

Vermont Dairy Producers Alliance

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TO: Vermont General Assembly

DATE: May 2, 2018

RE: Citizen Right of Action

The Vermont Dairy Producers Alliance opposes the inclusion of the "Citizen Right of Action" in any legislation. We believe this is a politically motivated effort that distracts from the efforts made by Vermont dairy producers to come to the table as part of Act 64 and the Required Agricultural Practices (RAP) rulemaking to ensure that Vermont farms had the necessary tools to advance water quality in the state. The General Assembly boasts the need for an "All-In" approach but that approach gets sidetracked with this proposed legislation. As a group, we are concerned that a few Legislators have created a distraction from the improvements being made, fueled by poor media reporting and interest groups. This is disheartening for Vermont. Instead of forcing farms to spend time and money paying attorneys to defend themselves in a citizen suit, that time and money would be better spent continuing to advance the industry's focus on environmental initiatives that improve the state's land, air and water.

Leah Ziemba, a partner at the law firm Michael Best & Friedrich LLP, has prepared the following comments to serve as a legal response to the recent testimony by interest groups advocating for this legislation.*

Citizen Suits Should Not Supplant Government Action

Citizen suits are intended to "supplement rather than supplant government action." According to the U.S. Supreme Court, a citizen suit is only proper "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (emphases added). Citizen suits should not, and were never intended to, take the place of a state agency's enforcement responsibility. Yet, as proposed, the legislation would do just that. It is my understanding that those advocating in support of this legislation have no study or set of facts to establish that the relevant state agencies are not properly exercising their enforcement responsibility. Instead, and as evidenced by communications from the Conservation Law Foundation (CLF), certain interest groups view this legislation as a way for "citizens to voice (and act on) their concerns." If a citizen has a concern, it is the role of the applicable agency to follow-up on that concern and, if appropriate, utilize the agency's enforcement authority. CLF is essentially acknowledging that this legislation would allow citizens to "supplant" governmental action, even when there is no evidence that the agencies have failed to exercise their enforcement responsibility — exactly what the U.S. Supreme Court held was improper.

Citizen Suit Provisions In Federal Environmental Laws Include Additional Protections

Although it is true that there are citizen suit provisions under a number of federal environmental laws, the proposed legislation is very different than those laws. For example, a citizen suit cannot be maintained under the Clean Water Act if the defendant is complying with the terms of an issued permit. No express permit shield is provided for in this legislation. Therefore, a business that has invested time, money and effort in order to comply with its permit could still be the subject of a citizen action in Vermont under the proposed legislation. If the public thinks permit terms should be more restrictive, that should be the subject of discussion and legislative action — not a lawsuit. Enacting a citizen suit state law will undoubtedly require permittees to defend the reasonableness of their permit terms, the exact situation that is prohibited under federal law.

In addition, a Clean Water Act citizen suit cannot be maintained for a single instance of a violation that is not continuous and ongoing. No similar protection is included in this legislation. This goes far beyond the U.S. Supreme Court's guiding language that citizen suits should only be allowed to go forward in cases where the state is not properly exercising its enforcement responsibility.

Lawsuits Will Not Remain a "Last Resort" Because Plaintiffs Can Continue to Bring a Citizen Suit Even if the Agency has Found No Violations or a Permittee is in Compliance with a Permit

CLF recently explained that:

Lawsuits will remain the last resort since a lawsuit can only be brought after the alleged violator and appropriate agency is provided with a 90-day notice period. If the alleged violator takes steps to come into compliance or the agency begins the enforcement process, a suit cannot be brought.

However, the legislation does not include language that would stop a lawsuit from proceeding if the alleged violator was acting in compliance with his/her permit or if the state agency determines the alleged violator was not violating any law or permit provision. While CLF may say that lawsuits will remain "the last resort" the legislation simply does not include the provisions necessary to ensure that is the case. This again demonstrates that the proposed legislation is an attempt to "supplant" the State of Vermont's role in enforcing its own environmental laws. And permittees will lose regulatory certainty, even when in compliance with a state-issued permit.

The Attorney's Fee Provision Does Not Make This Legislation Less Problematic

The fact that lawyers could be sanctioned, or plaintiffs could be forced to pay attorney's fees in the case of a frivolous suit is not reassuring. A farm would still have to spend tens of thousands of dollars to defend itself against a frivolous citizen suit, only to hope it still has enough money to pay an attorney to bring a claim against the opposing lawyer for a frivolous suit or to seek their attorney's fees. This is an expensive effort that would require a significant investment in order to see a case through to the end. Plaintiffs, and plaintiffs' attorneys, know this and use the leverage of time and money to force a settlement on permittees that may only be settling because they cannot afford to fight the claim. Given that there does not appear to be any findings that the agencies have systematically failed to exercise their enforcement responsibility, the fact that a wrongfully accused party *might* be able to recover his/her attorney's fees and costs at the end is insufficient.

Instead of creating new avenues for Vermont citizens to sue each other, which only helps to fund private interest groups and lawyers, the legislature should be assessing whether there are enforcement —related agency issues and then, if there are, solve that problem. Do not delegate the legislature's role and purpose to private attorneys interested in financial gain.

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About the Vermont Dairy Producers Alliance: *The Alliance is comprised of dairy farmers and industry partners in the farming industry, representing dairy farms of all sizes throughout Vermont.*

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