons or less of oil; or (20) an AST located on a farm or residence used for storing motor fuel for noncommercial purposes with an aggregate oil storage capacity of 1,100 gallons or less.** The regulation establishes requirements for the registration, notification, and closure of ASTs for owners of facilities with aggregate aboveground storage capacity of more than 1,320 gallons of oil or an operator of an individual AST located within the Commonwealth with a storage capacity of more than 660 gallons of oil. It also establishes pollution prevention standards and procedures (e.g., inventory control, inspections, secondary containment, cathodic protection, training, leak detection, etc.) for tanks meeting specified criteria. Any operator of a regulated AST facility having an aggregate oil storage capacity of 25,000 gallons or a tank storage capacity of 15,000 gallons must also have an Oil Discharge Contingency Plan, including inspections, testing, overfill protection equipment and secondary containment, as well as demonstrate financial responsibility. Department of Environmental Quality (http://www.deq.state.va.us/Portals/0/DEQ/Land/Tanks/astfin.pdf)
West Virginia	Senate Bill 373, containing the Aboveground Storage Tank Act §22-30 and the Public Water Supply Protection Act §22-31 was signed into law on April 1, 2014. The law officially took effect on June 6, 2014. The bill requires an inventory and registration of aboveground storage tanks. The bill also requires development of a variety of aboveground storage tank regulations for consideration in the 2015 Legislative session. The rule applies to owners/operators of ASTs with a **storage capacity of more than 1,320 gallons,** including mobile tanks that stay at the same location or 60 or more days. The rule sets minimum design, construction, inspection, secondary containment, leak reporting and performance standards. It also requires registration (including payment of fee) Effective November 20, 2014, owners of tanks meeting specified criteria for risk levels must submit a spill prevention response plan (SPRP) and annual inspection certification. Level 1 ASTs are those that, among various criteria, have a capacity of 50,000 gallons or more. Level 3 ASTs pose low risk (e.g., contain water or food grade material or are empty). Level 2 ASTs do not meet the Level 1 or Level 3 criteria. Thus, Level 2 ASTs may be inspected by the owner or operator whereas Level 1 ASTs must be inspected by a PE or certified inspector. Department of Environmental Protection (http://www.dep.wv.gov/WWE/abovegroundstoragetanks/Pages/default.aspx)
Wisconsin	Wisconsin Administrative Code Comm 10 regulates **all aboveground storage tanks (ASTs) 110 gallon capacity and larger** storing liquids that are classified as flammable, combustible and/or hazardous chemical. Regulated tanks must have approval of construction plan, registration, permitting, inspections and fees. Streamlined requirements apply to certain farm tanks. For example, the code provides some measures to accommodate the installation of aboveground tanks less than 1,100 gallon capacity on farms via an expedited plan submittal and sign-off. Department of Commerce
States with State-Specific Program – under the Office of the State Fire Marshal (Regulations Generally Apply to Farm Tanks, but with Potential Exceptions)	
Alaska	Regulations depend on the tank capacity as follows: • Aboveground storage tanks and facilities with an effective storage capacity under 1,320 gallons are regulated by the State Fire Marshal and/or local Fire Marshal. • Tanks with storage capacity between 1,320 gallons and 420,000 gallons (including a collection of 55 gallon drums that add up to 1,320 gallons) are regulated by the Environmental Protection Agency and the State Fire Marshal. • Aboveground storage tank facilities with an effective storage capacity of 420,000 gallons (10,000 barrels) or greater of refined petroleum product or over 210,000 gallons of crude oil are regulated by the Alaska Department of Environmental Conservation (DEC) under the Alaska

Table A-1: Summary of State Regulations and Programs for Oil Storage on Farms

State	***AST Regulation and Applicable Requirements***
	Administrative Code, Title 18, Chapter 75. Oil and Hazardous Substances Pollution Control. State Fire Marshal's Office (for smaller facilities); Alaska Department of Environmental Conservation (for larger facilities)
Arizona	ASTs must be registered with the State Fire Marshal. Application must include site plans. State Fire Marshal's office.
California	CAL FIRE-Office of the State Fire Marshall administers the Aboveground Petroleum Storage Act (APSA) element of the Unified Program (Health and Safety Code, Chapter 6.67. Aboveground Storage of Petroleum [25270 - 25270.13]. APSA regulates facilities with aggregate aboveground petroleum storage capacities of 1,320 gallons or more, which include aboveground storage containers or tanks with petroleum storage capacities of 55 gallons or greater. These facilities typically include large petroleum tank facilities, aboveground fuel tank stations and vehicle repair shops with aboveground petroleum storage tanks. The Act does not regulate non-petroleum products. Facilities with total petroleum storage quantities at or above 10,000 gallons are inspected at least once every three years by a Unified Program Agency and have reporting and fee requirements, while facilities with petroleum storage quantities equal to or greater than 1,320 gallons but less than 10,000 gallons have reporting and fee requirements only. All regulated facilities must meet the federal SPCC rule requirements. CAL FIRE-Office of the State Fire Marshall (http://osfm.fire.ca.gov/cupa/apsa.php; http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=HSC&division=20.&title=&part=&chapter=6.67.&article=)
Illinois	State program regulates all new tanks over 110 gallons that store flammable substances. Requires permits and registration for new ASTs, with secondary containment and site plans. Dispensing tanks are limited to 2,500 gallons in capacity each (except for mining facilities and coal-fired electric generating facilities) and any one facility is limited to two dispensing storage tanks. **Farms are limited to four dispensing storage tanks of 2,500 gallons each, not exceeding 5,000 gallons per type of fuel.** The regulations specify requirements for dispensing tanks, including vents, locks on permanently connected pumping devices, labeling, siting. Office of the State Fire Marshal, Division of Technical Services (http://www.ilga.gov/commission/jcar/admincode/041/041001800000200R.html)
Indiana	ASTs are regulated by the Indiana Fire Prevention Code (675 IAC 22-2.3; following IFC) with specifies the design, installation and permitting requirements. Department of Homeland Security
Iowa	State registration program requires tanks with greater than 1,100 gallons capacity to register and to receive approval of their plan prior to being placed in service. State Fire Marshal's Office (http://coolice.legis.iowa.gov/cool-ice/default.asp?category=billinfo&service=iowacode&ga=83&input=101)
Georgia	ASTs are regulated under Chapter 120-3-11: Flammable and Combustible Liquids. Storage tanks having a liquid capacity that exceed 60 gallons are covered. Plans for storage installations must be submitted for review by the State Fire Marshal; however, plans for tank installations with a storage capacity of 660 gallons or less may be submitted to the local fire authority, where one exists. Georgia Safety Fire Commissioner
Maine	All ASTs greater than 60 gallons must be registered with the State Fire Marshal's Office under Title 25, M. R. S. A. §2482. The law stipulates registration, siting, containment and other requirements: • The state requires that plans to be submitted with the permit application for a facility with a total aggregate capacity greater than 1,320 gallons must be certified by a professional engineer. • Secondary Containment must be provided for every tank. (NFPA 30-2003, 4.3.2.3). Secondary Containment may be a liquid tight dike with a capacity of 110% of the largest tank in the dike (NFPA 30-2003, 4.3.2.3.2). A "Secondary Containment" commonly called a "double wall" tank

Table A-1: Summary of State Regulations and Programs for Oil Storage on Farms

State	***AST Regulation and Applicable Requirements***
	not more than 12,000 gallons nominal capacity (NFPA 30-2003, 4.3.2.3.3) meets this requirement. • Facilities with an aggregate capacity of greater than 1,320 gallons must comply with the Federal Environmental Protection Agency Spill Prevention Control & Countermeasures Plan requirements. (40 CFR 112) State Fire Marshal's Office: http://www.maine.gov/dps/fmo/plans/storage_tanks.html New motor fuel ASTs *with underground piping* must be registered with the State Bureau of Remediation & Waste Management, Tank Registration Section. Department of Environmental Protection: http://www.maine.gov/dep/waste/abovegroundtanks/onsitemotorfuel.html
Massachusetts	Notification, registration and permitting are required for all tanks less than 10,000 gallons capacity under 527 CMR 9.00 (Tanks and Containers). Tanks are subject to annual inspections by the local Fire Department. Separate, more stringent requirements apply to tanks greater than 10,000 gallons under 502 CMR 5.00 (Permit and Inspection Requirements of Aboveground Storage Tanks of More than Ten Thousand Gallons Capacity). **Farm ASTs are exempt from permitting if less than 1,100 gallons capacity and used for storing motor fuel for noncommercial purposes.** State Fire Marshal's Office
Michigan	Michigan regulates the fees, plan reviews and registration of aboveground storage tanks (ASTs) under the Michigan Fire Prevention Code and Storage and Handling of Flammable and Combustible Liquids (FL/CL) Rules. Tank systems with storage tank capacity of 1,100 gallons or less must comply with the FL/CL Rules, but do not need a plan review, and are not inspected or certified by the Storage Tank Division. Approval by the local authority having jurisdiction (fire marshal, fire chief) is required. Motor vehicle fueling at farms, isolated construction projects, and rural areas has specific siting and operating requirements. The separation distances from the tank system, including the vehicle being fueled, to any building must be not less than 40 feet and the separation distances to property lines must be not less than 25 feet. The dispensing area, which is usually adjacent to the storage tank system, is required to be protected to prevent spills from entering the groundwater, surface water, or subsurface soils. Only three tanks are allowed at each site and a 100 feet separation distance must be provided between sites at the same property. A permit is required for ASTs containing flammable and combustible liquids or heating oil for consumptive use and with a capacity greater than 1,100 gallons. **Farm storage tank systems that exceed 1,100 gallons in capacity are regulated under the same requirements as private motor vehicle fueling locations**. Private motor vehicle-fueling storage tank systems are limited in capacity: • Tanks holding Class I liquids are limited to 6,000 gallons; • Tank systems holding Class II or IIIA liquids are limited to individual capacity of 15,000 gallons or 30,000 gallons in the aggregate. Department of Licensing and Regulatory Affairs , Storage Tank Division
Missouri	Safety inspections on ASTs are performed by the Department of Agriculture, Weights and Measures Division. Facilities must meet the Fire Code. Facilities with an aggregate capacity of 2,000 gallons or less in the secondary containment are deferred from the financial responsibility requirements, but must still comply with all other requirements of 2 CSR 90-30. Department of Agriculture, Weights and Measures Division (http://www.moga.mo.gov/mostatutes/chapters/chapText414.html)
Montana	ASTs are covered under the Fire Code (Administrative Rules of Montana 17.58.326), which follows the Uniform Fire Code.

Table A-1: Summary of State Regulations and Programs for Oil Storage on Farms

State	*AST Regulation and Applicable Requirements*
	Additionally, ASTs may also be covered by the Petroleum Tank Release Cleanup Fund provided that they meet minimum design, construction, and installation standards specified in 17.57.102. To be eligible for the Fund, ASTs must be double-walled and have maximum storage capacities of less than 30,000 gallons. Tank owners or operators wanting to avail themselves of the Fund coverage may voluntarily register their tanks with the Montana Petroleum Tank Release Compensation Board. Montana Petroleum Tank Release Compensation Board (http://deq.mt.gov/pet/default.mcpx)
Nebraska	ASTs are regulated under Title 153, Chapter 17. Installation and replacement of ASTs require a permit from the State Fire Marshal. Installations must be in accordance with NFPA codes. State Fire Marshal's Office
Nevada	Storage tanks are subject to State Fire Marshal regulations. Nevada Administrative Code 477.323 states "A person shall not store a hazardous material in excess of the amount set forth in the International Fire Code, 2006 Edition as adopted pursuant to NAC 477.281, unless he has been issued an operational permit by the State Fire Marshal to store that material." A hazardous materials permit must be renewed annually through the Department of Public Safety, State Fire Marshal's Division (SFM). Higher thresholds are set for retail gas stations that store fuels (gasoline and diesel) in USTs in compliance with UST regulations. State Fire Marshal (http://fire.nv.gov/bureaus/FPL/Hazmat_Reporting/) The Nevada Division of Environmental Protection does not regulate most AST systems, with the exception of AST systems located at or near a body of water and used to provide fuel to water vessels (i.e., marina storage tanks). For these tanks, the DEP registration program applies to tanks greater than 110 gallons but no more than 12,000 gallons capacity. Division of Environmental Protection (http://www.leg.state.nv.us/nac/NAC-459.html#NAC459Sec9921)
North Dakota	Approval of State Fire Marshal for fuel dispensing storage tanks only, according to UL 142 and NFPA guidelines. To be eligible for the North Dakota Petroleum Tank Release Compensation Fund, farm and ranch underground tanks greater than 1,100 gallons must be registered. Underground tanks less than 1,100 gallons and all aboveground tanks are excluded if they are used for non-commercial purposes. However, farmers and ranchers can voluntarily join the Fund upon application and payment of fees for excluded tanks. State Fire Marshal's Office
Ohio	Permits for ASTs holding flammable liquids, including diagram and accordance with Ohio Fire Code and NFPA 30/30A. Tank owners must submit application to the State Fire Marshal at installation, removal, alteration, temporary closure and abandonment. State Fire Marshal's Office
Oregon	DEQ only regulates the operation of facilities with ASTs of 10,000 gallon or greater capacity if petroleum is received from pipelines or vessels. Other tanks are subject to requirements of the Office of State Fire Marshall. Permits are required for tanks greater than 1,000 gallons holding flammable and combustible liquids. Office of State Fire Marshall
South Carolina	The State Fire Marshal administers the AST program, in accordance with NFPA 30 and 30A. Owners must register the tanks with the Fire Marshal Office for review. Office of State Fire Marshall
Washington	All ASTs in Washington used to store flammable or combustible materials are subject to the International Fire Code (IFC), which is a part of the Washington State Uniform Building Code. AST inspection required by fire district, tank must be in accordance with API Standard 653 and with the NFPA Uniform Fire Code. If the facility transfers oil to or from a tank vessel, such as a barge or oil tanker, or to or from a pipeline, then it is subject to Washington State's Contingency Planning and Facility Oil Handling Standards regulations (Chapters 173-182 and 173-180 WAC). State Fire Marshal's Office
States without State-Specific Program	
Connecticut	ASTs and their piping systems are subject to the State Fire Code, which follows NFPA 30 and 30A. The

Table A-1: Summary of State Regulations and Programs for Oil Storage on Farms

State	***AST Regulation and Applicable Requirements***
	requirements are administered locally.
Hawaii	No state program was identified, but local and county ordinances cover ASTs.
Idaho	Idaho Department of Environmental Quality does not regulate ASTs and refers to the SPCC rule. Note that local fire districts, cities and counties may have AST ordinances. https://www.deq.idaho.gov/waste-mgmt-remediation/storage-tanks.aspx
Mississippi	Mississippi Department of Environmental Quality does not regulate ASTs and refers to the SPCC rule. Notes that fire marshal, cities and counties may have separate regulations. In 2013 a measure was introduced that would have created a program similar to the UST program, but for ASTs. The measure was ultimately withdrawn but it would have exempted ASTs used at farms (and other sectors). http://www.deq.state.ms.us/mdeq.nsf/page/UST_FAQs?OpenDocument
Tennessee	The State Fire Marshal sets requirements for ASTs, following NFPA 30 and 30A, but does not inspect, register, or review site plan. Note that local fire districts, cities and counties may have AST ordinances. http://www.tn.gov/fire/documents/storagetanks5.8.12.pdf
Utah	ASTs are exempt from the Department of Environmental Quality requirements under the Petroleum Storage Tanks Act. The State Fire Marshal enforces state-adopted IFC, but no state program for registration for tanks that store flammable liquid or liquid petroleum. Local requirements may differ. For example, Utah County requires permit for tanks used for storage, handling or dispensing of flammable and combustible liquids on farms and construction sites and which have a storage capacity >10 gallons of Class I liquids or >60 gallons for Class II or III-A liquids. State Fire Marshal

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Senator BARRASSO. The Department of Agriculture in Wyoming has the responsibility for predator and pest control, the Weed and Pest Council, and human health priorities. You oversee this. Can you talk about the importance of pest and invasive species control, especially in a State with so much public land?

Mr. MIYAMOTO. Mr. Chairman, I think that Wyoming has a big job when it comes to controlling invasive species and for predator control, both. We have so many ties to Endangered Species Act and other considerations that there is a lot to do. When it comes to our predator districts and our weed and pest districts out there in those local communities, they have more job than they have time. Anything that we can do to streamline the process, as long as we are not harming anything on the environmental side of the equation, I think we should pursue that.

This example that you bring up of FIFRA as opposed to the Clean Water Act, NPDES permitting for pesticide applicators, in our experience at home, simply isn't necessary. We do it because we have to, but it doesn't change the application on the ground.

Senator BARRASSO. Mr. Yates, Section 7 and 8 of the ACRE Act deal with the issue of farmer safety and privacy. Could you please elaborate on why issues such as the disclosure of sensitive information of the location of certain farming operations or the aerial surveillance of farms by the Federal Government, why these are important and relevant issues to the agriculture community?

Mr. YATES. Thanks, Senator. I think, like most Americans, farmers and ranchers are very sensitive about their privacy, sensitive and concerned about information about their operation. Many farmers, it is not just the mailing address of their business; many farmers and ranchers live in the location of their business. Having that information get out or having aggregate data about farmers in a region, a county, a State, is dangerous and concerning for farmers and ranchers. So, I think when we are looking at data, obviously, many of us have discussed the issues of how we can use data to be more effective in the work that we do.

I think we should be mindful of that data and how that data can be used and who can access that data; and I think it is important in terms of oversight for this Committee to look at protecting the use of that date and ensuring that, if data is being requested from farmers and ranchers, that it is being done with their permission.

Senator BARRASSO. One last question, Mr. Yates, before I turn to Senator Boozman. The president of your organization, as we talked about, Mr. Zippy Duvall, was here and stated in his written testimony to our Committee in February, he said, "Farm income is reduced about 50 percent compared to 5 years ago." And he went on to say, "But I assure you that regulatory costs have not gone down."

So, in your opinion, will the provisions in the ACRE Act help reduce some of this regulatory burden on farmers and ranchers, and improve their income, while at the same time protect the environment?

Mr. YATES. The short answer to that is yes, Senator, I do believe that, and I think the bottom line is, as Congress and as Federal agencies look at rules and regulations, I think they should be looked at through a lens of is this effective, is this the best way

to conduct business. When we are looking at the issue of FIFRA and the Clean Water Act, the bottom line is, is additional duplicative regulatory requirements going to provide for increased environmental protections on the ground? If the answer to that is no, then I think the ACRE Act does a great job in providing for streamlining and ensuring that regulatory burdens on farmers and ranchers are minimized and are effective in providing for strong environmental compliance at the local level.

Senator BARRASSO. Thank you.

Senator BOOZMAN.

Senator BOOZMAN. Thank you, Mr. Chairman. I apologize for being late, late. I had a Veterans Affairs Committee hearing and then a Homeland Security, so I have good excuses. The problem is right now is there is just a lot going on up here, lots of stuff that is important, but positive stuff, so thank you all for being here and we do appreciate your testimony.

Mr. Miyamoto, the FIFRA established an effective and comprehensive regulatory web to provide pesticide-related environmental and public health protection. It is rigorous; it examines the environmental data, health exposure assessments for pesticide products. This process specifically examines the product's potential impact on water. Additional permit requirements under the Clean Water Act are duplicative and will entail significant costs for State permitting authorities and pesticide users.

Could you please highlight some of the challenges that your Department faces when regulating some of the regulatory requirements?

Mr. MIYAMOTO. Mr. Chairman, Senator, thank you for the question. Our experience in Wyoming has been that we have co-regulated under FIFRA and the Clean Water Act for eight or 9 years now. In the beginning there was a whole bunch of education that we had to do with our certified pesticide applicators to make sure that they understood that they needed to hold not only their certified applicating license, but they also needed to hold an NPDES permit.

I would argue that NPDES permits were designed for a completely different scenario, point source discharges, end-of-pipe type regulations, so it was difficult for us to come up with all of the right information that should be included in that application in order for them to get that permit.

Today, it is part of our standard operating and we do it, but I don't think that it gives us a corresponding increase in environmental benefit. It is one of those things that we do because we have to.

Senator BOOZMAN. Very good. Thank you very much. Also, many feel that the Comprehensive Environmental Response, Compensation, and Liability Act, CERCLA, reporting is unnecessary and was never intended to regulate agriculture. Can you talk about some of the environmentally based regulations that agriculture producers have to comply with and comment on CERCLA?

Mr. MIYAMOTO. Mr. Chairman, Senator, specifically, I think the aim behind CERCLA, or, you know, at least one of the considerations of CERCLA was to look at emissions; and, for agriculture, that would be probably most relevant to confined animal feeding

operations. And when it comes to confined animal feeding operations, the major regulatory law that is in place to guard against environmental damage from confining animals and feeding them would be the Clean Water Act.

I have worked extensively in trying to remediate those impacts, basically, relocating corrals and feeding areas to where we can write comprehensive nutrient management plans that allay a lot of the concern of concentrating all of these pollutants in one area and allowing them either to volatilize into the air or to get into the water. So I think there is a framework in place and Mr. Lyon mentioned NRCS, and they are a good partner of ours and they help us with implementing comprehensive nutrient management plans for all of these areas that address these concerns.

Senator BOOZMAN. Very good. Thank you.

Mr. Yates, a criticism of the EPA under the previous Administration was the Agency's disconnect with rural America. Many hardworking Americans in rural States feel that they didn't and still really feel like their voice is marginalized. Time and again I heard from my constituents who described a "gotcha" attitude from Federal agencies. Instead of working with stakeholders and industry to develop and implement rules and regulations, the Federal Government would go it alone, without fully understanding how the rules would affect hardworking Americans.

Can you explain the importance of the Federal Government to work hand-in-hand with the stakeholders as we develop rules and regulations? And then, also, do you believe that the current Administration has put an emphasis in cooperative federalism?

Mr. YATES. Senator Boozman, thank you for the question. I would suggest that it is critical, be it in our western States that have a large abundance of Federal lands, that proper coordination and consultation with Federal land management agencies is vital to ensuring that the proper decisions are made that make the most sense for the land. It certainly goes without saying that coordination between States, Federal Government, and end-users is ultimately going to provide for the best possible result moving forward in terms of complying with regulations.

Ultimately, I think the more interaction the Federal agencies have with folks at the local level, the better results you are going to have. Certainly, there have been criticisms from one Administration to another about do we have the best relationship, are they engaging with local stakeholders.

I would suggest that with this Administration, Administrator Pruitt, we have had a fantastic working relationship. I know they have a lot of work to do and I would like to certainly report that relationship is a positive one and we continue to strive to identify more opportunities to work hand-in-hand with EPA to identify commonsense solutions to the issues that are facing American farmers and ranchers.

Senator BOOZMAN. Good. Thank you, Mr. Yates.

Senator BARRASSO. Thank you, Senator Boozman.

Senator CAPITO.

Senator CAPITO. Thank you, Mr. Chairman.

Thank all of you. I appreciate you coming in today. I think we share with all the witnesses, and really all of us on this Committee

and in the Senate, that we realize how important our Nation's farmers and ranchers are, and we don't want to overburden with regulations. But we also want to ensure, as Americans, that they have the right to privacy like so many of us do.

When I was over in the House I introduced a bill called the Farmer's Privacy Act. This was in reaction to a situation that occurred in my State of West Virginia, where a poultry farmer was surveilled by the EPA—we are not talking about giant operations here, we are talking two or three houses—by the EPA and then fined accordingly, or investigated. It just struck me that the EPA, we found out later, had rented a small aircraft to surveil the small farms in the eastern portion of our States.

I raised the point, even though it is difficult to get from point A to point B sometimes because of the mountains that we have, that we were violating that farmer's rights, and it just felt too intrusive to me. So, part of what is included in this bill is that privacy provisions.

I am wondering if you, in Wyoming, have had any of these same kind of circumstances where you have had aerial surveillance without permission or if this is an issue in other parts of the Country. So, if you want to start, Mr. Miyamoto.

Mr. MIYAMOTO. Mr. Chairman, Senator, thank you for the question. We have experienced similar type of interest from mostly our special interest groups that have targeted individual ranchers and then would like to undermine their efforts to conduct successful business.

As a regulatory agency myself, I can tell you that we have been able to successfully regulate farms and ranchers in Wyoming without aerially surveilling them. We take that obligation fairly seriously, but I think it can be done, and probably should be done, face-to-face.

Senator CAPITO. Right. Right.

Does anybody else have any comments on that? I don't know if you heard anything at the Farm Bureau, Mr. Yates.

Mr. YATES. Senator, thank you. And thank you for your work on this important legislation. Again, as I mentioned in my testimony, the use of UAS in precision agriculture is a great tool. Many of our farmers are employing drones and drone technology.

Senator CAPITO. Right.

Mr. YATES. But, again, I think the broader concern for our members is the use of those tools in providing for surveillance of farms and farm operations without the consent of the farmer or the landowner; and I think that ultimately, if those tools are going to be used, we need to make sure that we ensure that private property rights and privacy are taken into account and that farmers provide their permission for the use of that technology by a Federal agency or an outside organization.

Senator CAPITO. And that is the substance of my bill, and I want to thank the Chairman for including that in there.

I want to ask another question. We had two things happen, two visits I had most recently, one from a beef farmer in our State in conjunction with Trout Unlimited. And I think sometimes the misconception that our farmers want to be in opposition of environmental stewardship is just a misplaced concept, but they don't have

the resources or the expertise to really move forward with what would be the best methods to go forward.

In this case, Trout Unlimited had partnered with the beef farmer to give him the resources to be able to clean up the stream and now it is a major trout stream in our area. So the landowner, obviously, has the benefit of that, along with others who want to recreate there. So it has a mutual benefit.

I would just ask, the partnerships that are developed, we also had the Wildlife Resources Foundation were just in our State, wildlife folks were just in, same kind of partnerships that are occurring. Are you finding that is what is happening around in Wyoming, that the private sector and the recreational industry that revolves around using our land and fisheries is the same sort? Because, obviously, in Wyoming tourism is very important as well.

Mr. MIYAMOTO. Mr. Chairman, Senator, strangely enough, years ago I spent a good deal of the early part of my career doing nothing but watershed planning on a collaborative and community-based standpoint, and I think we developed over two dozen different nonpoint-source watershed-based plans to address 303(d) listed in paired segments, and we did it exactly in the manner that you are talking about.

What I learned through that experience is that local, voluntary, and incentive-based approaches for water quality improvement tend to work much, much better than any regulatory scheme that we could put in place to address those issues.

Senator CAPITO. Thank you.

And just a final comment, because I am out of time, but I know there is a portion of this bill that deals with predatory species. I would just mention that I hope—I am not sure that it does because I haven't asked the question yet. But we have a problem with coyotes in our area and our livestock, and I would hope that resources would be available to help our agricultural entities deal with this predator that is pretty sneaky and pretty tough to get. Thank you very much.

Senator BARRASSO. Well, I want to thank all of the members for being here. I appreciate the testimony of the three witnesses.

Members may submit written questions. I know that Senator Carper has suggested he will be submitting some written questions, so I ask that you return those responses quickly.

The hearing record will remain open for 2 weeks.

I again want to thank you all for your testimony on this important issue.

The hearing is adjourned.

[Whereupon, at 11:29 a.m. the committee was adjourned.]

[Additional material submitted for the record follows.]

MEMORANDUM March 7, 2018

To: Senate Committee on Environment and Public Works
Attention: Kusai Merchant

From: David M. Bearden, Specialist in Environmental Policy, dbearden@crs.loc.gov, 7-2390

Subject: **Fair Agricultural Reporting Method Act/FARM Act (S. 2421)**

This memorandum responds to your request for an analysis of the potential effects of amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) proposed in the Fair Agricultural Reporting Method Act or "FARM Act" (S. 2421), as introduced in the 115th Congress on February 13, 2018. The bill would exempt air releases of hazardous substances emitted by animal waste at farms from requirements under CERCLA to notify the National Response Center. These amendments also would have a bearing on the applicability of requirements under the Emergency Planning and Community Right-to-Know Act (EPCRA) to notify state and local officials of such releases. However, EPCRA may continue to apply to the reporting of releases of separately listed extremely hazardous substances that are not contingent upon reporting under CERCLA, unless these releases may be covered by an exemption under EPCRA in current law for substances used in routine agricultural operations.

Overview

Whether the reporting requirements of CERCLA and EPCRA should be applied to air releases of hazardous substances from animal waste has been a long-standing issue addressed in multiple hearings and legislation in Congress. The purpose of reporting releases under these statutes is to inform federal, state, and local emergency response officials if a response action were warranted to protect human health and the environment. Some have observed though that reporting may impose a compliance burden without a commensurate need if the relative risks of air releases would not warrant a response action in most instances. Although others may still value the information gained from reporting to evaluate sources of air emissions for regulatory planning or other purposes, such utility would be incidental to the response objectives of CERCLA and EPCRA. Potential disclosure of release reports to the public also has been an issue, but certain protections are available in current law for sensitive and confidential information.

During the George W. Bush Administration, the U.S. Environmental Protection Agency (EPA) finalized a rule in 2008 to exempt air releases of hazardous substances emitted by animal waste at most farms from reporting under CERCLA and EPCRA, because of its expectation that the relative risks would make a response action unlikely or impractical in most cases. EPA did apply EPCRA to require reporting from large concentrated animal feeding operations (CAFOs) based on the number and type of livestock, in response to some public comments expressing desire for the information. Litigation challenging EPA's authority to create this administrative exemption led to a U.S. Court of Appeals for the D.C. Circuit decision in April 2017 (*Waterkeeper Alliance, et al., v. EPA*) that vacated the 2008 rule. In response to

petitions from EPA during the Trump Administration, the court subsequently stayed (i.e., delayed) the issuance of an order to lift the exemption in the 2008 rule until May 1, 2018.

EPA has released guidance that instructs farms to notify the National Response Center under CERCLA once the court issues its order, if air releases of hazardous substances emitted by animal waste are equal to or exceed reportable quantities.[1] The EPA guidance indicates that farms should not report releases to state and local officials under EPCRA though, based on the Trump Administration's interpretation that air releases from animal waste would be covered under the exemption for substances used in routine agricultural operations. The U.S. Court of Appeals April 2017 decision did not refer to this exemption.

If enacted into law, S. 2421 would amend CERCLA to provide an exemption from the reporting of air releases of hazardous substances emitted by animal waste at farms. In turn, this amendment would have the effect of exempting such releases of hazardous substances from reporting under EPCRA that is contingent upon reporting required under CERCLA. However, the potential applicability of EPCRA to air releases of separately listed extremely hazardous substances may depend on whether the Trump Administration's interpretation of the exemption for substances used in routine agricultural operations is challenged. Any potential reporting requirements under state or local laws may continue to apply though, as neither CERCLA nor EPCRA would preempt such requirements.

The following sections of this memorandum discuss the purposes of CERCLA and EPCRA in current law, the types of hazardous substances and extremely hazardous substances that may be released from animal waste at farms, the George W. Bush Administration 2008 rule, the D.C. Circuit April 2017 decision that vacated this rule, the Trump Administration's guidance issued in response to the reversal of the rule, and how the amendments to CERCLA proposed in S. 2421 may affect reporting requirements. I hope that this information is helpful to the Committee. I remain available if the Committee needs further assistance from CRS in consideration of S. 2421 and related issues.

CERCLA

Enacted in 1980, CERCLA authorized the Superfund program administered by EPA to remediate environmental contamination from releases of hazardous substances at sites elevated for priority federal attention in coordination with the states, and established the financial liability of "potentially responsible parties" (PRPs) associated with a release.[2] Congress has amended CERCLA in multiple laws over time to clarify the applicability of the statute to federal facilities, and to modify various response, liability, and enforcement provisions to address issues that arose during the course of implementation.[3] Although risks posed by abandoned hazardous waste sites were a central topic in the debate of legislation that led to the enactment of CERCLA, the final bill that Congress enacted included language more broadly addressing past or present releases of hazardous substances across environmental media and industrial, commercial, and governmental sectors.[4]

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[1] For a summary of this guidance, see EPA, Office of Land and Emergency Management, *CERCLA and EPCRA Reporting Requirements for Air Releases of Hazardous Substances from Animal Waste at Farms*, 520-F-18-001, February 2018, available at: https://www.epa.gov/epcra/fact-sheet-cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal.

[2] 42 U.S.C. §§9601-9675.

[3] For a broader discussion of the scope and purposes of CERCLA than presented in this memorandum, see CRS Report R41039, *Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related Provisions of the Act*, by David M. Bearden.

[4] See U.S. Congress, Senate Committee on Environment and Public Works, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510*, committee print, prepared by Congressional Research Service, 97th Cong., 2nd sess., 1983, S. Serial No. 97-14 (Washington: GPO, 1983).

Applicability to Releases

CERCLA generally applies to the release, or the substantial threat of a release, of a hazardous substance into the environment within the United States or under the jurisdiction of the United States. The geophysical scope of the environment covered under CERCLA encompasses multiple media. The term "environment" is defined in Section 101(8) to include surface water, groundwater, a drinking water supply, surface soils, sub-surface soils, or ambient air.[5] As defined in Section 101(22), the term "release" also is relatively broad in terms of the manner in which a hazardous substance may enter the environment, including spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.[6]

Section 101(14) of CERCLA references specific categories of chemicals designated under other laws as hazardous substances subject to CERCLA.[7] Section 102 authorizes EPA to designate additional hazardous substances that may present substantial danger to public health or welfare, or the environment, if a release were to occur.[8] Section 102 also authorizes EPA to establish a quantitative threshold for each hazardous substance to determine when a release must be reported to the federal government.[9] Section 103 requires the person responsible for a release to notify the National Response Center, if the release is equal to or exceeds the reportable quantity during a 24-hour period.[10] Section 103(f) authorizes an exception to offer compliance flexibility for a continuous release that is "stable in quantity and rate," in which case notice may be provided to the National Response Center on an annual basis as an alternative to daily notification.[11] However, Section 103(f) requires intervening updates during the year to report a "statistically significant increase" in the quantity of a release above that previously reported or occurring.

Reporting requirements under CERCLA provide a mechanism through which the federal government may become aware of a release to determine whether a response action may be warranted to fulfill the objective of the statute to protect human health and the environment.[12] Whether a response action is warranted generally would depend on the potential risks of exposure at the site where the release occurs. Reportable quantities merely serve as thresholds to determine the quantity of a release that is subject to notification, but do not necessarily indicate a particular level of risk. As for any chemical, the potential risks of a release would depend on the concentration, duration, and frequency of exposure (i.e., the dose), the conditions of exposure, and individual characteristics of the exposed individual.[13]

Once a release is reported, Section 103(a) requires the National Response Center to notify EPA and other appropriate federal agencies, and the state in which the release occurs.[14] If warranted, Section 104 authorizes federal actions to respond to the release in coordination with the state, including enforcement of liability.[15] The federal response authorities of CERCLA are Presidential authorities delegated to EPA

[5] 42 U.S.C. §9601(8).

[6] 42 U.S.C. §9601(22).

[7] 42 U.S.C. §9601(14).

[8] 42 U.S.C. §9602.

[9] Designated hazardous substances and reportable quantities are codified in federal regulation at 40 C.F.R. Part 302.

[10] 42 U.S.C. §9603. The U.S. Coast Guard administers the National Response Center.

[11] 42 U.S.C. §9603(f). Procedures for filing continuous release reports are codified in federal regulation at 40 C.F.R. §302.8.

[12] Releases reported under CERCLA also generate data that some may desire to evaluate sources of pollution for regulatory planning or other purposes, although this utility would be incidental to the statutory objective of CERCLA.

[13] For information on risk assessment, see National Academy of Sciences, National Research Council, *Science and Decisions: Advancing Risk Assessment*, 2009, available at: http://www.nap.edu/catalog/12209/science-and-decisions-advancing-risk-assessment. This report updates the previous National Research Council risk assessment guidelines issued in 1983.

[14] 42 U.S.C. §9603(a).

[15] 42 U.S.C. §9604.

and other federal agencies on the National Response Team.[16] The procedures for taking response actions under CERCLA are outlined in the National Oil and Hazardous Substances Pollution Contingency Plan.[17]

Section 107 of CERCLA establishes the categories of PRPs who may be held liable for response costs, natural resource damages, and the costs of federal studies of potential health hazards that may be associated with a release.[18] Federal response actions are subject to annual appropriations but may be recovered from the liable parties. PRPs generally may include current and past site owners and operators, persons who arranged for the treatment, disposal, or transport of a hazardous substance, and transporters who selected a site for disposal.

Section 104 also authorizes federal actions to respond to releases of other pollutants or contaminants that are not designated as hazardous substances, if the release would present an imminent and substantial danger to public health or welfare. However, CERCLA does not establish liability for such releases, nor does the statute require the reporting of such releases.

Statutory Exemptions

Although CERCLA is relatively broad in its applicability to releases of hazardous substances, Congress has excluded certain types of substances or releases from the statutory definitions in Section 101 that it did not intend to be subject to the statute. Section 107(b) of CERCLA also provides defenses to liability for certain conditions beyond a party's control such as an act of God, act of war, or an act or omission of a third party.[19] In the 1980 enactment and subsequent amendments, Congress also has exempted specific categories of parties, circumstances, or uses that it did not intend to be subject to liability or reporting requirements, but for which federal authority remains available to respond to a release if warranted to protect human health and the environment.

Some of these exclusions or exemptions are based on practical considerations, whereas others are intended to avoid duplication or overlap with other laws that apply to the same releases. Among the exclusions or exemptions more directly relevant to the agricultural sector, Congress excluded the "normal application of fertilizer" from the definition of the term "release" in Section 101(22) of CERCLA, making such use not subject to the statute in its entirety. Congress also excluded hazardous substances that may be released as a result of the proper application of a pesticide from liability under the statute in Section 107(i),[20] and reporting requirements in Section 103(e).[21] The availability of the pesticide exemption is dependent upon proper application of the pesticide in accordance with federal registration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[22] Congress included both the fertilizer exclusion and the pesticide exemption in the 1980 enactment. Congress has not since amended CERCLA to exempt the agricultural sector more broadly.

EPCRA

Once CERCLA required the reporting of releases of hazardous substances to the federal government, questions arose as to whether federal law also should require reporting of the same information directly to

[16] Executive Order 12580, *Superfund Implementation*, January 23, 1987.

[17] 40 C.F.R. Part 300.

[18] 42 U.S.C. §9607.

[19] 42 U.S.C. §9607(b).

[20] 42 U.S.C. §9607(i).

[21] 42 U.S.C. §9603(e).

[22] 7 U.S.C. §§136-136y. Demonstration of the proper application of a federally registered pesticide generally would be subject to documentation of its use.

state and local governments to help facilitate their emergency response capabilities.[23] This question was among the prominent topics in the debate of the 1986 amendments to CERCLA. Although some state and local laws at that time addressed releases of hazardous substances, response authorities and capabilities varied among jurisdictions. Congress developed uniform federal requirements for the reporting of releases to state and local governments in EPCRA under Title III of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499). Title III enacted EPCRA as a separate law, and not as an amendment CERCLA.[24]

EPCRA addresses emergency notification of releases at the state and local level to complement the reporting of releases to the federal government under CERCLA. Similar in objective to CERCLA, release notification under EPCRA provides a mechanism for state and local governments to determine whether a response action may be warranted under their own respective authorities, or in coordination with a federal response. Reporting under EPCRA also provides an earlier opportunity for state and local governments to become aware of a release instead of relying upon subsequent notification from the National Response Center once a release is reported to the federal government. However, EPCRA does not authorize federal, actions to respond to a release, nor does the statute establish liability for releases. Federal response authorities and liability for releases are rooted in CERCLA.

EPCRA also requires notification at the state and local level for emergency planning purposes if a facility stores extremely hazardous substances or other hazardous chemicals in excess of certain amounts.[25] These notification requirements are intended to enhance state and local emergency preparedness in the event of an actual release. Other provisions of EPCRA also require the reporting of toxic chemicals used at a facility in excess of certain amounts to EPA for public disclosure in the federal Toxic Release Inventory (TRI).[26] These emergency planning and TRI disclosure requirements apply to the presence or use of chemicals at a facility, in addition to actual releases into the environment.

Section 324 of EPCRA generally requires information on chemicals reported for emergency planning purposes, disclosure on the TRI, and followup emergency notices of actual releases to be made available to the general public.[27] CERLA does not include similar public disclosure requirements. However, followup emergency notices subject to EPCRA generally would include information on releases of hazardous substances that are subject to CERCLA. Section 322 of EPCRA authorizes the withholding of certain sensitive or confidential information from disclosure to the general public under Section 324.[28] As a matter of practice, the National Response Center also maintains a publicly available database that tracks the nature and general location of releases of hazardous substances reported under CERCLA, but not private or confidential information.[29] The following discussion of EPCRA focuses on emergency notification of releases into the environment potentially relevant to air releases, and statutory exemptions from notification in current law.[30]

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[23] See U.S. Congress, Senate Committee on Environment and Public Works, *A Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (Public Law 99-499)*, committee print, prepared by Congressional Research Service, 101st Cong., 2nd sess., 1990, S. Prt. 101-120 (Washington: GPO, 1990).

[24] 42 U.S.C. §§11001-11050.

[25] For emergency planning, reportable quantities of extremely hazardous substances are codified in federal regulation at 40 C.F.R. Part 355, Appendix A, and of hazardous chemicals are codified in federal regulation at 40 C.F.R. Part 370.

[26] Threshold quantities subject to reporting for the TRI are codified in federal regulation at 40 C.F.R. Part 372.

[27] 42 U.S.C. §11044.

[28] 42 U.S.C. §11042.

[29] Information publicly disclosed from the database is available in reports that track releases by calendar year, available on the National Response Center's website at: http://nrc.uscg.mil.

[30] For a broader discussion of EPCRA than presented in this memorandum, see CRS Report RL32683, *The Emergency Planning and Community Right-to-Know Act (EPCRA): A Summary*, by David M. Bearden.

Emergency Release Notification

Section 301 of EPCRA established the framework for the formation of State Emergency Response Commissions (SERCs) appointed by the governor of each state, and Local Emergency Planning Committees (LEPCs) within each state appointed by the respective SERC.[31] Section 302 authorizes EPA to establish quantitative thresholds for the reporting of releases of extremely hazardous substances into the environment.[32] Most of these substances also are listed as hazardous substances under CERCLA, but some of these substances are not designated under CERCLA.[33] Section 304 of EPCRA applies to emergency notification of releases into the environment.[34] This provision outlines three situations in which the reporting of releases of extremely hazardous substances or hazardous substances is required. In each situation, the person responsible for the release must notify the SERC and the appropriate LEPC that covers the local jurisdiction where the release occurs.

Two of these situations are contingent upon the release being subject to reporting to the National Response Center under Section 103 of CERCLA. Section 304(a)(1) of EPCRA requires the notification of a release of an extremely hazardous substance to the SERC and the appropriate LEPC, if the release also would require notification as a hazardous substance under Section 103 CERCLA.[35] If a substance is not designated as an extremely hazardous substance, Section 304(a)(3) requires the reporting of a release to the SERC and the appropriate LEPC if the release still would require notification as a hazardous substance under Section 103 of CERCLA.[36]

Section 304(a)(2) of EPCRA covers a third situation in which a substance is separately listed as an extremely hazardous substance, but is not subject to reporting under Section 103 of CERCLA. Section 304(a)(2) requires the reporting of a release of a separately listed extremely hazardous substance in such instances, if the release:

- is not a federally permitted release as defined in Section 101(10) of CERCLA,[37]
- is in an amount in excess of a reportable quantity that EPA designated under Section 302, and
- "occurs in a manner" which would require notification under Section 103 of CERCLA.[38]

With respect to the third criterion, the phrase "occurs in a manner" generally has been implemented over time to mean the nature of the release in terms of how the substance enters the environment. Section 329 of EPCRA defines the term "release" and "environment" similar in scope to CERCLA.[39] The regulations that EPA promulgated to implement Section 304 reflect these statutory definitions.[40]

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[31] 42 U.S.C. §11001.

[32] 42 U.S.C. §11002.

[33] Reportable quantities of extremely hazardous substances subject to emergency release notification under EPCRA are codified in federal regulation at 40 C.F.R. Part 355, Appendix A.

[34] 42 U.S.C. §11004.

[35] 42 U.S.C. §11004(a)(1).

[36] 42 U.S.C. §11004(a)(3).

[37] 42 U.S.C. §9601(10).

[38] 42 U.S.C. §11004(a)(2).

[39] 42 U.S.C. §11049. The definition of the term "release" in EPCRA is nearly identical to that in CERCLA. The definition of the term "environment" in EPCRA is similar to CERCLA, but is more generally worded in its description to encompass "water, air, and land and the interrelationship which exists among and between water, air, and land and all living things."

[40] 40 C.F.R. §355.61.

Statutory Exemptions

In any of these scenarios involving extremely hazardous substances or hazardous substances, Section 304(a)(4) exempts a release of either substance from reporting under EPCRA, if the release would result in exposure to persons solely within the site or sites on which a facility is located.[41] Other factors also may determine whether a release is subject to reporting under EPCRA. In each instance of applicability, Section 304 refers to the reporting of a release at facilities where a hazardous chemical is produced, used, or stored. Conversely, if a hazardous chemical is not produced, used, or stored, at a facility, the reporting requirements do not apply.

Section 311(e) generally defines the term "hazardous chemical" to mean any such chemical regulated under the Occupational Safety and Health Act that is subject to federal requirements for hazard communication in the workplace.[42] However, Congress excluded certain uses from this definition in EPCRA, thereby exempting these uses from reporting requirements of the statute. Among those more directly relevant to the agricultural sector, uses of "any substance to the extent it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer" are excluded from EPCRA. The statute does not further describe or define the scope of these uses though. Section 329(5) cross-references the definition in Section 311(e) for application of this exclusion across the requirements of the statute. Congress did not include a similarly broad exclusion from CERCLA for releases of hazardous substances used in routine agricultural operations.

Animal Waste

"Animal waste" per se is not designated in CERCLA as a hazardous substance or in EPCRA as an extremely hazardous substance. Numerous studies have examined the chemical constituency of animal waste, and associated chemical by-products that may be generated from decomposition of the organic matter. For example, a 2003 study by the National Research Council found that air emissions from animal waste commonly include ammonia, hydrogen sulfide, methane, volatile organic compounds, and particulate matter that may consist of various chemicals.[43] Of these chemicals, ammonia and hydrogen sulfide are designated as hazardous substances in regulation under CERCLA[44] and as extremely hazardous substances in regulation under EPCRA.[45] The threshold for the reportable quantity of a release of ammonia or hydrogen sulfide into the environment under either CERCLA or EPCRA is 100 pounds during a 24-hour period into any media (e.g., air, water, or soils).

If such quantity were released into the ambient air, the concentrations generally would decline with increasing distance from the point of release as a result of dispersion.[46] The National Research Council 2003 study noted that potential risks from air releases would depend on exposure that may vary by site and among individuals. The Council found "little scientific evidence" that exposures beyond the boundaries of animal feeding operations have significant effects on human health because the

[41] 42 U.S.C. §11004(a)(4).

[42] 42 U.S.C. §11021(e). This provision of EPCRA references the Occupational Safety and Health Administration's definition of a hazardous chemical codified in federal regulation at 29 C.F.R. §1910.1200(c) that means "any chemical which is classified as a physical hazard or a health hazard, a simple asphyxiant, combustible dust, pyrophoric gas, or hazard not otherwise classified."

[43] National Academies, National Research Council, *Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs*, 2003, 263 pp. available at: https://www.nap.edu/catalog/10586/air-emissions-from-animal-feeding-operations-current-knowledge-future-needs.

[44] 40 C.F.R. §302.4.

[45] 40 C.F.R. Part 355, Appendix A.

[46] The rate of dispersion of a chemical released into ambient air would depend on multiple factors (e.g., properties of the chemical, wind, temperature, humidity, and interaction with other chemicals present in the atmosphere).

concentrations "usually" are below threshold levels that would present a health risk.[47] The Council observed that risks of inhalation may be more significant within the boundaries of an animal feeding operation and within enclosed animal housing where concentrations are higher. The Council identified technical challenges in capturing and measuring air releases from animal waste for regulatory purposes, but recommended additional research and the development of best management practices to mitigate air releases. Additional studies have examined these issues since that time.[48]

EPA 2008 Rule

As a matter of implementation, EPA historically has not applied CERCLA and EPCRA to air releases of hazardous substances from animal waste at farms, with the exception of large concentrated animal feeding operations (CAFOs) subject to EPCRA under a 2008 rule. On December 18, 2008, EPA finalized a rule during the George W. Bush Administration to establish an administrative exemption from reporting requirements of CERCLA for air releases of hazardous substances from animal waste at all farms, and to apply EPCRA only to large CAFOs of certain sizes.[49] The rule specified thresholds for the maximum number of livestock by type that an operation could stable or confine to qualify for the exemption from reporting under EPCRA. The rule exempted air releases from animal waste of livestock that are not stabled or confined. Operations that stable or confine livestock in numbers equal to or greater than the following thresholds were considered sufficiently large to make them subject to emergency notification requirements for air releases in excess of reportable quantities under EPCRA:

- 700 mature dairy cows, whether milked or dry;
- 1,000 veal calves;
- 1,000 cattle other than mature dairy cows or veal calves (cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs);
- 2,500 swine each weighing 55 pounds or more;
- 10,000 swine each weighing less than 55 pounds;
- 500 horses;
- 10,000 sheep or lambs;
- 55,000 turkeys;
- 30,000 laying hens or broilers, if the farm uses a liquid manure handling system;
- 125,000 chickens (other than laying hens), if the farm uses other than liquid manure handling system;
- 82,000 laying hens, if the farm uses other than a liquid manure handling system;
- 30,000 ducks (if the farm uses other than a liquid manure handling system); or
- 5,000 ducks (if the farm uses a liquid manure handling system).[50]

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[47] National Academies, National Research Council, *Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs*, 2003, p. 66.

[48] For example, see National Association of Local Boards of Health, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, 2010, prepared under a cooperative agreement with the Centers for Disease Control and Prevention, available at: https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf. This study includes a bibliography of numerous other studies as well.

[49] U.S. Environmental Protection Agency, "CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms," 73 *Federal Register* 76948-76960, December 18, 2008.

[50] 40 C.F.R. §355.31(g).

In the preamble to the final rule, EPA noted a petition submitted in August 2005 by the National Chicken Council, National Turkey Federation, and U.S. Poultry and Egg Association requesting an administrative exemption from CERCLA and EPCRA reporting requirements specifically for ammonia emissions from poultry operations. However, EPA indicated that the final rule was not a direct response to that petition.[51] EPA stated that the exemption from reporting was warranted in its view because a response action would be "impractical" or "unlikely" in most instances, and that the exemption was consistent with the agency's goal of reducing the "burden" of reporting releases for which response actions most often are not expected.[52] EPA explained that its decision to apply EPCRA to large CAFOs was based on a response to public comments on the 2007 proposed rule by some who expressed a desire for this information because of the potentially greater magnitude of air releases.[53] The proposed rule would have exempted CAFOs of any size from reporting requirements.[54]

The 2008 rule did not exempt air releases from animal waste at farms from liability under Section 107 of CERCLA or otherwise restrict EPA's authority under Section 104 to take federal response actions if warranted to protect human health and the environment. The 2008 rule also did not exempt air releases of hazardous substances from other potential sources at farms, or releases of hazardous substances from animal waste into other environmental media (e.g., soil, groundwater, or surface water), if such releases were to exceed thresholds for reporting.

However, releases from animal waste into surface waters in compliance with a Clean Water Act discharge permit would be treated as a "federally permitted release" under Section 101(10) of CERCLA.[55] Section 103(a) exempts federally permitted releases from reporting under the statute,[56] and Section 107(j) exempts federally permitted releases from liability under the statute.[57] Federally permitted releases exempt under CERCLA also are exempt from reporting under EPCRA. Exemptions for federally permitted releases are based on the presumption that regulation under another federal law would address potential risks. In current law, there is no similar permitting of air releases of hazardous substances from animal waste upon which to base a federally permitted release exemption.

Litigation Challenging the EPA 2008 Rule

The Waterkeeper Alliance and other organizations filed a petition for review in court to challenge EPA's authority to issue the 2008 rule, arguing against EPA's conclusion that the reporting of hazardous substance releases from animal waste at farms under CERCLA and EPCRA is "unnecessary."[58] On April 11, 2017, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) granted the petition and vacated the exemptions from reporting in the 2008 rule.[59] The court held that Congress did not authorize EPA to exempt releases of hazardous substances from the statutory reporting requirements under CERCLA and EPCRA.[60] The court concluded that the information gained from this reporting

[51] U.S. Environmental Protection Agency, "CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms," 73 *Federal Register* 76951, December 18, 2008.

[52] Ibid., 73 *Federal Register* 76949.

[53] Ibid., 73 *Federal Register* 76950.

[54] U.S. Environmental Protection Agency, "CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste," 72 *Federal Register* 73700-73708, December 28, 2007.

[55] 42 U.S.C. §9601(10).

[56] 42 U.S.C. §9603(a).

[57] 42 U.S.C. §9607(j).

[58] Petition for Review, Waterkeeper Alliance v. Envtl. Prot. Agency, 853 F.3d 527 (D.C. Cir. Jan. 15, 2009) (No. 09-1017).

[59] Waterkeeper Alliance v. Envtl. Prot. Agency, 853 F.3d 527, 537-38 (D.C. Cir. 2017).

[60] *Id.* at 534-36.

would not have "trivial or no value," but that the information could potentially provide "some real benefits" to the public and local emergency responders.[61] The court subsequently approved multiple EPA motions to stay (i.e., delay) the issuance of an order to lift the exemptions in the 2008 rule to allow more time to develop procedures for reporting and collecting release data, considering the potentially large number of farms that had not reported previously under the 2008 rule. The court granted the most recent stay on February 1, 2018, extending it until May 1, 2018.[62]

Trump Administration Guidance

During the Trump Administration, EPA has issued guidance to instruct farms that they should comply with the reporting of air releases under Section 103 of CERCLA through filing annual continuous release reports with the National Response Center once the court order becomes effective after the expiration of the stay.[63] EPA has issued guidelines for farms to estimate the quantity of continuous releases using various existing methodologies, and has announced that the agency is developing additional methodologies to better inform emission estimates. This guidance for continuous release reporting and emission estimates applies to reporting under Section 103 of CERCLA.

EPA also has issued separate guidance outlining the Trump Administration's interpretation that farms using substances in "routine agricultural operations" are excluded from emergency notification of releases under Section 304 of EPCRA.[64] Based on this interpretation, EPA has announced that farms are not required to report air releases from animal waste to state and local officials, and that the agency intends to conduct a rulemaking on its interpretation of this exemption. The George W. Bush Administration did not render an interpretation of the "routine agricultural operations" exemption in its 2008 rule and instead determined that Section 304 of EPCRA did apply to large CAFOs. The April 2017 D.C. Circuit decision made no reference to this particular exemption in EPCRA.

S. 2421

As introduced, S. 2421 would amend Section 103(e) of CERCLA to exempt "air emissions from animal waste (including decomposing animal waste) at a farm" from reporting to the National Response Center regardless of the quantity of the release of hazardous substances in air emissions. The bill would define the term "animal waste":

- to mean "feces, urine, or other excrement, digestive emission, urea, or similar substances emitted by animals (including any form of livestock, poultry, or fish)," and
- to include "animal waste that is mixed or commingled with bedding, compost, feed, soil, or any other material typically found with such waste."

S. 2421 would define the term "farm" to mean a site or area (including associated structures) that:

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[61] *Id.* at 535-38.

[62] Per Curiam Order, Waterkeeper Alliance v. Envtl. Prot. Agency, 853 F.3d 527 (D.C. Cir. Feb. 1, 2018) (No. 09-1017).

[63] During the Trump Administration, EPA has issued guidance for farms to report air releases from animal waste once the court order becomes effective. See "CERCLA and EPCRA Reporting Requirements for Air Releases of Hazardous Substances from Animal Waste at Farms" available at: https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms (as viewed on March 7, 2018).

[64] EPA, Office of Land and Emergency Management, *Does EPA Interpret EPCRA Section 304 to require farms to report releases from animal waste?*, October 25, 2017, available at: https://www.epa.gov/epcra/question-and-answer-epcra-reporting-requirements-air-releases-hazardous-substances-animal.

- is used "for the production of a crop;" or "the raising or selling of animals (including any form of livestock, poultry, or fish);" and
- "under normal conditions, produces during a farm year any agricultural products with a total value equal to not less than $1,000."

S. 2421 would not exempt such air emissions from federal response authority under Section 104 if action were warranted to protect human health and the environment, or potential liability under Section 107.

In current law, Section 103(e) of CERCLA exempts the proper application of a federally registered pesticide from reporting. S. 2421 would strike Section 103(e) in its entirety, *reinsert* this existing exemption, and add an exemption for air emissions from animal waste at farms as defined in the bill. S. 2421 would not alter the treatment of pesticides under CERCLA in current law.

S. 2421 would not amend EPCRA. However, exempting releases of hazardous substances in air emissions from animal waste at farms from reporting under Section 103 of CERCLA would have the effect of exempting such releases from reporting to state and local officials under Section 304(a)(1) and Section 304(a)(3) of EPCRA. Reporting is required under both of these provisions contingent upon reporting of hazardous substances required under Section 103 of CERCLA. Exempting a release from reporting under Section 103 of CERCLA thereby would exempt the same release from reporting under these two provisions in Section 304 of EPCRA.

Whether releases of extremely hazardous substances in air emissions from animal waste would remain subject to other provisions of EPCRA would depend on two factors. First, Section 304(a)(2) applies to releases of separately listed extremely hazardous substances that are not subject to reporting as hazardous substances under Section 103 of CERCLA. For example, ammonia and hydrogen sulfide are listed separately as extremely hazardous substances under EPCRA, not only as hazardous substances under CERCLA. An exemption from CERCLA therefore may not necessarily apply to separately listed extremely hazardous substances covered under Section 304(a)(2) of EPCRA. Second, if substances released from animal waste may be considered substances used in routine agricultural operations, such releases may be exempt from reporting under EPCRA altogether, as the Trump Administration has interpreted.

If enacted into law, S. 2421 would amend CERCLA to provide an exemption from the reporting of air releases of hazardous substances emitted by animal waste at farms. In turn, this amendment would have the effect of exempting the same releases of hazardous substances from reporting under EPCRA that is contingent upon reporting required under CERCLA. However, the potential applicability of EPCRA to air releases of separately listed extremely hazardous substances may depend on whether the Trump Administration's interpretation of the exemption for substances used in routine agricultural operations is challenged. Any potential reporting requirements under state or local laws may continue to apply though, as neither CERCLA nor EPCRA would preempt such requirements.

MEMORANDUM March 13, 2018

To: Senate Committee on Environment and Public Works
Attention: Kusai Merchant

Honorable Cory A. Booker, Ranking Member
Subcommittee on Superfund, Waste Management, and Regulatory Oversight
Attention: Adam Zipkin

From: David M. Bearden, Specialist in Environmental Policy, dbearden@crs.loc.gov, 7-2390

Subject: **Supplemental Analysis: Fair Agricultural Reporting Method Act/FARM Act (S. 2421)**

This memorandum responds to your request for a more detailed discussion of the analysis presented in a CRS memorandum provided on March 7, 2018. CRS prepared this earlier memorandum to respond to your initial request for an analysis of amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in the Fair Agricultural Reporting Method Act or "FARM Act" (S. 2421), as introduced on February 13, 2018. As discussed in the March 7th CRS memorandum, S. 2421 would exempt air releases of hazardous substances emitted by animal waste at farms from reporting requirements under CERCLA, and would have a bearing on the applicability of reporting requirements under Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA).

This supplemental memorandum elaborates upon the analysis presented in the March 7th CRS memorandum to outline circumstances in which the emergency notification requirements in Section 304 of EPCRA would apply under current law, and the bearing of S. 2421 on the applicability of these requirements to air releases emitted by animal waste. The March 7th CRS memorandum provides additional background information in support of this analysis, and offers a broader examination of how S. 2421 would define the terms "animal waste" and "farm" for purposes of the bill. I hope that this supplemental memorandum is helpful to address your questions about circumstances in which EPCRA may continue to apply if S. 2421 were enacted. If you need further assistance from CRS in consideration of this legislation or related issues, please do not hesitate to contact me.

Section 304 of EPCRA

As explained in the March 7th CRS memorandum, Section 304 of EPCRA outlines three situations in which the reporting of releases of extremely hazardous substances or hazardous substances into the environment is required.[1] In each situation, the person responsible for the release must notify the State Emergency Response Commission (SERC) and the appropriate Local Emergency Planning Committee

[1] 42 U.S.C. §11004.

(LEPC) that covers the local jurisdiction where the release occurs. Two of these situations are contingent upon the release being subject to notification under Section 103 of CERCLA for reporting to the National Response Center.[2] The third situation is not contingent upon reporting under CERCLA. The three situations covered in Section 304 of EPCRA are as follows.

- Section 304(a)(1) requires notification of releases of extremely hazardous substances listed under EPCRA, if the release would require notification for hazardous substances under Section 103 of CERCLA.[3]
- Section 304(a)(3) requires notification of releases of other hazardous substances that are not separately listed as extremely hazardous substances under EPCRA, if the release would require notification under Section 103 of CERCLA.[4]
- Section 304(a)(2) requires notification of releases of extremely hazardous substances listed under EPCRA (but that are not subject to notification under CERCLA), if three criteria are met.[5]

In this third situation, releases of extremely hazardous substances listed under EPCRA would require notification under Section 304(a)(2), if the release:

- (A) is not a federally permitted release as defined in Section 101(10) of CERCLA;[6]
- (B) is in an amount in excess of a reportable quantity that the U.S. Environmental Protection Agency (EPA) designated under Section 302 of EPCRA;[7] and
- (C) "occurs in a manner" that would require notification under Section 103 of CERCLA.

S. 2421

S. 2421 would amend Section 103(e) of CERCLA to exempt "air emissions from animal waste (including decomposing animal waste) at a farm" from reporting to the National Response Center regardless of the quantity of the release of hazardous substances in air emissions. The bill would not amend Section 304 or any other provisions of EPCRA. Although S. 2421 would not amend this statute, the bill would have the effect of eliminating reporting requirements under Section 304(a)(1) and Section 304(a)(3) of EPCRA for air releases of hazardous substances emitted by animal waste at farms, in so far as the terms "animal waste" and "farm" are defined in the bill.

Both Section 304(a)(1) and Section 304(a)(3) of EPCRA are contingent upon reporting required under Section 103 of CERCLA. Exempting a release from reporting under Section 103 of CERCLA thereby would have the effect of exempting the same release from reporting under Section 304(a)(1) and Section 304(a)(3) of EPCRA. The April 2017 court decision referenced in the March 7th CRS memorandum (*Waterkeeper Alliance, et al., v. EPA*) described this statutory relationship in terms of "a release that triggers the CERCLA duty also automatically trips the EPCRA reporting requirements in subsections (1) and (3)" of Section 304.[8]

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[2] 42 U.S.C. §9603.

[3] 42 U.S.C. §11004(a)(1).

[4] 42 U.S.C. §11004(a)(3).

[5] 42 U.S.C. §11004(a)(2).

[6] 42 U.S.C. §9601(10).

[7] 42 U.S.C. §11002.

[8] Waterkeeper Alliance v. Envtl. Prot. Agency, 853 F.3d 527, 537-38 (D.C. Cir. 2017).

S. 2421 would not have a bearing on the reporting of releases of extremely hazardous substances under Section 304(a)(2) of EPCRA though, as this provision is not contingent upon reporting required under Section 103 of CERCLA. If the exemption from CERCLA in S. 2421 were enacted, the applicability of Section 304(a)(2) therefore would remain the same as in current law. An air release of an extremely hazardous substance emitted by animal waste at a farm would be subject to Section 304(a)(2) if all three statutory criteria for reporting were met.

An air release of an extremely hazardous substance emitted by animal waste would satisfy the first criterion in Section 304(a)(2)(A) if it were not a federally permitted release. Section 101(10) of CERCLA defines the term "federally permitted release" to mean releases regulated under other specific laws. Section 101(10)(H) authorizes a federally permitted release for "any emission into the air" subject to a permit, regulation, or State Implementation Plan, pursuant to the Clean Air Act.[9] CRS is not aware of the use of these authorities to regulate air releases emitted by animal waste upon which a federally permitted release presently could be based. If such air releases were permitted under the Clean Air Act, the releases would be exempt from reporting and liability under CERCLA as a federally permitted release, and thereby exempt from reporting to state and local officials under Section 304 of EPCRA.

An air release of an extremely hazardous substance emitted by animal waste would satisfy the second criterion in Section 304(a)(2)(B) if the quantity of the release were to exceed the quantitative threshold for reporting that EPA designated in federal regulation pursuant to Section 302 of EPCRA.[10] For example, EPA separately listed ammonia and hydrogen sulfide (substances commonly emitted by animal waste) as extremely hazardous substances, and designated 100 pounds released during a 24-hour period as the threshold for reporting under Section 302 of EPCRA. Air releases of ammonia or hydrogen sulfide emitted by animal waste in excess of 100 pounds during a 24-hour period therefore would satisfy this second criterion in Section 304(a)(2)(B).

An air release of an extremely hazardous substance emitted by animal waste (e.g., ammonia or hydrogen sulfide) would satisfy the third criterion of Section 304(a)(2)(C) of EPCRA, if the release were to occur in the same *manner* as a "release" that would require reporting under CERCLA. As outlined in the March 7th CRS memorandum, the term "release" in CERCLA is relatively broad with respect to the manner in which a hazardous substance may enter the environment, including spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.[11] The term "environment" is defined in Section 101(8) of CERCLA to include surface water, groundwater, a drinking water supply, surface soils, sub-surface soils, or ambient air.[12] Section 329 of EPCRA defines the terms "release" and "environment" similar in scope to CERCLA.[13] The federal regulations promulgated under Section 304 of EPCRA reflect these statutory definitions.[14] Both CERCLA and EPCRA generally treat emissions into the ambient air as releases into the environment.

In implementation, EPA has treated the phrase "occurs in a manner" in EPCRA Section 304(a)(2)(C) to mean the nature of the release in terms of how a substance enters the environment, not that reporting *is* required under Section 103 of CERCLA. Otherwise, Section 304(a)(2) would be rendered meaningless in

[9] 42 U.S.C. §9601(10)(H).

[10] Reportable quantities for extremely hazardous substances subject to emergency release notification under Section 304 of EPCRA are codified in federal regulation at 40 C.F.R. Part 355, Appendix A.

[11] 42 U.S.C. §9601(22).

[12] 42 U.S.C. §9601(8).

[13] 42 U.S.C. §11049. The definition of the term "release" in EPCRA is nearly identical to that in CERCLA. The definition of the term "environment" in EPCRA is similar to CERCLA, but is more generally worded in its description to encompass "water, air, and land and the interrelationship which exists among and between water, air, and land and all living things."

[14] 40 C.F.R. §355.61.

covering releases of extremely hazardous substances that do not require reporting as hazardous substances under CERCLA, while requiring reporting under CERCLA at the same time.

The March 7th CRS memorandum observed that the exemption from reporting under Section 103 of CERCLA in S. 2421 may not necessarily exempt releases of separately listed extremely hazardous substances from reporting under Section 304(a)(2) of EPCRA. The applicability of this provision to a particular release would depend on whether all three statutory criteria outlined above are met. Regardless of these criteria though, Section 304 in its entirety may not apply to air releases from animal waste at farms if the Trump Administration's interpretation of the exemption for substances used in routine agricultural operations is not challenged.[15] S. 2421 would not have a bearing on this exemption.

Also as noted in the March 7th CRS memorandum, potential reporting requirements under state or local laws may continue to apply regardless of an exemption in federal law, as neither CERCLA nor EPCRA would preempt such state or local requirements.

[15] The March 7th CRS memorandum provides further discussion of the Trump Administration's interpretation of the exemption in Section 311(e) of EPCRA for substances used in routine agricultural operations. This interpretation is outlined in the following agency guidance: EPA, Office of Land and Emergency Management, *Does EPA Interpret EPCRA Section 304 to require farms to report releases from animal waste?*, October 25, 2017, available at: https://www.epa.gov/epcra/question-and-answer-epcra-reporting-requirements-air-releases-hazardous-substances-animal.

National Wildlife Federation
National Advocacy Center
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March 13, 2018

The Honorable John Barrasso
Chairman
Committee on Environment & Public Works
Washington, DC 20510

The Honorable Tom Carper
Ranking Member
Committee on Environment & Public Works
Washington, DC 20510

Dear Chairman Barrasso, Ranking Member Carper, and Members of the EPW Committee:

The National Wildlife Federation would like to share our concerns with the "Agriculture Creates Real Employment (ACRE) Act" in advance of tomorrow's hearing on this bill, on behalf of our approximately six million members and supporters nationwide. While we have many partners in agriculture, and are strong supporters of responsible agricultural practices, this bill is a package of provisions that would undermine bedrock environmental safeguards for wildlife and water. These provisions threaten fish and wildlife habitat and populations as well as the drinking water and health of rural communities. America's outdoor recreation economy depends on the rivers, lakes, and streams protected by the Clean Water Act, and America's 47 million sportsmen rely on clean water for quality fishing and hunting. To protect water quality, fish health and America's outdoors heritage, we urge opposition to this bill. Some of our concerns are described below.

Section 4 of the Acre Act would arbitrarily exempt sea urchins and sea cucumbers from the Endangered Species Act (ESA) and Fish and Wildlife Service regulations, specifically export permitting requirements. Sea urchins and cucumbers are a highly

sought after food product, particularly as a delicacy in Asian markets. As a result of this demand, sea cucumbers in particular have been overharvested and are subject to illegal smuggling. Both species play important roles in marine ecosystems. Export permitting and licensing requirements help the U.S. Fish and Wildlife Service make sure these and other species are not overharvested, yet the requirements are designed to be compatible with legal commercial activities. If any unnecessary or unjustified delays to commerce arise, for example due to inspections, they can be resolved administratively through improved implementation. Given the commercial and illegal pressure on sea cucumber and urchin populations, export permits and licenses serve an important role in maintaining the populations of these species and their role in the marine environment. Congressional intervention is not needed, and there is no justification for creating a loophole in the ESA or Fish and Wildlife Service regulations for these two species.

Section 6 of the ACRE Act would eliminate important Clean Water Act safeguards that protect our streams, rivers, and lakes from excessive pesticide pollution. It would allow pesticides to be sprayed into water bodies without any meaningful oversight due to the fact that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not require tracking of such pesticide spraying. Nearly 2,000 waterways in the United States are known to be impaired because of pesticide pollution, and pesticides pose a particularly concerning threat to wildlife populations. Passage of this bill would limit Clean Water Act tools and, by relying solely on FIFRA to control pesticide pollution, eliminate meaningful oversight of pesticide discharge. The Clean Water Act provides generous exemptions and pragmatic general permits for agriculture and forestry that allow for efficient and effective pesticide use while protecting drinking water and wildlife. There is no need to change existing, commonsense Clean Water Act protections preventing excessive pesticide pollution.

Section 7 bars the U.S. Environmental Protection Agency (EPA) from sharing basic information about large-scale industrial agricultural operations that generate significant loads of pollution. The bill would attempt to conceal information about waste management and facilities' proximity to waterways, making it difficult for states and their residents to understand where health-harming pollution is coming from. The bill's new secrecy provision would require EPA to hide already publicly available

information that is vital for protecting surrounding communities, drinking water supplies, and fish and wildlife against environmental hazards. Large livestock facilities generate an enormous amount of waste -- sometimes as much waste as an entire city. The waste, which may contaminate nearby waters, contains bacteria and viruses, pharmaceuticals, and nitrogen and phosphorus that can cause oxygen-depleting and toxic algal outbreaks. The waste from these large-scale industrial agricultural operations is a serious threat to downstream communities, fish and wildlife, and the outdoor recreation economy. The public has a right to know if these threats are lurking in the waters on which we depend.

Section 10 would make it even more difficult for the EPA to enforce oil spill prevention and response requirements on large-scale industrial agriculture operations. The Clean Water Act requires facilities to take steps to prevent and respond to oil spills in order to prevent pollution of nearby waters. Farming operations are already treated more leniently than other industrial operations, but this bill would weaken those requirements further. Oil spills on farms are no less threatening to water resources than oil spills at other operations, and facilities that store significant amounts of oil should all be responsible for taking precautions against polluting nearby waterways.

Section 11 places an unnecessary burden on the Fish and Wildlife Service and Animal Plant Health Inspection Service (APHIS) to further speed up permits for control of eagles, migratory birds, and species deemed a nuisance. The Fish and Wildlife Service and APHIS are already empowered and incentivized to collaborate and efficiently issue permits responding to harassment, nuisances, and predation. There is no problem and Congressional intervention is not necessary.

Thank you for taking our concerns into account as you consider this bill.

The National Wildlife Federation