IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S MOTION FOR PRELIMINARY INJUNCTION
AND INTEGRATED BRIEF IN SUPPORT THEREOF

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Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State") respectfully moves this Court, pursuant to 42 U.S.C. § 6972(a)(1)(B), for entry of a preliminary injunction enjoining each Defendant from (1) applying poultry waste to any land within the Illinois River Watershed ("the IRW") and (2) allowing the application of poultry waste generated at its respective poultry feeding operations and/or the respective poultry feeding operations under contract with it to any land within the IRW. The State also moves for any other relief deemed necessary to enjoin the above activities. The State's motion should be granted for the reasons set forth below.[1 & 2]

I. Preliminary Statement

The Oklahoma portion of the IRW, with its steep limestone bluffs, once crystal-clear waters and numerous springs, is known for its striking beauty. Recognizing this beauty and the important recreation resource provided by it, the Oklahoma Legislature has designated approximately 70 miles of the Illinois River, 35 miles of the Barren (a/k/a Baron) Fork Creek and 12 miles of Flint Creek as Scenic River Areas.

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[1] The State of Oklahoma seeks this preliminary injunction to address but one of several serious, substantial and imminent risks to human health and the environment which it alleges to be attributable to Defendants' waste disposal practices. Published literature points to other human health and environmental risks from land application of poultry litter, including but not limited to creation of trihalomethanes, blue green algae, and eutrophication. These other risks are more persistent and will not respond as rapidly to immediate injunctive relief. By not raising other risks in this Motion, the State is not suggesting that those risks are not as serious as the one focused on by this Motion or that they cannot be proven. By bringing this Motion, the State does not waive any of its rights to seek further and additional relief -- both injunctive and monetary -- for any and all of the harms caused by Defendants' conduct.

[2] The State intends to file an emergency motion for a status conference in order to secure an expedited hearing on this matter.

Each spring thousands of people begin to make their way to this river valley to swim in its waters, canoe and raft on its rivers and streams, picnic on the river banks and gravel bars, and enjoy its beauty. By the end of each year, approximately 155,000 people will have recreated in and around these rivers and streams. Many of these visitors and thousands of its rural residents also will have used the groundwater from wells and springs for drinking and bathing.

Before significant numbers of tourists begin to arrive each year, beginning in the late winter and extending into the spring, a large number of poultry houses in this area will be cleaned out. During this time, tens of thousands of tons of waste, laden with feces from poultry owned by Defendants, is removed from the houses where the poultry has been raised under the dictates and close supervision of Defendants. This waste, known as poultry waste, is then disposed of by being spread over the thin rocky soil of the IRW.

The accumulated evidence is now clear and indisputable: The rains that follow this disposal cause large quantities of this poultry waste, and the fecal bacteria that it contains, to run off into the rivers and streams of the IRW and seep into the groundwater. The fecal bacteria levels in the water running off from the fields where the waste has been spread can approximate the bacteria levels typically found in raw sewage. This large load of poultry waste causes fecal bacteria levels in the rivers, streams and groundwater of the IRW to reach levels that pose substantial and immediate threats to the health and safety of people who use the Illinois River, its tributaries and the groundwater of this basin.

Unless this Court enters the requested preliminary injunction, this spring, poultry waste will be spread on the land of the IRW, and the fecal bacteria contained in that waste will run off or seep into the waters of the State of Oklahoma. As additional poultry waste is spread on the land in subsequent months, the problem will continue. The people who come to the river and

streams to recreate, as well as those who use the groundwater as a domestic water source, will thus face substantial and imminent dangers to their health. This disposal of poultry waste must therefore be enjoined.

II. Factual Predicate

A. The IRW is a critically important and environmentally sensitive watershed

The 1,069,530-acre IRW straddles the Oklahoma-Arkansas border. *See* Ex. 1 (Comprehensive Basin Management Plan for the Illinois River Basin in Oklahoma, Oklahoma Conservation Commission, p. 2). The approximately 576,030 acres of the IRW that are located in Oklahoma include portions of Delaware, Adair, Cherokee and Sequoyah counties. *See id.*

Within the IRW is the Illinois River, as well as its major tributaries, the Baron Fork Creek, the Caney Creek and the Flint Creek. *See id.* at p. 5. Approximately 70 miles of the Illinois River have been designated by the Oklahoma Legislature as a Scenic River Area. 82 Okla. Stat. § 1452. Additionally, approximately 35 miles of the Baron Fork Creek and approximately 12 miles of the Flint Creek have been designated by statute as Scenic River Areas. 82 Okla. Stat. § 1452. The designation as "Scenic River Areas" reflects a recognition by the Oklahoma Legislature that these rivers and streams "possess such unique natural scenic beauty, water conservation, fish, wildlife and outdoor recreational values of present and future benefit to the people of the state that it is the policy of the Legislature to preserve these areas for the benefit of the people of Oklahoma." 82 Okla. Stat. § 1452.

The waters of the Illinois River and its tributaries are extensively used by the public for recreation, including floating (canoes, kayaks and rafts), camping, swimming, wading and picnicking. *See* Ex. 2 (Caneday Aff., ¶¶ 11 & 15). In recent years (2003-2007), on average over 155,000 people use the Illinois River and its tributaries for recreation each year. *See* Ex. 2

(Caneday Aff., ¶ 11). Most of these users have direct contacts with the water in these rivers and streams. *See* Ex. 2 (Caneday Aff., ¶¶ 11-14). Additionally, the groundwater in the IRW is an important source of drinking water. *See* Ex. 3 (Fisher Aff., ¶ 8). Over 1700 groundwater wells are located in the Oklahoma portion of the IRW, and 98% of these are used for domestic purposes (*i.e.,* drinking and household uses). *See* Ex. 4 (Teaf Aff., ¶ 15); Ex. 3 (Fisher Aff., ¶ 8).

Both the surface water and the groundwater of the IRW are highly susceptible to pollution from land application of animal waste because of the terrain and the geology of this area. *See* Ex. 3 (Fisher Aff., ¶¶ 6-7). Specifically, the karst terrain of the IRW allows for ready transport of land applied poultry waste, including the fecal bacteria in this waste, into the surface water and groundwater in the IRW. *See* Ex. 3 (Fisher Aff., ¶¶ 6-7). This is because the terrain contains numerous passages for water transport in its fractures and faults. *See* Ex. 3 (Fisher Aff., ¶¶ 6-7).

B. Defendants have extensive poultry operations in the IRW and these operations generate thousands of tons of poultry waste

Defendants are poultry integrators. *See* Ex. 5 (Taylor Aff., ¶¶ 7-8). Defendants Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production LLC, George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc. and Willow Brook Foods, Inc. currently own poultry feeding operations and/or have contract poultry feeding operations in the IRW, or until recently owned poultry feeding operations and/or had contract poultry feeding operations in the IRW.[3]

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[3] For instance, Defendants Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc. no longer have operations in the IRW, but did at the time this lawsuit was filed. *See* DKT #1239, ¶¶ 10 & 11 (Defendants Cal-Maine Foods & Cal-Maine Farms Answer). They now own 90% of a company that owns approximately 800,000 layers in the IRW. *See* Ex. 6 (Cal-Maine Foods, Inc. 2007 Annual Report, p. 43); Ex. 7 (Deposition of Steve Storm, p. 98-101).

See, e.g., DKT #1236, ¶¶ 16 & 33 (Defendant Peterson Answer to SAC); DKT #1237, ¶¶ 14, 15 & 33 (Defendants George's & George's Farms Answer to SAC); DKT #1238, ¶¶ 7, 8 & 9 (Tyson Defendants Answer to SAC); DKT #1239, ¶¶ 10 & 11 (Cal-Maine Defendants Answer to SAC); DKT #1241, ¶ 13 (Defendant Cargill Turkey Production Answer to SAC); DKT #1242, ¶¶ 18 & 33 (Defendant Willow Brook Foods Answer to SAC); DKT #1243, ¶ 17 (Defendant Simmons Answer to SAC); Ex. 10 (Deposition of Benny McClure, pp. 32-35); Ex. 11 (CARTP0000001-0000002); Ex. 12 (Deposition of Steve Patrick, pp. 36-40). Together, these poultry feeding operations will be referred to in this Motion, as appropriate, as "Defendants' poultry operations," "their poultry operations," "Defendant's poultry operations," or "its poultry operations."

This region contains some of the most concentrated poultry feeding operations in the entire country. For example, Benton and Washington Counties, which encompass much of the Arkansas portion of the IRW, have the third and fourth largest recorded broiler production of all counties in the United States. *See* Ex. 3 (Fisher Aff., ¶ 3). Collectively, in recent years, it is estimated that Defendants' poultry operations in the IRW have generated over 347,000 tons of poultry waste each year.[4] *See* Ex. 13 (Engel Aff., ¶ 3). This poultry waste has no beneficial use

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Defendant Cargill, Inc. had its own operations and contract growing operations in the IRW until April 2004, when it transferred its poultry operations to Defendant Cargill Turkey Production LLC. *See* Ex. 8 (Cargill, Inc.'s Supplemental Answers to Plaintiff's First Set of Interrogatories & CAR00003-00004 attached thereto).

Defendant Tyson Foods, Inc. does not own birds per se, but does own 100% of and controls Defendants Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc. *See* Ex. 9 (Deposition of Read Hudson, pp. 36 & 49).

[4] The Defendants' poultry operations are estimated to generate approximately the following amounts of poultry waste in the IRW each year: the Tyson Defendants -- 163,650 tons; the Cargill Defendants -- 17,870 tons; Defendant Peterson -- 36,700 tons; Defendant Simmons -- 63,600 tons, the George's Defendants -- 59,570 tons; the Cal-Maine Defendants -- 2,950 tons, and Defendant Willow Brook -- 2,710 tons. *See* Ex. 13 (Engel Aff., ¶ 3).

in the poultry growing / feeding process. *See* Ex. 5 (Taylor Aff., ¶ 19). Put another way, it is not reused, recycled or reclaimed for feeding or growing poultry.

C. Thousands of tons of poultry waste generated by Defendants' poultry operations in the IRW are disposed of in the IRW, resulting in widespread run-off and seepage of the poultry waste into the waters of the State

Although in some circumstances it is trucked out, the overwhelming majority of the estimated 347,000 tons of poultry waste generated by Defendants' poultry operations is disposed of by applying it to the land within the IRW.[5] *See* Ex. 13 (Engel Aff., ¶¶ 3, 4 & 5). The great majority of the IRW, however, does not reasonably require additional application of poultry waste as a P (phosphorus) fertilizer under good agronomic practices. *See* Ex. 14 (Johnson Aff., ¶¶ 6-8). Although some exceptions might be identified, continued land application of poultry waste within the IRW should be judged as a waste disposal practice rather than fertilization. *See* Ex. 14 (Johnson Aff., ¶ 8).

This land-applied poultry waste (and its constituents, including fecal bacteria) runs off or seeps, directly and indirectly, into the surface water and groundwater of the State. *See* Ex. 15 (Olsen Aff., ¶¶ 7 & 8); Ex. 3 (Fisher Aff., ¶¶ 6, 7 & 9). In fact, a significant source of the bacteria found in the environment throughout the IRW is from poultry waste. *See* Ex. 15 (Olsen Aff., ¶ 7).

D. Contained within this poultry waste run-off and seepage are fecal bacteria that present an imminent and substantial endangerment to human health

Contained within this poultry waste run-off and seepage are fecal bacteria. *See* Ex. 4 (Teaf Aff., ¶¶ 16-18); Ex. 16 (Harwood Aff., ¶¶ 7 & 8). These bacteria include *Escherichia coli*

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[5] Much of this disposal -- over 70% -- occurs between January and June. *See* Ex. 13 (Engel Aff., ¶ 6).

and other species, including bacterial indicators (*e.g.*, fecal coliforms and enterococci) which suggest the presence of other dangerous bacteria (*e.g.*, *Campylobacter*, *Salmonella*, and/or *Staphylococcus*). *See* Ex. 4 (Teaf Aff., ¶ 17). Infectious diseases related to fecal bacteria from poultry waste include, but are not limited to, campylobacteriosis, giardiasis, cryptosporidiosis, salmonellosis, and *E. coli* 0157:H7. *See* Ex. 4 (Teaf Aff., ¶ 18); Ex. 16 (Harwood Aff., ¶ 6). Exposure to fecal pathogens can also cause gastroenteritis, cholecystitis, pancretitis, peritonitis, massive gastrointestinal hemorrhage, infections of the urinary tract, blood, respiratory tract and central nervous system, boils, cellulitis, impetigo and serious wound infections. *See* Ex. 4 (Teaf Aff., ¶ 18); Ex. 16 (Harwood Aff., ¶ 6). In fact, segments of Flint Creek, Baron Fork Creek and the Illinois River have been designated as "impaired" due to contamination from fecal bacteria. *See* Ex. 4 (Teaf Aff., ¶ 11); Ex. 16 (Harwood Aff., ¶ 5). Put another way, the water in these river and stream segments violates federal water quality standards for primary body contact due to high levels of *E. coli*, enterococci and fecal coliforms.

People are exposed to this fecal bacteria in the IRW surface waters when they swim or otherwise recreate on or near the Illinois River and its tributaries. Fecal bacteria can then contact and infect people by dermal exposure to surface waters containing fecal bacteria or by accidental ingestion of surface waters containing the fecal bacteria. *See* Ex. 4 (Teaf Aff., ¶ 13); Ex. 2 (Caneday Aff., ¶¶ 12-14 & 16). This surface water exposure is significant. As noted above, an average of over 155,000 people participate in water-based recreation in the Illinois River and its tributaries each year. *See* Ex. 2 (Caneday Aff., ¶ 11). A total of 622,220 recreation hours occur annually in which recreational visitors are in contact with water from the Illinois River and the bacteria in that water. *See* Ex. 2 (Caneday Aff., ¶ 16). Over 90% of this recreational activity occurs during the months of May through August, which either immediately follows or coincides

with the time at which most poultry waste is land applied. *See* Ex. 2 (Caneday Aff., ¶ 11); Ex. 13 (Engel Aff., ¶ 6).

The poultry waste constituents, including fecal bacteria, also seep into the groundwater of the IRW. *See* Ex. 3 (Fisher Aff., ¶¶ 6 & 8-9); Ex. 15 (Olsen Aff., ¶¶ 7 & 8). Any presence of these fecal bacteria in groundwater presents a hazard to human health. *See* Ex. 4 (Teaf Aff., ¶ 15). Fecal bacterial contamination has been found in groundwater samples, groundwater wells and springs discharging groundwater to surface waters within the IRW, thereby demonstrating the vulnerability of shallow groundwater, and illustrating the health concern associated with land application of poultry waste in areas where groundwater is used for potable and other domestic purposes. *See* Ex. 4 (Teaf Aff., ¶ 15); Ex. 15 (Olsen Aff., ¶ 7). As noted above, there are over 1700 documented groundwater wells in the Oklahoma portion of the IRW. *See* Ex. 4 (Teaf Aff., ¶ 15); Ex. 3 (Fisher Aff., ¶ 8). Thus, significant exposures to contaminated groundwater can occur through drinking water supplies. *See* Ex. 4 (Teaf Aff., ¶ 15).

Records of the Oklahoma Department of Health (ODH) underscore the potential for increases in infectious diseases related to land disposal of poultry waste in large quantities in the IRW. *See* Ex. 4 (Teaf Aff., ¶ 19). The ODH maintains records, by county, of diseases caused by bacteria associated with poultry waste, such as campylobacteriosis, salmonellosis and *E. coli* 0157:H7. *See* Ex. 4 (Teaf Aff., ¶ 19). ODH reports of campylobacteriosis in Adair County -- the county that makes up the largest portion of Oklahoma land area in the IRW -- reported rates in excess of the State average for the period 1997-2005. Salmonellosis cases in Adair County reported between 1990-2005 have periodically exceeded the statewide incidence rate. *See* Ex. 4 (Teaf Aff., ¶ 19). In Sequoyah County, another IRW county, the rate of salmonellosis exceeded the state rate for all but 3 years during the period of 1990-2001. *See* Ex. 4 (Teaf Aff., ¶ 19).

Simply put, exposure to fecal bacteria from poultry waste that has run off and seeped into the surface water and groundwater of the State in the IRW presents an imminent and substantial endangerment to human health.[6] *See* Ex. 4 (Teaf Aff., ¶ 20); Ex. 16 (Harwood Aff., ¶ 8); Ex. 17 (Lawrence Aff., ¶¶ 8-9).

E. A moratorium on the land application of poultry waste in the IRW will address the imminent and substantial endangerment to human health

There is annual "re-loading" of fecal bacteria in the IRW from the land application of massive amounts of fecal bacteria-laden poultry waste. Because fecal bacteria cannot indefinitely persist in the environment, if land application of poultry waste ceases, a major source of fecal bacterial contamination to the IRW will be removed and a season of rain will scour the fecal bacteria from contaminated soils and sediments, resulting in a substantial improvement in bacterial water quality and a substantial decrease in the threat to human health. *See* Ex. 16 (Harwood Aff. ¶ 9); Ex. 4 (Teaf Aff. ¶ 20).

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[6] It has long been known (or knowable) to Defendants that fecal bacteria from land-applied poultry waste have the propensity to run-off and cause harm and the threat of harm to health. For example, the Peterson Farms Poultry Water Quality Handbook, at PIGEON0630-31, states:

> Animal waste is a potential source of some 150 disease-causing organisms or pathogens. These organisms include bacteria, viruses, fungi, protozoa, and parasites. Examples of undesirable microorganisms include Salmonella, Cryptosporidium, Listeria, coliform, New Castle (virus), ringworm, coccidiosis, and Ascaris. When found in water or wastes, these pathogens pose significant threats to humans and other animals through drinking water, contact with the skin, or consumption of fish or other aquatic animals. Most pathogens die relatively quickly. However, under the right conditions, they may live long enough to cause problems. They may persist longer in groundwater than in surface water.

Ex. 18.

III. Preliminary Injunction Relief Being Requested

A. The scope of the requested preliminary injunction

The State is seeking a preliminary injunction enjoining each Defendant from (1) applying poultry waste to any land within the IRW and (2) allowing the application of poultry waste generated at its respective poultry feeding operations and/or the respective poultry feeding operations under contract with it to any land within the IRW.

B. RCRA injunctive relief

RCRA is a comprehensive environmental statute that governs the treatment, storage and disposal of solid and hazardous wastes. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). As explained below, poultry waste is a solid waste governed by RCRA. Accordingly, the State has brought a RCRA citizen suit claim against the Defendants pursuant to 42 U.S.C. § 6972(a)(1)(B). *See* DKT # 1215 (Second Amended Complaint, Count 3). It is pursuant to this claim that the State is seeking its preliminary injunctive relief.

The citizen suit provision of RCRA provides that:

> . . . Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf --
>
> * * *
>
> [1](B) against <u>any person</u>, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, <u>who has contributed or who is contributing</u> to the past or present handling, storage, treatment, transportation, or disposal of any <u>solid</u> or hazardous <u>waste</u> which <u>may present an imminent and substantial endangerment to health</u> or the environment[.]

42 U.S.C. § 6972(a)(1)(B) (emphasis added). The citizen suit provision of RCRA further provides that:

> The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties . . . to restrain any person who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B) . . . .

42 U.S.C. § 6972(a).

IV. Preliminary Injunction Standard

A movant is entitled to a preliminary injunction if it can establish, to the extent necessary, the following:

> (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.

Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001).

Differing burdens of proof apply depending on the type of preliminary injunction being sought. *See, e.g., O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 974-76 (10th Cir. 2004) (en banc) (discussing applicability of "heightened burden" standard). As explained in *Meghrig,* 516 U.S. at 484, a plaintiff "suing under § 6972(a)(1)(B) [can] seek a mandatory injunction, *i.e.*, one that orders a responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, *i.e.*, one that 'restrains' a responsible party from further violating RCRA." Given that it is seeking to restrain Defendants from further violating RCRA, the State submits that the injunction it is seeking from this Court is a prohibitory injunction and no "heightened burden" applies. Even assuming *arguendo*, however, that the injunction that the State is seeking were not so characterized, and thus subject to the "heightened burden," this is a standard the State can easily satisfy.

V. Argument

A. The State is likely to succeed on the merits

The Tenth Circuit has set out the elements of a claim under 42 U.S.C. § 6972(a)(1)(B) as follows:

> Section 6972(a)(1)(B), requires: (1) the defendant must be a person, including, though not limited to, one who was or is a generator or transporter of solid or hazardous waste, or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that this defendant contributed to, or is contributing to, the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) that such waste may present an imminent and substantial endangerment to health or the environment.

Burlington Northern and Santa Fe Railway Co. v. Grant, 2007 WL 2758502, *3 (10th Cir. Sept. 24, 2007) (citation omitted). As demonstrated below, applying the facts to these elements, the State can demonstrate an extraordinarily high likelihood of success on the merits of its RCRA claim against Defendants.

1. Poultry waste is a "solid waste" within the meaning of RCRA

42 U.S.C. § 6903(27) provides:

> The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and <u>other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from</u> industrial, commercial, mining, and <u>agricultural operations</u>, ...

(Emphasis added.) Defendants' poultry operations located in the IRW result in the generation of massive quantities of excrement. *See* Ex. 13 (Engel Aff., ¶ 3). Depending upon the type of operation, this excrement becomes mixed with either bedding material or water. This waste material (*i.e.*, "poultry waste") is not reused, recycled or reclaimed for feeding or growing poultry; it has no further use or role in the poultry feeding or growing process. *See* Ex. 5 (Taylor Aff., ¶ 19). Rather the poultry waste is discarded, primarily by means of removing it from the

poultry feeding or growing house and spreading it on nearby lands within the IRW.[7] *See* Ex. 13 (Engel Aff., ¶ 4). As such, poultry waste constitutes a "solid waste" within the meaning of RCRA. *Compare, e.g., United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993) (holding that lead parts which have been reclaimed from spent car and truck batteries by smelter for recycling in another industrial process are a solid waste within the meaning of RCRA) *with Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) (holding that grass residue remaining after Kentucky bluegrass harvest is not a solid waste within meaning of RCRA because same growers reuse the grass residue in a continuous process for Kentucky bluegrass production).

2. Defendants are "persons" within the meaning of RCRA

42 U.S.C. § 6903(15) defines the term "person" as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, [or] association . . . ." Defendants, which are variously corporations and partnerships, plainly fit within this definition. *See* DKT #1236, ¶ 16 (Defendant Peterson Answer to SAC); DKT #1237, ¶¶ 14 & 15 (George's Defendants Answer to SAC); DKT #1238, ¶¶ 6-9 (Tyson Defendants Answer to SAC); DKT #1239, ¶¶ 10 & 11 (Cal-Maine Defendants Answer to SAC); DKT #1240 & 1241, ¶¶ 12 & 13 (Cargill Defendants Answers to SAC); DKT #1242, ¶ 18 (Defendant Willow Brook Answer to SAC); DKT #1243, ¶ 17 (Defendant Simmons Answer to SAC).

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[7] Lest it be contended by Defendants that poultry waste is being reclaimed for use as a fertilizer in the IRW, it should be pointed out that, except in rare instances, because past land application of poultry waste in the IRW has led to a surplus of P in the soils of IRW fields and pastures, such lands in the IRW do not reasonably require additional application of poultry waste as a P fertilizer under good agronomic practices. *See* Ex. 14 (Johnson Aff., ¶ 8). Additionally, it should be pointed out that land application of poultry waste in the IRW involves only surface spreading without tilling, and consequently land application of poultry waste in the watershed does not qualify as a soil amending practice. *See* Ex. 14 (Johnson Aff., ¶ 9). Although there may be specific, limited exceptions, land application of poultry waste within the IRW should thus be judged as a waste disposal practice rather than fertilization. *See* Ex. 14 (Johnson Aff., ¶ 10).

3. Defendants are persons who have contributed and/or are contributing to the handling or disposal of poultry waste

The scope of "contributor" liability under RCRA is extremely broad. As explained by the Fifth Circuit in *Cox v. City of Dallas, Texas*, 256 F.3d 281, 294-95 (5th Cir. 2001):

> The RCRA does not define the term "contribute" or any variation thereof. "This silence compels us to 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'"
>
> Webster's Dictionary defines "contribute" as to "have a share in any act or effect." Webster's Third New International Dictionary 496 (unabridged) (1963); *see also* Oxford English Dictionary 849 (2d ed. 1989) ("to have a part or share in producing [an effect]"); The American Heritage Dictionary of the English Language 410 (3d ed.1992) ("to help bring about a result").
>
> Our sister circuits have drawn upon the plain meaning of the word "contribute" and on the legislative history as well to interpret the "contributing to" phrase under the analogous § 6973 provision. *See, e.g., Aceto*, 872 F.2d at 1383 ("The relevant legislative history supports a broad, rather than a narrow, construction of the phrase 'contributed to.'"); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 167 (4th Cir.1984) ("Congress's intent, then, was to establish a standard of liability by incorporating and expanding upon the common law."). The Court of Appeals for the Fourth Circuit aptly summarized congressional intent regarding interpretations of phrases such as "contributing to":
>
>> [Congress has mandated] that the former common law of nuisance, as applied to situations in which a risk of harm from solid or hazardous wastes exists, shall include new terms and concepts which shall be developed in a liberal, not a restrictive, manner. This ensures that problems that Congress could not have anticipated when passing the [RCRA] will be dealt with in a way minimizing the risk of harm to the environment and the public.
>
> *Waste Indus.*, 734 F.2d at 167. (citations omitted). Therefore, <u>we follow our sister circuits' lead and interpret "contribute" to mean "have a part or share in producing an effect</u>."

(Emphasis added) (some citations omitted.)

Significantly, a defendant need not have a direct hand in the disposal of solid waste in order to be encompassed within the expansive reach of "contributor" liability under RCRA. *Cox*, 256 F.3d at 296-97, explains:

> . . . Negligent oversight of disposal is actionable under the RCRA. . . . The district court did not clearly err in finding that this "lax oversight" of its contractors and their disposal of City waste is evidence of the City's "contributing to" liability. . . . The City's actions therefore snugly fit the "failed to exercise due care in selecting or instructing the entity actually conducting the disposal" statement from S. Rep. No. 96-172, at 5 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023. . . . This situation also closely parallels an example considered in a 1979 House Committee Report and a 1979 Senate Report, *i.e.*, that a generator of solid waste is subject to liability even when someone else conducted the disposal at the generator's request. *See* S. Rep. No. 96-172, at 5 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023; H.R. Comm. Print No. 96-IFC 31, at 31 (1979).

(Some citations omitted.) *See also United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) ("We also disagree with the district court's conclusion that an explicit allegation of "control" is required [to find 'contributing to' liability]. . . . Defendants contracted with Aidex to formulate their technical grade pesticides; they retained ownership of the pesticide throughout the process; and inherent in the process is the generation of wastes. Defendants supplied the specifications for their commercial grade products to Aidex; it may reasonably be inferred that they had authority to control the way in which the pesticides were formulated, as well as any waste disposal"); *United States v. Valentine,* 885 F. Supp. 1506, 1512 (D. Wyo. 1995) ("Contrary to the assertions of JWS, it is not necessary that a party have control over the ultimate decisions concerning waste disposal or over the handling of materials at a site in order to be found to be a contributor within the purview of RCRA").

The legislative history fully supports this broad reading of "contributor" liability under RCRA. *See* S. Rep. No. 96-172 (1980). The Senate Report states:

> Section 7003, therefore, incorporates the legal theories used for centuries to assess liability for creating a public nuisance (including intentional tort, negligence, and strict liability) and to determine appropriate remedies in common law history attached to terms such as "imminent" and "substantial," as well as more recent legislative history. However, Section 7003 should not be construed solely with respect to the common law. Some terms and concepts, such as persons "contributing to" disposal resulting in a substantial endangerment, are meant to be more liberal than their common law counterparts. <u>For example, a company that</u>

> generated hazardous waste might be someone 'contributing to' an endangerment under Section 7003 even where someone else deposited the waste in an improper site (similar to strict liability under common law), where the generator had knowledge of the illicit disposal or failed to exercise due care in selecting or instructing the entity actually conducting the disposal.

Id. (emphasis added).

Under their business model, Defendants exercise control over all essential aspects of poultry production -- from baby chick to processed wholesale poultry products. *See* Ex. 5 (Taylor Aff., ¶¶ 7-9). Defendants generally own or control their breeding flocks, hatcheries, chicks, feedmills, feed ingredients, and the processing (slaughter) plants. *See* Ex. 5 (Taylor Aff., ¶¶ 8 & 9). They also make all decisions regarding placement of baby chicks, the number of chicks placed with each grower, the manner in which those chicks will be raised, and when birds will be picked up from the grower. *See* Ex. 5 (Taylor Aff., ¶¶ 8 & 9). Poultry integrators such as Defendants also dictate specifications for growout houses and associated equipment. *See* Ex. 5 (Taylor Aff., ¶¶ 8 & 9). Contract poultry growers are not permitted to negotiate contract terms with Defendants; a poultry grower's only option is to accept or reject the contract. *See* Ex. 5 (Taylor Aff., ¶ 14). "Poultry waste 'necessarily follows' from the 'growing' of poultry." *See City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1296 (N.D. Okla. 2003), *subsequently vacated in connection with settlement*. In short, the massive quantities of poultry waste are generated as a direct result of Defendants' tightly-controlled poultry operations in the IRW.

The location of growout facilities and thus the location of poultry waste generation is also fully controlled by Defendants. *See* Ex. 5 (Taylor Aff., ¶¶ 8 & 22). They make or approve all decisions about the location of grow-out facilities. *See* Ex. 5 (Taylor Aff., ¶¶ 8 & 22). Because litter is costly to transport relative to its fertilizer value, Defendants also determine distribution of waste products within a watershed by their selection of where the growout facilities will be

located. *See* Ex. 5 (Taylor Aff., ¶¶ 22 & 23). Decisions about where to locate growout facilities are based on Defendants' out-of-pocket expenses for hauling feed to growout facilities and birds to processing plants. *See* Ex. 5 (Taylor Aff., ¶¶ 22 & 23). Thus, the IRW's problems associated with the massive land disposal of poultry waste are not the result of decisions made by the relatively small growers on family farms, but by Defendants' decisions to concentrate poultry production and thus litter and waste production in relatively small geographic areas to save their production costs. *See* Ex. 5 (Taylor Aff., ¶¶ 22 & 23).

These facts clearly demonstrate that Defendants "have a part or share in producing" not only the poultry waste, but also the circumstances under and manner in which that poultry waste is handled and disposed of in the IRW. *See Cox,* 256 F.3d at 294-97; *Aceto Agricultural Chemicals*, 872 F.2d at 1383; *Valentine,* 885 F. Supp. at 1512. Defendants are thus "contributors" within the meaning of RCRA.

4. This solid waste "may present an imminent and substantial endangerment to health or the environment" in the IRW

The Tenth Circuit very recently did an extensive analysis of the terminology used in the phrase "<u>may</u> present an <u>imminent</u> and <u>substantial</u> <u>endangerment</u> to health or the environment." With a proper understanding of this terminology, it is indisputable that this poultry waste "may present an imminent and substantial endangerment to health or the environment" in the IRW.

With respect to the term "may," the Tenth Circuit in *Burlington Northern*, 2007 WL 2758502, *3, has explained:

> [I]t is well established that the operative word in § 6972(a)(1)(B) is "may" . . . . This "expansive language" is "'intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate <u>any risk</u> posed by toxic wastes.'"

(Citations omitted) (emphasis in original). *Accord Wilson v. Amoco Corp.*, 989 F.Supp. 1159, 1172 (D. Wyo. 1998) ("it is not necessary that Plaintiffs show the contamination is damaging, or will damage, health or the environment. It is enough to show that such endangerment 'may' exist. In other words, Plaintiffs need not show actual harm to health or the environment, only threatened harm").[8]

With respect to the term "imminent," the Tenth Circuit in *Burlington Northern*, 2007 WL 2758502, *4, has explained:

> [T]he term "imminent" is not defined by RCRA, however, the Supreme Court has held that "[a]n endangerment can only be 'imminent' if it threatens to occur immediately[.]" *Meghrig*, 516 U.S. at 485 (quotations omitted). Nonetheless, a finding of "imminency" does not require a showing that actual harm will occur immediately as long as the risk of threatened harm is present. *Id* . at 485-86 (holding that "there must be a threat which is present now, although the impact of the threat may not be felt until later") (quotations omitted). In other words, "'[a]n 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public.'" *Davis v. Sun Oil Co.*, 148 F.3d 606, 610 (6th Cir.1998) (quoting *Dague*, 935 F.2d at 1355-56); *see also United States Navy*, 39 F.3d at 1019. Imminence, thus, refers "to the nature of the threat rather than identification of the time when the endangerment initially arose." *United States Navy*, 39 F.3d at 1019 (citation omitted).

Accord Albany Bank & Trust Co. v. Exxon Mobil Corp., 310 F.3d 969, 972 (7th Cir. 2002) ("Imminence does not require an existing harm, only an ongoing threat of future harm") (citation omitted).

With respect to the term "substantial," the Tenth Circuit in *Burlington Northern*, 2007 WL 2758502, *4, has explained:

> [T]he word "substantial" is not defined in RCRA or its legislative history. Nonetheless, relevant case law has held that an endangerment is "substantial"

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[8] This showing may be made through the use of circumstantial evidence. *Cf. Tosco Corp. v. Koch Industries,* 216 F.3d 886, 892 (10th Cir. 2000); *Ohio Oil Company v. Elliott*, 254 F.2d 832, 834 (10th Cir. 1958); *Mid-Continent Petroleum Corporation v. Miller*, 79 P.2d 804, 805 (Okla. 1938); *King v. State*, 109 P.2d 836, 838 (Okla. Crim. App. 1941); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (*en banc*).

> under RCRA when it is "serious." This does not necessitate quantification of endangerment, as an endangerment is substantial where there is reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened release, of hazardous substances in the event remedial action is not taken. As such, given RCRA's language and purpose, "'if an error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare and the environment.'"

(Citations omitted.)

And finally, with respect to the term "endangerment," the Tenth Circuit in *Burlington Northern*, 2007 WL 2758502, *4, has explained:

> [T]he term "endangerment" has been interpreted by courts to mean a threatened or potential harm, thus, it is not necessary that BNSF show proof of actual harm to health or the environment. *See Dague*, 935 F.2d at 1355-56; *United States v. Price*, 688 F.2d at 211. In other words, injunctive relief is authorized when there <u>may</u> be a risk of harm. This gives effect to Congress' intent "to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate <u>any risk</u> posed by toxic wastes." *Dague*, 935 F.2d at 1355 (emphasis in original).

In the present case, Drs. Teaf, Harwood and Lawrence explain how the level of fecal bacteria in IRW surface water and groundwater present such an imminent and substantial threat. *See* Ex. 4 (Teaf Aff., ¶¶ 9-12, 15, 17 & 20); Ex. 16 (Harwood Aff., ¶¶ 5, 8 & 9); Ex. 17 (Lawrence Aff., ¶¶ 8-9). As discussed above, the fecal bacterial levels in runoff from fields where poultry waste has been applied are similar to raw sewage. There are eight water bodies within the Oklahoma portion of the IRW that have been listed as impaired for primary body contact recreation by the State because of bacteria associated with poultry waste. Oklahoma water quality standards have been exceeded for bacteria in at least 18 different IRW locations. Additionally, there are over 1700 documented wells in the Oklahoma portion of the IRW, of which 98% are registered for domestic purposes such as drinking and washing. A "no bacteria" (nondetect) standard for bacteria in groundwater is the human health standard, yet bacteria

contamination has been detected in the groundwater, groundwater wells and springs in the Oklahoma portion of the IRW.

Serious sickness and disease are associated with fecal bacteria in poultry waste. *See* Ex. 4 (Teaf Aff., ¶¶ 17 & 18); Ex. 16 (Harwood Aff., ¶ 6). In fact, increased incidences of disease associated with fecal bacteria have been documented in two Oklahoma counties, including Adair County which constitutes the largest portion of Oklahoma land area within the IRW. *See* Exhibit 4 (Teaf Aff., ¶ 19). Given this factual record, the State has clearly demonstrated that an imminent and substantial endangerment to human health or the environment may be presented, and in fact is presented, by this poultry waste.

In sum, the State has established that it has a likelihood -- indeed, an extraordinarily high likelihood -- of success on the merits of its claim.

B. The State will suffer irreparable harm if the preliminary injunction is denied

The State's Motion is being brought pursuant to RCRA, an environmental and human health statute. *See* 42 U.S.C. § 6901(b)(2). "When a case is brought pursuant to an environmental or public health statute . . . the primary focus shifts from irreparable harm to concern for the public interest." *United States v. Power Engineering Co.*, 10 F. Supp. 2d 1145, 1149 (D. Colo. 1998) (citations omitted); *Wilson*, 989 F.Supp. at 1172 (citations omitted); *see also Christie-Spencer Corp. v. Hausman Realty Co., Inc.*, 118 F. Supp. 2d 408, 423 (S.D.N.Y. 2000) ("In a RCRA case, the irreparable injury prong of the inquiry effectively merges with the court's analysis of plaintiff's likelihood of success on the merits"). Indeed, courts have gone so far as to state that "[w]here a statute authorizes injunctive relief for its enforcement, plaintiffs need not plead and prove irreparable injury." *See Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 338 (4th Cir. 1983) (citations omitted) (RCRA context); *accord United*

States v. Rx Depot, Inc., 290 F. Supp. 2d 1238, 1246 (N.D. Okla. 2003) (citations omitted) (Federal Food, Drug and Cosmetic Act context). Protecting the public from exposure to dangerous fecal bacteria is indisputably in the public interest, and therefore the State submits that further analysis of the irreparable harm factor is unnecessary.[9]

Assuming *arguendo* that an "irreparable harm" analysis were necessary, however, the State can easily satisfy this factor. "An 'irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages.'" *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) (citation omitted) (emphasis omitted). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). "The irreparable harm standard

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[9] The State clearly has legally cognizable and protectable interests at stake here. The State "has a quasi-sovereign interest in the health and well-being -- both physical and economic -- of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982); *see also Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1907) ("[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain"); *Massachusetts v. EPA*, 127 S.Ct. 1438, 1454 (2007). "[I]t is clear that a state may sue to protect its citizens against 'the pollution of the air over its territory; or of interstate waters in which the state has rights.'" *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) (citation omitted); *see also Spiva v. State of Oklahoma,* 584 P.2d 1355, 1359 (Okla. Crim. App. 1978) ("That the State has a valid interest in matters which affect the public health, safety and general welfare is undisputed . . .").

Additionally, pursuant to 60 Okla. Stat. § 60, "[w]ater running in a definite stream, formed by nature over or under the surface" is public water. "Public water" is the State's water unless and until it is actually appropriated and used by another. *See, e.g., City of Stillwater v. Oklahoma Water Resources Board*, 524 P.2d 938, 944 (Okla. App. 1974); *Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District,* 464 P.2d 748, 753 (Okla. 1969). It is public policy of the State to protect these waters from pollution. *See, e.g.,* 27A Okla. Stat. § 2-6-102 & 82 Okla. Stat. § 1084.1.

is not necessarily met by a given quantity of harm; rather, it is met by showing that the quality of the harm is irremediable by a monetary damage award." *Wilson*, 989 F.Supp. at 1177.

As noted previously, the State "has a quasi-sovereign interest in the health and well-being -- both physical and economic -- of its residents in general." *See Snapp*, 458 U.S. at 607. Once sickness occurs there is little that can be done to "undo" that harm to the health and well-being of its population. Although the State is seeking damages for the injury to and lost use of its water resources, as noted in the *Flowers* case monetary damages will not fully remedy the State's injury from Defendants' conduct -- namely the endangerment and threatened endangerment to the health and safety of its population from fecal bacterial in Defendants' poultry waste. Accordingly, the State will suffer irreparable harm if the preliminary injunction does not issue.

C. The Court need not balance injuries (but if it were to do so, the threatened injury to the State if a preliminary injunction were not to issue clearly outweighs any "injury" to Defendants)

Because this matter involves an endangerment to health and the movant here is a sovereign, factor 3 -- the balancing of interests factor -- is to be accorded no weight in the analysis. As explained in *Lamphier*, 714 F.2d at 337-38, "the law of injunctions differs with respect to governmental plaintiffs (or private attorneys general) as opposed to private individuals. Where the plaintiff is a sovereign and where the activity may endanger the public health, 'injunctive relief is proper, without resort to balancing.' *Illinois v. Milwaukee*, 599 F.2d 151, 166 (7th Cir.1979), *rev'd on other grounds*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981)." *See also EPA v. Environmental Waste Control, Inc.*, 917 F.2d 327, 332 (7th Cir. 1990) (same); *United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 868 (7th Cir. 1994) (same); *United States v. Marine Shale Processors*, 81 F.3d 1329, 1359 (5th Cir. 1996) ("when the United States or a sovereign state sues in its capacity as protector of the public interest, a court may rest an

injunction entirely upon a determination that the activity at issue constitutes a risk of danger to the public").

In any event, even if a balancing of interests were required, the cost for properly managing the poultry waste is surprisingly small in this case. If all Defendants were to transport their poultry waste 100 miles (*i.e.*, out of the IRW), the effect at the retail level to consumers of poultry meat in the United States is estimated to be only one to two pennies per year per person for all poultry consumed. *See* Ex. 5 (Taylor Aff., ¶ 25). There can be no disputing that this is an extraordinarily small price to pay in return for eliminating the serious human health hazard created by Defendants' practices.

D. The public interest will be served by entering the preliminary injunction

"It is beyond cavil that the public has a right to soil and water that is free from environmental contamination." *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 175 F. Supp. 2d 593, 629 (S.D.N.Y. 2001); *accord Power Engineering Co.,* 10 F. Supp. 2d at 1165 (". . . citizens have a right to expect contamination-free groundwater and soils, [and] a clean river . . . ."). This public interest, as noted above, is reflected in Oklahoma law:[10] "Whereas the pollution of the waters of this State constitutes a menace to public health and welfare . . . it is hereby declared to be the public policy of this state . . . to provide that no waste or pollutant be discharged into any waters of the state or other placed in a location likely to affect such waters without first being given the degree of treatment or taking such other measures as necessary to protect the legitimate beneficial uses of such waters [and] to provide for the

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[10] "The public interest may be declared in the form of a statute." *Federal Practice & Procedure*, § 2948.4. *See, e.g.,* 42 U.S.C. § 6901(b)(2) ("The Congress finds with respect to the environment and health - . . . (2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment").

prevention, abatement and control of new or existing water pollution . . . ." 27A Okla. Stat. § 2-6-102; *see also* 82 Okla. Stat. § 1084.1 ("Whereas the pollution of the waters of this state constitutes a menace to public health and welfare . . . it is hereby declared to be the public policy of this state to conserve and utilize the waters of the state and to protect, maintain and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses . . ."). Simply put, "[t]here is a strong public interest in protecting public health and our environment." *Industrial Park Development Co. v. EPA*, 604 F.Supp. 1136, 1144 (E.D. Pa. 1985). Protecting the public from exposure to and the threat of exposure to fecal bacteria in poultry waste is indisputably in the public interest. Any suggestion to the contrary is specious.

VI. Conclusion

WHEREFORE, premises considered, this Court should enter a preliminary injunction enjoining each Defendant from (1) applying poultry waste to any land within the IRW and (2) allowing the application of poultry waste generated at its respective poultry feeding operations and/or the respective poultry feeding operations under contract with it to any land within the IRW. Such an injunction is critical to protect the public from the imminent and substantial endangerment to health posed by Defendants' contribution to the disposal of poultry waste within the IRW.

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