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

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 05-CV-329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY TO DEFENDANT PETERSON FARMS, INC.'S SEPARATE RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W. A. 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 under CERCLA ("State"), and respectfully submits its Reply to Peterson Farms, Inc.'s ("Peterson") Separate Response to Motion for Preliminary Injunction[DKT #1532].[1]

I. Introduction

Peterson generates over 36,000 tons of poultry waste per year in the IRW. Most of this poultry waste is being land applied in the IRW, and the fecal bacteria from this poultry waste is polluting the waters of the IRW. But rather than accept responsibility for its ongoing use of the IRW as its dumping ground, Peterson now attempts to create a heightened causation standard that does not exist.

Particularly, in its Response, Peterson argues that in order to establish a RCRA violation, the State must somehow trace its evidence of contaminated water to each and every individual farm.

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[1] The State adopts and incorporates by reference each of the other reply briefs it is filing in reference to its Motion for Preliminary Injunction [DKT #1373].

As shown below, such a heightened causation standard is a fiction that is not supported by any of the authorities that Peterson stretches, misapplies and misapprehends. Peterson's arguments are nothing more than a diversion. However, try as it might, Peterson cannot hide 36,000 tons of fecal bacteria-laden poultry waste and its threat to human health.

II. Argument

A. The State's evidence will show that Peterson is "contributing to" the disposal of solid waste in the IRW

1. The RCRA causation standard is quite simple and quite liberal

The legal standard in this case is simply whether Defendants, including Peterson, contributed to, or are contributing to, the handling, storage, treatment, transportation, or disposal of solid waste in the IRW, and whether the disposal of that waste may present an imminent and substantial endangerment to health or the environment in the IRW. *See Burlington Northern and Santa Fe Railway Co. v. Grant*, 505 F.3d 1013, 1020-21 (10th Cir. 2007) (citation omitted).

The phrase "contributing to" as used in RCRA's citizen suit provision is to be "liberally construed." *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) (citing H.R. Rep. No. 96-IFC 31 at 31 (1979) (the Eckhardt Report); S. Rep. No. 96-172, at 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023); *accord United States v. Waste Indus., Inc.*, 734 F.2d 159, 167 (4th Cir.1984). "Contributing to" simply means to "have a part or share in producing an effect." *Cox v. City of Dallas, Texas*, 256 F.3d 281, 295 (5th Cir. 2001). Further, a defendant may be held liable as a RCRA "contributor" where he "'failed to exercise due care in selecting or instructing the entity actually conducting the disposal.'" *Cox*, 256 F.3d at 296 (quoting S. Rep. No. 96-172, at 5 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023). At the hearing, the State will easily establish that Peterson, and the other Defendants, are RCRA contributors under the liberal and broad standard. The Court should not accept Peterson's

invitation to narrow this standard by creating a heightened causation burden which does not exist.

Specifically, Peterson incorrectly argues that in order to establish "contributing to" liability for the purposes of its Motion for Preliminary Injunction, the State must "establish a causal link between each, individual farm and the alleged public risk." Peterson Response, p. 7 (emphasis added). However, none of the authorities cited by Peterson support such a heightened burden of proof. And, while Peterson seems to be arguing that a plaintiff cannot prove RCRA causation through circumstantial evidence, this is simply not the case. *See, e.g., Raymond K. Hoxsie Real Estate Trust v. Exxon Educational Foundation*, 81 F.Supp.2d 359, 368 (D.R.I. 2000) (In RCRA context, "[c]ircumstantial evidence is sufficient to allow a factfinder to determine the timing of a leak…") (citing *Zands v. Nelson*, 797 F.Supp. 805, 811 (S.D.Cal.1992)). *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*).

It is noteworthy that the first case that Peterson cites in "support" of its causation argument, *Delaney v. Town of Carmel*, 55 F.Supp.2d 237 (S.D.N.Y. 1999), is inapposite. The State does not dispute the general rule from *Delaney* that "some level of causation between the contamination and the party to be held liable must be established." *Delaney*, 55 F.Supp. at 256 (emphasis added). However, one need only read the *Delaney* decision to see that *Delaney* does not support Peterson's argument for a heightened causation standard. The *Delaney* Court held that plaintiffs had not sufficiently established causation there because:

> …the disposal about which Plaintiffs complain ceased some 15 years before [the defendant] had anything to do with the property. The fact that [the defendant] came into

> ownership of the property years after the allegedly offending activity means it cannot be held liable under RCRA.

Id. (emphasis added).[2] Thus, the *Delaney* case was about historic, rather than ongoing, releases.

In contrast, the State will show that Peterson is presently contributing to the disposal of poultry waste in such large quantities and in such proximity to the IRW that ongoing releases into the IRW are assured. In other words, unlike the defendant in *Delaney*, Peterson cannot claim to be a mere innocent who can only be loosely connected with releases from many years past involving some other tortfeasor. Instead, Peterson (like the other Defendants) is actively and presently generating poultry waste in the IRW, and that poultry waste is being disposed of in the IRW. It simply defies reason to say that *Delaney* is somehow analogous to the present fact pattern, let alone absolves Peterson from "contributor" liability.

One of the other cases cited by Peterson, *New Jersey Turnpike Authority v. PPG Indus., Inc.*, 16 F.Supp.2d 460 (D.N.J. 1998), involves causation issues under CERCLA, not RCRA. Moreover, undercutting Peterson's reliance on *New Jersey Turnpike*, is the fact that the Tenth Circuit has adopted a CERCLA causation standard which is highly favorable to the State. Specifically, in *Tosco Corp. v. Koch Industries, Inc.*, 216 F.3d 886, 891 (10th Cir. 2000), the Court held that:

> The plaintiff in a CERCLA response cost recovery action involving multiple potentially responsible persons need not prove a specific causal link between the costs incurred and an individual responsible person's waste.

(Emphasis added.) Peterson also fails to reference the actual holding in *New Jersey Turnpike* that "[i]n order to prevail, [plaintiff] must prove that each Generator Defendant deposited (or

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[2] Peterson also neglects to mention that just two years after the *Delaney* decision came down, the Eastern District of New York stated that "*Delaney* cannot be relied upon as giving appropriate consideration or content to the meaning of 'contribute to' for the purposes of RCRA liability." *Aiello v. Town of Brookhaven*, 136 F.Supp.2d 81, 113 (E.D.N.Y. 2001) (emphasis added).

caused to be deposited) [the contaminant] at each of the sites in question." *New Jersey Turnpike*, 16 F.Supp.2d at 469. Here, there is only one "site[] in question" -- the IRW. The State will show, through overwhelming evidence, that Peterson (like the other Defendants) has disposed of massive amounts of bacteria-laden waste in the IRW.

Peterson similarly cherry-picks portions of the *Wilson v. Amoco*, 989 F.Supp. 1159 (D. Wyo. 1998) decision in its effort to create a heightened causation standard. Peterson Response, pp. 7-11.[3] For example, Peterson notes that the *Amoco* Court refused to issue an injunction with respect to a former service station site where the evidence "'was not sufficiently heavy and compelling to attribute [the] contamination to Amoco or establish that the contamination poses an imminent and substantial endangerment to health or the environment.'" *Id.* at 7 (quoting *Amoco*, 989 F.Supp. at 1180). However, there was a genuine question about whether Amoco contributed to the plume at issue there because: (1) it had not owned or operated the station since 1991; (2) when Amoco's underground storage tanks were removed from the site, "no holes were found in the . . .tanks"; and (3) there were upgradient service stations which could have been responsible. *Amoco*, 989 F.Supp. at 1167, 1180. This is a far cry from the evidence here that Peterson (like the other Defendants) is presently contributing to the disposal of enormous quantities of unrestrained waste into the IRW in such a manner that ongoing releases are a practical certainty.[4]

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[3] It should also be noted that the Court in *Amoco* found that because the plaintiffs there were seeking a mandatory injunction, they bore the burden of "showing that on balance the four [preliminary injunction] factors weigh[ed] compellingly in their favor." *Amoco*, 989 F.Supp. at 1171. As detailed fully in the State's Motion for Preliminary Injunction and discussed *infra*, the State does not believe that such a standard applies here. However, the State will make its case no matter which preliminary injunction standard is applied.

[4] Similarly, the *Amoco* Court found that there were serious questions about whether defendant Burlington Northern contributed any hazardous materials to the plume at issue.

More fundamentally, part of the *Amoco* decision upon which Peterson relies should have no bearing on the question of RCRA causation. In particular, the *Amoco* Court decided not to enjoin defendant Steiner Corp. because there was some question as to the "degree and extent to which Steiner contributed to the plume . . . ." *Amoco,* 989 F.Supp. at 1180. However, the RCRA citizen suit provision makes no reference to the "degree and extent" of contribution. *See* 42 U.S.C. § 6972(a)(1)(B). As the *Amoco* Court itself noted: "[i]f . . . the Court finds an imminent and substantial endangerment exists, it has broad equitable powers, and may, 'without regard to the amount in controversy or the citizenship of the parties, . . . restrain <u>any person who has contributed</u> to the past or present handling, storage, treatment, transportation, or disposal of the solid or hazardous waste' presenting the threat to health or the environment." *Amoco,* 989 F.Supp. at 1172 (quoting 42 U.S.C. § 6972(a)) (emphasis added). Nevertheless, the State will show that Peterson has contributed in large "degree and extent" to the pollution of the IRW at issue here.

Peterson also points to an unpublished opinion from the Northern District of Texas, *In re Voluntary Purchasing Groups, Inc. Litigation,* 2002 WL 31431652 (N.D. Tex Oct. 22, 2002). Peterson Response, pp. 11-12. But the *Voluntary Purchasing Groups* decision turned on the defendant railroads' lack of "control" over the handling and disposal of arsenic after said arsenic had been delivered to the subject site. *In re Voluntary Purchasing Groups, Inc.,* 2002 WL 31431652, * 5-7. Corporate agriculture integrators, such as Defendants here, cannot reasonably claim any such lack of control over the conduct of their growers. Indeed, courts have <u>repeatedly</u> rejected integrators' attempts to avoid environmental liability on the grounds that growers are

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Amoco, 989 F.Supp. at 1180 ("Only the diesel fuel, a non-hazardous waste, has been shown with any certainty to be attributable to BN.") There is no such uncertainty as to Peterson's contribution to the bacteria in the IRW.

independent contractors. *See, e.g., Tyson Foods, Inc. v. Stevens*, 783 So.2d 804, 808-09 (Ala. 2000); *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F.Supp.2d 693, 718-21 (W.D. Ky. 2003); *City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1296 (N.D. Okla. 2003), *vacated pursuant to settlement*.

In sum, Peterson would like to impose an evidentiary standard which would require the State to pinpoint the exact location and time of every release attributable to each individual farm. RCRA does not impose such a standard. As noted above, all it need establish under *Burlington Northern* is that Defendants, including Peterson, contributed to, or are contributing to, the handling, storage, treatment, transportation, or disposal of solid waste in the IRW, and that disposal of that waste may present an imminent and substantial endangerment to health or the environment in the IRW. The State will make its case by use of ample direct and circumstantial evidence of the ongoing generation and disposal of massive amounts of bacteria-laden poultry waste in such a manner that releases to the IRW are assured. This evidence will be more than adequate to prove causation and support issuance of a preliminary injunction.

2. Whether Peterson (and the growers for which it is legally accountable) have complied with other laws is irrelevant for purposes of RCRA

Peterson also claims that the State cannot demonstrate a RCRA violation because Peterson growers have not "violated any state or federal environmental regulation or law." Peterson Response, p. 16. As a preliminary matter, the State need not demonstrate a violation of law in order to be entitled to relief under 42 U.S.C. § 6972(a)(1)(B). *See* State's Reply to George's Defendants' Response to Preliminary Injunction Motion. That said, the State will demonstrate at the hearing that Peterson generates such massive quantities of waste (which is land applied) in areas of the IRW where runoff is assured. Oklahoma law prohibits the runoff of poultry waste and the resultant

pollution of the IRW. *See, e.g.*, 2 Okla. Stat. § 10-9.7(B)(1)**;** 27A Okla. Stat. § 2-6-105; O.A.C. § 785:45-3-2. Furthermore, Peterson has clearly violated RCRA by contributing to the disposal of bacteria-laden waste into the IRW.

B. The State is not contributing to the bacterial contamination in the IRW

Peterson also raises the specter that the State is not "entirely innocent" with respect to the contamination at issue. Peterson's Response, pp. 19-20. In support of this assertion, Peterson relies on a single Administrative Compliance Order concerning wastewater treatment facilities at Tenkiller State Park, which is located near the dam on Lake Tenkiller. What Peterson omits is that the issues regarding the wastewater treatment systems addressed in that Administrative Compliance Order were resolved some time ago, and that the facility is located downstream from the bacterial contamination in the waters at issue in the State's Motion for Preliminary Injunction. Accordingly, the wastewater treatment facilities at Tenkiller State Park are not currently, and have not historically, contributed to the bacterial contamination of the Illinois River, Flint Creek, the Baron Fork or any of their tributaries.

WHEREFORE, premises considered, the Court should grant the State's Motion for Preliminary Injunction over the objections of Peterson.

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