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

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

STATE OF OKLAHOMA'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND INTEGRATED BRIEF IN SUPPORT THEREOF

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Plaintiff, the State of Oklahoma ("the State"), moves for partial summary judgment against Defendants except Defendant Willow Brook Foods, Inc.[1] On the issues set forth below, there are no genuine disputes as to any material facts and judgment as a matter of law is appropriate.

A. Count 1 (CERCLA Cost Recovery) and Count 2 (CERCLA Natural Resource Damages). The State seeks summary judgment on the following issues: (1) that phosphorus existing in the form of phosphorus compounds contained in poultry waste is a hazardous substance within the meaning of CERCLA; (2) that the IRW and the locations where poultry waste has been land applied constitute facilities within the meaning of CERCLA; and (3) that Defendants cannot establish the affirmative defense that the land application of poultry waste in the IRW constitutes "the normal application of fertilizer."[2]

B. Count 3 (RCRA Citizen Suit). The State seeks summary judgment on the following issues: (1) that Defendants are persons within the meaning of RCRA; (2) that poultry waste is a solid waste within the meaning of 42 U.S.C. § 6903(27); (3) that Defendants have contributed / are contributing to the handling or disposal of poultry waste; and (4) that the phosphorus in this poultry waste may present an imminent and substantial endangerment to the environment in the IRW.[3]

C. Count 4 (State Law Nuisance). The State seeks summary judgment under the principles stated in Restatement (Second) of Torts § 427B and similar caselaw, which establish Defendants' liability for any nuisance created by their respective contract growers that is attributable to poultry waste because they were aware or should have been aware that in the ordinary course of doing the contract work a nuisance would be likely to result. Additionally, the State seeks summary judgment on Defendants' liability for injunctive relief under state law nuisance because there is a reasonable degree of probability that phosphorus from the land application of poultry waste for which Defendants are responsible will cause injury to the State's interests in its natural resources in the IRW.[4]

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[1] On May 8, 2009, the State and Willow Brook Farms, Inc. entered into a proposed consent decree. The proposed consent decree was filed with the Court on May 12, 2009.

[2] The State is not at this time moving for summary judgment with respect to the remaining aspects of Counts 1 or 2.

[3] The State is not at this time moving for summary judgment with respect to (1) endangerment to health or the environment in the IRW from bacteria in poultry waste, (2) endangerment to health in the IRW from phosphorus in poultry waste, (3) remedies, or (4) any other relief under Count 3.

[4] The State is not at this time moving for summary judgment with respect to the remaining aspects of Count 4.

D. Count 5 (Federal Common Law Nuisance). The State seeks summary judgment under the principles stated in Restatement (Second) of Torts § 427B and similar caselaw, which establish Defendants' liability for any nuisance created by their respective contract growers that is attributable to poultry waste because they were aware or should have been aware that in the ordinary course of doing the contract work a nuisance would be likely to result. Additionally, the State seeks summary judgment on Defendants' liability for injunctive relief under federal common law nuisance because phosphorus from the land application of poultry waste for which Defendants are responsible is causing a significant threat of injury to the State's natural resources in the IRW.[5]

E. Count 6 (Trespass). The State seeks summary judgment under the principles stated in Restatement (Second) of Torts § 427B and similar caselaw, which establish Defendants' liability for any trespass by their respective contract growers that is attributable to poultry waste because they were aware or should have been aware that in the ordinary course of doing the contract work a trespass would be likely to result.[6]

F. Count 7 (Violation of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1). The State seeks summary judgment under the principles stated in Restatement (Second) of Torts § 427B and similar caselaw, which establish Defendants' liability for any violation of 27A Okla. Stat. § 2-6-105 by their respective contract growers that is attributable to poultry waste because they were aware or should have been aware that in the ordinary course of doing the contract work a violation of 27A Okla. Stat. § 2-6-105 would be likely to result. Additionally, the State seeks summary judgment on Defendants' liability for injunctive relief under 27A Okla. Stat. § 2-6-105 because poultry waste for which Defendants are responsible has been placed in locations where it is likely to cause pollution by phosphorus of the waters of the State in the IRW.[7]

I. Introduction[8]

Tens of millions of chickens and turkeys are raised annually in the Illinois River Watershed ("IRW") at poultry feeding operations under contract with Defendants. Defendants at

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[5] The State is not at this time moving for summary judgment with respect to the remaining aspects of Count 5.

[6] The State is not at this time moving for summary judgment with respect to the remaining aspects of Count 6.

[7] The State is not at this time moving for summary judgment with respect to the remaining aspects of Count 7.

[8] In its February 4, 2009 Minute Order, the Court granted the State leave to file "a single, reasonably sized summary judgment motion." *See* DKT #1846. Thus, the State is relieved from the page limitation found in LCvR 7.2(c).

all times own these birds, and provide all the feed for these birds. These birds in turn generate hundreds of thousands of tons of poultry waste annually. This poultry waste has no further use in poultry feeding operations. Defendants do nothing to manage or properly dispose of this enormous amount of poultry waste created by their birds. Rather, they simply leave it behind with their growers, knowing that the growers will dispose of the vast majority of this waste by applying it on the land in the IRW (or by transferring it to someone else for land application in the IRW). By Defendants' own admission, this poultry waste has been over-applied to the land.

It has long been known that the constituents of this poultry waste, including phosphorus, can, and do, run-off and leach into the surface and ground waters of the State. A central theme of the claims being asserted by the State in this lawsuit is that this land application of Defendants' poultry waste is threatening to pollute, and indeed is polluting, the natural resources of the State located in the IRW. As a result, the State is entitled to not only damages, but also other forms of relief, including injunctive relief.

During the course of discovery in this case, it has become clear that there are no genuine issues of material fact concerning the following elements of the State's claims against Defendants:

1. That phosphorus existing in the form of phosphorus compounds contained in poultry waste is a "hazardous substance" within the meaning of CERCLA, that the IRW and the locations where poultry waste has been land applied constitute "facilities" within the meaning of CERCLA, and that Defendants cannot establish the affirmative defense that the land application of poultry waste in the IRW constitutes "the normal application of fertilizer."

2. That Defendants are persons within the meaning of RCRA, that poultry waste is a "solid waste" within the meaning of RCRA, that Defendants are "contributors" to the handling or

disposal of poultry waste, and that the phosphorus in this poultry waste "may present" an imminent and substantial endangerment to the environment in the IRW.

3. That under the principles stated in Restatement (Second) of Torts § 427B and similar caselaw, Defendants are liable for any nuisance, trespass or violation of 27A Okla. Stat. § 2-6-105(A) by their respective contract growers that is attributable to poultry waste because Defendants were aware or should have been aware that in the ordinary course of doing the contract work a nuisance, trespass or violation would be likely to result.

4. That Defendants are liable for injunctive relief under state law nuisance because there is "a reasonable degree of probability" that phosphorus from the land application of poultry waste for which Defendants are responsible, *see* point #3 above, will cause injury to the State's interests in its natural resources in the IRW.

5. That Defendants are liable for injunctive relief under federal common law nuisance because phosphorus from the land application of poultry waste for which Defendants are responsible, *see* point #3 above, is causing "a significant threat" of injury to the State's natural resources in the IRW.

6. That Defendants are liable for injunctive relief for violation of 27A Okla. Stat. § 2-6-105 because poultry waste for which Defendants are responsible, *see* point #3 above, has been placed in locations where it is "likely to cause" pollution by phosphorus of the waters of the State in the IRW.

Accordingly, summary judgment against Defendants is warranted.

II. Statement of Undisputed Facts[9]

1. Each Defendant to this action is either a corporation or a partnership. *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 #1243, ¶ 17 (Defendant Simmons Answer to SAC).

2. The IRW straddles the Oklahoma-Arkansas border. Roughly half of the IRW is located in Oklahoma. Within the IRW are the Illinois River, as well as its major tributaries, the Baron (a/k/a Barren) Fork River, the Caney Creek and the Flint Creek. The Illinois River feeds into Tenkiller Ferry Lake. *See* Ex. 2 (Oklahoma Conservation Commission, *Comprehensive Basin Management Plan for the Illinois Basin in Oklahoma*, (May 1999), pp. 2 & 5).

3. Approximately 70 miles of the Illinois River have been designated by the Oklahoma Legislature as a Scenic River Area. *See* 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. *See* 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." *See* 82 Okla. Stat. § 1452.

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[9] Exhibit 1 to the State's Motion is a list of the names of the persons cited in the Statement of Undisputed Facts together with information about their respective backgrounds.

4. The waters of the IRW in Oklahoma have long been used for recreational purposes and for drinking water. *See* Ex. 3 (Caneday July 23, 2008 Depo., pp. 157-59) (". . . I looked at the history as being a way of providing evidence that this river has been a recreational river from the time that white settlers moved into this area. We don't have a good written record from the Native peoples of their recreation on the river, although we know it occurred. But historically, [the Illinois River] has been a recreational river."); *See* Ex. 4 (Oklahoma Water Resources Board Final Order No. 26 (April 12, 1966)) (reflecting beneficial uses of surface waters of Illinois River Stream System as early as 1908).

5. The IRW has been designated a "nutrient limited watershed" by the Oklahoma Water Resources Board, and a "nutrient surplus area[] for phosphorus and nitrogen" by the Arkansas legislature. *See* Okla. Admin. Code § 785:45-5-29 & Ark. Code § 15-20-1104(a)(1). A "nutrient-limited watershed" means "a watershed of a waterbody with a designated beneficial use which is adversely affected by excess nutrients as determined by Carlson's Trophic State Index (using chlorophyll-a) of 62 or greater, or is otherwise listed as 'NLW' in Appendix A of [Chapter 45 of the Oklahoma Administrative Code]." *See* Okla. Admin. Code § 785:45-1-2. A "nutrient surplus area" means "an area declared by [Ark. Code] § 15-20-1104 in which the soil concentration of one (1) or more nutrients is so high or the physical characteristics of the soil or area are such that continued application of the nutrient to the soil could negatively impact soil fertility and the waters within the state." *See* Ark. Code § 15-20-1103(12).

6. The poultry industry in the IRW is vertically integrated. *See* Ex. 5 (Taylor P.I. Test., pp. 929-34).

7. Vertical integration is where the entire production, processing, marketing, and sometimes even distribution and retailing is integrated and controlled from some point in that

vertical structure. *See* Ex. 5 (Taylor P.I. Test., pp. 929-30); Ex. 6 (State's P.I. Ex. 443) (illustrating vertical integration in the broiler industry).

8. Defendants are poultry integrators. *See* Ex. 7 (Storm 10/9/07 Depo., p. 240); Ex. 8 (McClure 8/15/07 Depo., p. 30); Ex. 9 (Henderson 6/5/08 Depo., p. 66); Ex. 10 (Hudson 8/20/07 Depo., pp. 56-57); Ex. 11 (Dicks 2/13/09 Depo., p. 112).

9. Defendants 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. Specifically:

a. Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc. ("the Tyson Defendants") contract with growers to raise their birds and raise their birds themselves within the IRW. *See* Ex. 12 (Pilkington 8/20/07 Depo., p. 125); Ex. 13 (Schaffer 7/9/08 Depo., p. 14); Ex. 14 (Patrick 8/21/07 Depo., pp. 36-38).

b. A large number of the Tyson Defendants' birds are, and have been, raised in the IRW. For example, between 2000 and 2007 the following number of the Tyson Defendants' birds were raised in the IRW:

2000	2001	2002	2003	2004	2005	2006	2007
83,539,243	88,217,253	89,422,357	91,335,834	96,273,917	90,963,059	89,883,818	83,459,913

See Ex. 15 (Tyson Foods' Second Amended Answers to Interrog. 1); Ex. 16 (Tyson Chicken's Second Amended Answers to Interrog. 1); Ex. 17 (Tyson Poultry's Second Amended Answers to Interrog. 1); Ex. 18 (Cobb-Vantress's Second Amended Answers to Interrog. 1).

c. Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc. ("the Cal-Maine Defendants") contracted with growers to raise their birds within the IRW. *See* Ex. 19 (Storm 10/8/07 Depo., pp. 14-15).

d. A large number of the Cal-Maine Defendants' birds have been raised in the IRW. For example, between 2000 and 2007 the following number of the Cal-Maine Defendants' birds were raised in the IRW:

2000	2001	2002	2003	2004	2005	2006	2007
1,560,445	1,135,998	879,281	633,656	403,739	200,000	--	--

See Ex. 19 (Storm 10/8/07 Depo., pp. 110-12); Ex. 20 (Ex. 47 to Storm 10/8/07 Depo.).

e. Cargill, Inc. and Cargill Turkey Production LLC ("the Cargill Defendants") contract with growers to raise their birds and raise their birds themselves within the IRW. *See* DKT #1241.

f. A large number of the Cargill Defendants' birds are, and have been, raised in the IRW. For example, between 2000 and 2007 the following number of the Cargill Defendants' birds were raised in the IRW:

2000	2001	2002	2003	2004	2005	2006	2007
3,232,273	2,866,994	2,828,313	2,475,995	3,545,084	3,381,451	2,305,422	2,477,053

See Ex. 21 (Cargill Inc.'s Second Supp. Answer to Interrog. 1); Ex. 22 (Cargill Turkey's Second Supp. Answer to Interrog. 1).

g. George's, Inc. and George's Farms, Inc. ("the George's Defendants") contract with growers to raise their birds and raise their birds themselves within the IRW. *See* DKT #1237, ¶ 33.

h. A large number of the George's Defendants' birds are, and have been, raised in the IRW. For example, between 2000 and 2007 the following number of the George's Defendants' birds were raised in the IRW:

2000	2001	2002	2003	2004	2005	2006	2007
11,060,750	19,972,941	20,082,206	21,312,971	23,535,964	26,524,368	27,479,391	27,103,748

See Ex. 23 (George's Defendants' Supp. Answer to Interrog. 1).

i. Peterson Farms, Inc. ("Peterson") contracts with growers to raise its birds within the IRW. *See* DKT #1236, ¶ 33.

j. A large number of Peterson birds are, and have been, raised in the IRW. For example, between 2000 and 2007 the following number of Peterson birds were raised in the IRW:

2000	2001	2002	2003	2004	2005	2006	2007
4,336,123	13,277,715	14,454,936	14,897,458	20,981,977	18,166,724	16,887,638	17,563,979

See Ex. 24 (Peterson's Second Supp. Answers to Interrog. 1).

k. Simmons Foods, Inc. ("Simmons") contracts with growers to raise its birds within the IRW. *See* Ex. 25 (Simmons 6/17/08 Depo., pp. 13-14).

l. A large number of Simmons' birds are, and have been, raised in the IRW annually. For example, between 2000 and 2007 the following number of Simmons' birds were raised in the IRW:

2000	2001	2002	2003	2004	2005	2006	2007
13,500,000	15,400,000	17,600,000	18,600,000	25,400,000	31,600,000	27,400,000	12,900,000

See Ex. 26 (Murphy 7/30/07 Depo., pp. 155-59, 266); Ex. 27 (Ex. 38 to Murphy 7/30/07 Depo.).

10. Defendants exercise control over all essential aspects of poultry production. *See* Ex. 5 (Taylor P.I. Test., pp. 929-35, 940-44). For example, with respect to birds raised by their respective growers:

a. Defendants own the birds. *See* DKT #1236 (Peterson Answer to SAC, ¶ 37); DKT #1237 (George's Defendants' Answer to SAC, ¶ 37); DKT #1238 (Tyson Defendants' Answer to SAC, ¶ 37) ("usually retain title); DKT #1239 (Cal-Maine Defendants' Answer to SAC, ¶ 37); DKT #1241 (Cargill Turkey Answer to SAC, ¶ 37); DKT #1243 (Simmons' Answer to SAC, ¶ 37).

b. Defendants own and supply the feed the birds eat. Ex. 19 (Storm 10/8/07 Depo., pp. 47-48); Ex. 8 (McClure 8/15/07 Depo., pp. 135-36); Ex. 28 (Maupin 5/15/08 Depo., pp. 142-43); Ex. 29 (Butler 8/22/07 Depo., p. 16); Ex. 30 (Houtchens 7/26/07 Depo., pp. 147-48); Ex. 26 (Murphy 7/30/07 Depo., p. 141); Ex. 12 (Pilkington 8/20/07 Depo., pp. 49-50); Ex. 13 (Schaffer 7/9/08 Depo., p. 14).

c. Defendants prescribe and supply the medications for the birds. *See* Ex. 19 (Storm 10/8/07 Depo., p. 47 & 86); Ex. 8 (McClure 8/15/07 Depo., p. 136); Ex. 28 (Maupin 5/15/08 Depo., pp. 144-45); Ex. 26 (Murphy 7/30/07 Depo., pp. 141-142); Ex. 12 (Pilkington 8/20/07 Depo., p. 50).

d. Defendants decide when the birds are delivered. *See* Ex. 11 (Dicks 2/13/09 Depo., p. 116); Ex. 8 (McClure 8/15/07 Depo., p. 134); Ex. 31 (Schwabe 6/12/07 Depo., p. 47); Ex. 32 (Wear 7/26/07 Depo., pp. 26-27); Ex. 26 (Murphy 7/30/07 Depo., pp. 140-41); Ex. 12 (Pilkington 8/20/07 Depo., p. 49).

e. Defendants decide the number of birds delivered. *See* Ex. 11 (Dicks 2/13/09 Depo., p. 116); Ex. 33 (Alsup 6/25/08 Depo., p. 261); Ex. 32 (Wear 7/26/07 Depo., p. 26).

f. Defendants dictate specifications for the poultry houses and equipment in the poultry houses. *See* Ex. 11 (Dicks 2/13/09 Depo., p. 118); Ex. 34 (Alsup 6/24/08 Depo., p. 23, 56-57); Ex. 29 (Butler 8/22/07 Depo., p. 44); Ex. 26 (Murphy 7/30/07 Depo., p. 160); Ex. 12 (Pilkington 8/20/07 Depo., p. 22).

g. Defendants regularly inspect and supervise the growing operations. *See* Ex. 11 (Dicks 2/13/09 Depo., pp. 118-9); Ex. 19 (Storm 10/8/07 Depo., pp. 60-61); Ex. 34 (Alsup 6/24/08 Depo., pp. 29-31 & 35); Ex. 28 (Maupin 5/15/08 Depo., pp. 150-52); Ex. 8

(McClure 8/15/07 Depo., pp. 136-140); Ex. 29 (Butler 8/22/07 Depo., pp 21-22); Ex. 35 (Mullikin 11/14/07 Depo., pp. 46-48); Ex. 26 (Murphy 7/30/07 Depo., pp. 132 & 142); Ex. 36 (Reed 6/11/07 Depo., pp. 50-52); Ex. 12 (Pilkington 8/20/07 Depo., p. 50); Ex. 37 (Pigeon 5/25/07 Depo., pp. 65-68).

h. Defendants dictate where the growing operations are located. *See* Ex. 11 (Dicks 2/13/09 Depo., p. 115); Ex. 34 (Alsup 6/24/08 Depo., p. 58); Ex. 8 (McClure 8/15/07 Depo., p. 176); Ex. 30 (Houtchens 7/26/07 Depo., p. 30); Ex. 26 (Murphy 7/30/07 Depo., p. 171); Ex. 38 (Tyson website page).

i. Defendants specify clean-outs and cake-outs of the poultry houses. *See* Ex. 34 (Alsup 6/24/08 Depo., pp. 45-48, 52-53); Ex. 29 (Butler 8/22/07 Depo., p. 25); Ex. 39 (Williams 11/13/07 Depo., 14-15); Ex. 37 (Pigeon 5/25/07 Depo., p. 75); Ex. 26 (Murphy 7/30/07 Depo., p. 199).

11. The structure of the contracts with the growers -- generally flock to flock -- underscore the control Defendants have over the growers, as Defendants can simply decline to deliver new birds to a particular grower. *See* Ex. 5 (Taylor P.I. Test., pp. 933-35).

12. Moreover, Defendants' contracts with the growers are generally non-negotiable. *See* Ex. 5 (Taylor P.I. Test., p. 940); Ex. 19 (Storm 10/8/07 Depo., p. 55); Ex. 28 (Maupin 5/15/08 Depo., p. 21); Ex. 39 (Williams 11/13/07 Depo., p. 14); Ex. 8 (McClure 8/15/07 Depo., p. 133); Ex. 32 (Wear 7/26/07 Depo., pp. 39 & 56); Ex. 26 (Murphy 7/30/07 Depo., p. 230); Ex. 12 (Pilkington 8/20/07 Depo., p. 21).

13. In short, Defendants have oligopsony power over the growers. *See* Ex. 5 (Taylor P.I. Test., pp. 941-43); Ex. 40 (Taylor 7/15/08 Depo., p. 29).

14. Defendants' contracts with their growers, with the exception of Defendant Peterson's contracts since 1999, do not transfer ownership of the poultry waste to the growers. *See* Ex. 5 (Taylor P.I. Test., p. 938); Ex. 40 (Taylor 7/15/08 Depo., pp. 132-34); Ex. 41 (5/14/09 Taylor Aff., ¶ 15).

15. As noted above, however, Defendant Peterson contracts with its growers are non-negotiable, even as to responsibility for poultry waste. *See* Ex. 32 (Wear 7/26/07 Depo., pp. 39 & 56-57) (testifying that growers cannot negotiate who has responsibility for poultry waste produced in the growing operation); Ex. 40 (Taylor 7/15/08 Depo., p. 55-56) ("I mean that simply because the grower has such an investment in houses and equipment, that generally if the integrator chooses not to deliver birds except for the first flock, they don't have to and if the integrator decides to put a new contract feature in, whatever it may be, can apply waste and dead bird disposal, then the grower has little viable economic option other than to accept it or go bankrupt.").

16. Moreover, Defendant Peterson's employee assigned to environmental issues has written that he believed that irrespective of ownership, poultry integrators would be found liable for the effect it has on the environment. *See* Ex. 42 (3/27/98 Mullikin to Henderson memo) ("I personally have no opinion on whether or not the integrator or the grower owns the litter. I do feel, without any doubt, that as time passes, we the integrator will be found to be liable for it and the affect [sic] it has on our environment. . . . Dan, I feel the direction of Peterson Farms and all integrators would be best served to focus its resources towards, would be alternative uses. Things such as using litter as bedding, feed, fertilizer and fuel are just a few of the uses I've found some information on. Each of these uses has it's [sic] own set of benefits and short-

comings. But they all address the environmental need to stop applying litter to our local pasture lands.").

17. As demonstrated by the *City of Tulsa* settlement and its implementation, Defendants have the ability to control the growers and the disposal of the poultry waste. *See* Ex. 43 (Tolbert P.I. Test., pp. 94-95); Ex. 44 (*City of Tulsa* Consent Decree, pp. 8-9).

18. Defendants' birds are housed at the approximately 1917 active poultry houses in the watershed. *See* Ex. 45 (Fisher 9/3/08 Depo., p. 143).

19. A modern poultry house is, on average, populated by a flock of between 20,000 and 25,000 birds, and between five and six flocks generally pass through a house annually. *See* Ex. 46 (Fisher P.I. Test., p. 409).

20. Indeed, the IRW contains some of the most concentrated poultry feeding operation activity in the entire country. *See* Ex. 47 (Arkansas Water Resources Center, *Illinois River Phosphorus Sampling Results and Mass Balance Computations*, MSC-336, (2002), p. 2) ("Arkansas ranked second in the nation in broiler production in 1998. Benton and Washington counties ranked first and second respectively in the state."). Ex. 48 (11/12/07 Fisher Aff., ¶ 3) (stating that Benton and Washington Counties, which encompass much of the Arkansas portion of the IRW, have the third and fourth largest recorded broiler sales of all counties in the United States).

21. Defendants' poultry feeding operations are dispersed geographically across the IRW. *See* Ex. 49 (State's P.I. Ex. 113); Ex. 50 (State's P.I. Ex. 397).

22. Poultry waste necessarily follows from the growing of poultry, and Defendants' birds in the IRW generate an enormous amount of poultry waste annually. Collectively, it is

estimated that these birds generate between 354,000 tons and more than 500,000 tons of poultry waste annually:

Source	IRW Poultry Waste (tons/yr)
Dr. Fisher (Fisher, 2008)	354,000
Defendant supplied poultry and USDA waste coefficients (2001-2006)	421,000-482,000
USDA Census and USDA waste coefficients (2002)	414,000-528,000
Arkansas Soil and Water Conservation Commission Data, Dr. Fisher House Data, USDA waste coefficients (2007)	477,000
USDA-SCS (1989)	403,000
Willett et al. (2006)	361,000

See Ex. 51 (5/14/09 Engel Aff., ¶¶ 6-11); Ex. 45 (Fisher 9/3/08 Depo., pp. 140-41) (2005 estimate).

23. Phosphorus content of this poultry waste ranges from 8.7 million to nearly 10 million pounds annually. *See* Ex. 51 (5/14/09 Engel Aff., ¶ 6). It is estimated that this is the equivalent to a human population of 8 million people. *See* Ex. 51 (5/14/09 Engel Aff., ¶ 10).

24. Based upon Defendant-supplied poultry production data for 2001-2006, the respective Defendants' birds are estimated to have generated the following amounts of poultry waste (in tons) in the IRW:

Year	Cal-Maine	Cargill	George's	Peterson	Simmons	Tyson & Cobb
2001	18,626	45,086	69,510	27,970	40,247	219,116
2002	14,561	44,698	67,494	30,450	45,996	222,110
2003	10,821	49,843	73,401	31,382	48,610	226,862
2004	6,712	52,257	73,730	44,199	66,381	239,128
2005	3,135	49,845	76,879	38,269	82,585	225,936
2006	0	33,984	80,943	35,574	71,608	223,256

See Ex. 51 (5/14/09 Engel Aff., ¶ 6).

25. The poultry waste generated by Defendants' birds has no beneficial use in the poultry growing / feeding process; it is not reused, recycled or reclaimed for feeding or growing

poultry. *See* Ex. 52 (Johnson P.I. Test., p. 476); Ex. 5 (Taylor P.I. Test., 944-45); Ex. 53 (Littlefield P.I. Test., p. 2018); Ex. 54 (Daniel 11/26/07 Depo., p. 49).

26. The poultry waste generated by Defendants' birds contains, without limitation, significant amounts of phosphorus in the form of phosphorus compounds. *See* Ex. 55 (1997 Tyson Environmental Poultry Farm Management, p. 3) ("Poultry manure is also composed of relatively large amounts of phosphorus"); Ex. 56 (Poultry Water Quality Handbook, p. PIGEON.0643) ("Poultry wastes also contain significant amounts of phosphorus. Phosphorus . . . contributes to environmental problems. In fact, it seems to be the limiting factor in the huge algae blooms that make lakes unfit for swimming and ultimately deplete their oxygen supply, deadening the water and killing fish. Phosphorus has become a major cause of water quality degradation.").

27. Phosphorus in the form of phosphorus compounds is a hazardous substance within the meaning of CERCLA. *See* 40 C.F.R. § 302.4 & 42 U.S.C. § 9601(14); *see also* DKT #1913 ("State of Oklahoma's Response in Opposition to 'Defendants' Joint Motion for Summary Judgment on Counts 1 and 2 of the Second Amended Complaint,'" Disputed Material Facts, ¶¶ 4, 6-9) & DKT #1919 (errata to DKT #1913).

28. Defendants are aware that it is and has been the practice to apply the poultry waste generated by their birds in the IRW to the land in the IRW. *See* Ex. 55 (1997 Tyson Environmental Poultry Farm Management, p. 14) ("The majority of producers will apply poultry manure to their pastures or croplands which will be used as fertilizer."); Ex. 57 (2004 Tyson Environmental Poultry Farm Management, p. TSN0076CORP) ("Land application is the most common and beneficial method to utilize the nutrients in poultry litter."); Ex. 58 (Chaubey 1/27/09 Depo., p. 32-33) (testifying that the primary method of disposal of poultry waste is land

application); Ex. 59 (12/5/04 advertisement by several Defendants stating: "Lately, a good deal of concern has been raised about the effect of excess nutrients on the land and waters of Eastern Oklahoma. So where do these nutrients come from? Nutrients can come from many sources, one of which is the use of poultry litter as an organic fertilizer. . . ."); Ex. 60 (9/10/04 advertisement by several Defendants); Ex. 11 (Dicks 2/13/09 Depo., p. 194) (agreeing that historically the predominant use of poultry waste has been to land apply it); Ex. 61 (Ryan P.I. Opening., p. 46) ("And I don't think there's any question but that there has been an overapplication of litter on some or many farms. That's not an issue in our book.").

29. The State does not issue permits or authorizations for the land application of poultry waste. *See* 2 Okla. Stat. § 10-9, *et seq.*; *see also* Ex. 62 (Gunter 8/27/08 Depo., pp. 175-79 & 180-81) (testifying that an animal waste management plan is a guidance document and compliance with such a plan does not necessarily equate to compliance with the law); Ex. 63 (Parrish 1/14/08 Depo., pp. 140 & 152-53) (same); Ex. 64 (Tolbert 4/13/09 Depo., p. 222) (". . . I think there's no permit that's issued in the poultry context. So I don't know that you could say [land application of poultry waste in the IRW] is somehow expressly allowed."); Ex. 65 (Strong 4/9/09 Depo., pp. 211 & 220) (agreeing that a farmer can get a nutrient management plan and comply with that nutrient management plan and still be violating the law because there can be site-specific runoff from his application of poultry waste); Ex. 65 (Strong 4/9/09 Depo., p. 245) (testifying that he does not believe that an animal waste management plan is a permission to apply a certain amount of phosphorus into the environment within the State of Oklahoma).

30. The vast majority of the poultry waste generated by Defendants' birds is and has been land applied throughout the IRW in close proximity to where it is generated. *See* Ex. 66

(Engel P.I. Test., pp. 446-67); Ex. 45 (Fisher 9/3/08 Depo., pp. 158-60); Ex. 67 (3/5/09 Fisher Aff., ¶ 5); Ex. 54 (Daniel 11/26/07 Depo., pp. 26-27); Ex. 58 (Chaubey 1/27/09 Depo., pp. 35).

31. The majority of the land applications of poultry waste occurs between February and June, a period of time when nearly half of the annual rainfall occurs. *See* Ex. 68 (Fisher 9/4/08 Depo., p. 632); Ex. 69 (Teaf P.I. Test., pp. 208-13); Ex. 46 (Fisher P.I. Test., p. 416); Ex. 66 (Engel P.I. Test., pp. 446-47).

32. Significant amounts of poultry waste from each Defendants' birds have been land applied in the IRW. *See* Exs. 70 (Table 8 to Fisher Report) & 45 (Fisher 9/3/08 Depo., pp. 184-93) (testimony regarding Table 8 to Fisher Report); Ex. 45 (Fisher 9/3/08 Depo., p. 193) (testifying that the mass of poultry waste generated within the Illinois River watershed but disposed of outside the watershed is a minority of the waste generated within the watershed).

33. Locations, without limitation, of where poultry waste generated by Defendants' birds have been land applied in the IRW is reflected on the attached Exhibit 71. *See* Ex. 72 (5/14/09 Fisher Aff., ¶ 6).

34. By virtue of the fact that they have concentrated poultry growing operations in the IRW, *see, e.g.*, Facts, ¶¶ 18, 19, 20 & 21, the fact that they determine where poultry growing operations will be located in the IRW, *see, e.g.*, Facts, ¶ 10(h), and the fact that land application generally occurs in close proximity to poultry growing operations, *see, e.g.*, Facts, ¶ 30, Defendants strongly influence the distribution of poultry waste disposal in the IRW. *See* Ex. 41 (5/14/09 Taylor Aff., ¶¶ 9-14).

35. Land applied poultry waste is not incorporated into the soil by tilling, thus putting it in a circumstance where it may be more readily transported. *See* Ex. 45 (Fisher 9/3/08 Depo., pp. 156-57); Ex. 54 (Daniel 11/26/07 Depo., p. 27).

36. Poultry waste is not a good fertilizer or soil conditioner. *See* Ex. 52 (Johnson P.I. Test., pp. 489-91).

37. At a soil test phosphorus level of 65 lbs. / acre or higher, there is virtually no agronomic benefit gained from applying additional phosphorus. *See* Ex. 73 (Zhang 1/16/08 Depo., p. 189); Ex 74 (Mullikin 7/18/02 Depo., pp. 119-20) (testifying that STPs between 50 and 70 are sufficient for crops being grown in northwest Oklahoma and northeast Oklahoma); Ex. 75 (Johnson Rpt., ¶ 5).

38. Land application of poultry waste on fields testing above 120 lbs. / acre constitutes disposal of poultry waste without benefit to crop production and with an increased risk to water quality by runoff and erosion. *See* Ex. 76 (OSU Oklahoma Cooperative Extension Service, *Science-Based Animal Waste Phosphorus Management for Oklahoma*, PT 98-1, p. 5); Ex. 77 (Chaubey 3/2/09 Depo., pp. 231-35) (testifying that application of poultry waste above agronomic rate for phosphorus is disposal, even if there is an agronomic need for other nutrients); Ex 74 (Mullikin 7/18/02 Depo., pp. 49-50) (testifying that from an agronomic and environmental standpoint there is no reason to apply more phosphorus on a field than the plants can uptake).

39. Poultry waste has been over applied in the IRW. *See* Ex. 61 (Ryan P.I. Opening., p. 46) ("And I don't think there's any question but that there has been an overapplication of litter on some or many farms. That's not an issue in our book."); Ex. 75 (Johnson Rpt., ¶ 7(e)) ("The dramatic increase in average STP values, which are more than six times the adequate level for crops, and the presence of such astronomically high soil test results, is a clear indication excessive poultry litter P has been applied in the past and fertilizer P is no longer needed for the vast majority (93%) of these fields."); Ex. 75 (Johnson Rpt., ¶ 7(i)) ("[I]t is clear that land

application of poultry litter has led to excessive P build-up in land within the IRW."); Ex. 52 (Johnson P.I. Test., p. 480) (testifying that average soil test phosphorus values for 2006 test results in Benton and Washington counties were at least ten times levels needed agronomically to grow crops); Ex. 77 (Chaubey 3/2/09 Depo., pp. 175-76) (testifying that high STP levels are indicative of application of poultry waste in excess of agronomic need); Ex. 78 (Tyson Research Farm Nutrient Management Plan at TSN18689SOK) (soil tests from Tyson's own research farm in the IRW showing STP as high as 717 lbs. / acre); Ex. 79 (Keller 10/15/08 Depo., pp. 156-58) (agreeing that 717 lbs. / acre STP is "high" and that increased STP increases the risk for runoff); Ex. 80 (Cargill Breeder Farm Nutrient Management Plan at CARTP123748) (Cargill admission regarding STP at Cargill breeder farm -- Filed under seal due to Cargill claim of confidentiality).

40. Defendants have disclaimed any knowledge of where their poultry waste has been land applied in the IRW, how much has been land applied, or the soil test phosphorus for any application location, and thus Defendants have no evidence that poultry waste generated by their birds has been applied in the IRW in a manner constituting the normal application of fertilizer (*i.e.*, not in significantly greater concentrations or amounts than are beneficial to crops) or consistent with good agricultural practices. *See* Ex. 81 (Responses of Cal-Maine Farms and Cal-Maine Foods to March 17, 2009 Interrogatories, Nos. 1 & 2) (". . . Cal-Maine does not have knowledge of when poultry litter is applied within the IRW, where it is applied, how much is applied, or the STP for any location before its application"); Ex. 7 (10/9/07 Cal-Maine 30(b)(6) Depo., p. 221) ("Cal-Maine doesn't know specifically any details about the application by the -- by the contract producers"); Ex. 82 (Responses of Peterson Farms to March 17, 2009 Interrogatories, Nos. 1 & 2) (". . . Peterson Farms does not have knowledge of when poultry litter is applied within the IRW, where it is applied, how much is applied, or the STP for any location

before its application"); Ex. 83 (Responses of Tyson Defendants to March 17, 2009 Interrogatories, Nos. 1 & 2) (The Tyson Defendants have "no knowledge of specific land applications of poultry litter generated at poultry feeding operations under contract with it"); Ex. 84 (Responses of Tyson Defendants to September 13, 2007 Interrogatories, No. 6 ("The Tyson Defendants do not possess sufficient information to respond to this interrogatory" requesting information about land application of poultry waste generated by their birds in the IRW); Ex. 85 (7/21/08 Cargill 30(b)(6) Depo., p. 230) ("We don't track the poultry litter on our contract producers' farms"); Ex. 34 (6/24/08 Cargill 30(b)(6) Depo., p. 84) (testifying that prior to July 1, 1998, Cargill did not know what its contract growers did with the poultry waste that was produced by their birds); Ex. 86 (Responses of Simmons to March 17, 2009 Interrogatories, No. 1) ("To the extent Plaintiff is seeking the location that poultry litter from a farm under contract with Simmons may have been land applied, Simmons does not have that information other than in the form of 'Grower Surveys' which are voluntary and have only been used in the past few years"); Ex. 87 (Responses of George's to September 13, 2007 Interrogatories, No. 6) (Aside from that poultry waste that George's has transported from the IRW, "George's does not receive or maintain copies of the [poultry waste management] filings or records for operations in either State as its relates to contract growers . . .").

41. In fact, the evidence is to the contrary: poultry waste generated by Defendants' birds has not been applied in the IRW in a manner constituting the normal application of fertilizer or consistent with good agricultural practices. *See* Facts, ¶¶ 30-33 & 35-39; DKT #1913 ("State of Oklahoma's Response in Opposition to 'Defendants' Joint Motion for Summary Judgment on Counts 1 and 2 of the Second Amended Complaint,'" Disputed Material Facts, ¶¶ 10-18) & DKT # 1919 (errata to DKT #1913).

42. The highest phosphorus loadings to the waters of the IRW occur during high-flow events. *See* Ex. 88 (USGS, *Phosphorus Concentrations, Loads, and Yields in the Illinois River Basin, Arkansas and Oklahoma, 2002-2004*, Scientific Investigations Report 2006-5175 (2006), p. 11) ("Phosphorus concentrations in runoff samples from the Illinois River, Flint Creek, and the Baron Fork generally increased with increased streamflow . . . ."); Ex. 47 (Arkansas Water Resources Center, *Illinois River Phosphorus Sampling Results and Mass Balance Computation*, MSC-336 (2002), p. 10 (Figure 2)); Ex. 89 (Arkansas Water Resources Center, Illinois River 2006 Water Quality Assessment at Arkansas Highway 59 Bridge, (June 2007), p. 9) ("Storm events usually have higher [phosphorus] concentrations and with the higher discharges, have much greater [phosphorus] loads.").

43. The largest contributor to the phosphorus loadings during high-flow events is from non-point sources. *See* Ex. 47 (Arkansas Water Resources Center, *Illinois River Phosphorus Sampling Results and Mass Balance Computation*, MSC-336 (2002), p. 9) (Non-point sources account for "73% of storm flow [phosphorus] outputs"); Ex. 88 (USGS, *Phosphorus Concentrations, Loads, and Yields in the Illinois River Basin, Arkansas and Oklahoma, 2002-2004*, Scientific Investigations Report 2006-5175 (2006), p. 4) ("Phosphorus concentrations in Ozark streams are typically greater in streams draining agricultural lands . . . because runoff from pastures fertilized with animal manure are probably substantial sources of phosphorus to the rivers in [the] [IRW] . . . ."); *see also* Ex. 90 (Connolly 4/9/09 Depo., p. 107) ("And I acknowledge and agree that there is a significant amount of phosphorus that comes into this system associated with runoff.").

44. Poultry waste is the dominant source of phosphorus in the watershed. *See* Ex. 58 (Chaubey 1/27/09 Depo., pp. 74-75); Ex. 91 (Smith 9/10/08 Depo., p. 41) (estimating that

poultry production / land application of poultry waste is currently responsible for more than 76% of net annual phosphorus additions to the IRW); Ex. 92 (Smolen 3/27/09 Depo., pp. 138-39) (testifying that it would be the consensus among water quality professionals who have studied the IRW that land applied poultry waste is the number one source of phosphorus in the waters of the IRW).

45. Cattle are not a major contributor of phosphorus in the watershed as they are simply recycling pre-existing nutrients. *See* Ex. 58 (Chaubey 1/27/09 Depo., p. 49-50) ("[B]ecause there is not a lot of import of nutrients coming to feed the cattle in the watershed which are grazing, they are primarily recycling the nutrients within the watershed."); Ex. 45 (Fisher 9/3/08 Depo., p. 123) ("The cattle, on the other hand, are dominantly living on forage that is being grown with phosphorus that's already been applied to fields largely or significantly through poultry waste. So the cattle are recycling phosphorus in terms of mass balance; whereas, the poultry waste is a contribution from an external source."); Ex. 91 (Smith 9/10/08 Depo., p. 65) ("We assume, for the most part, that beef cattle is -- recycles, actually is recycling nutrients in the watershed . . . ."); Ex. 47 (Arkansas Water Resources Center, *Illinois River Phosphorus Sampling Results and Mass Balance Computations*, MSC-336, (2002), p. 7) ("For animal inputs in the Table 2, cattle-beef and dairy are the only animals that obtain the majority of their phosphorus through grazing. Therefore, they are consuming plant phosphorus and depositing manure phosphorus (ie no net change in phosphorus in IRDA [Illinois River Drainage Area]."); Ex. 11 (Dicks 2/13/09 Depo., p. 244) (agreeing that cattle are recycling phosphorus that has been uptaken in the grass that they eat from land on which poultry waste has been applied).

46. The surface water and groundwater of the IRW are highly susceptible to pollution from phosphorus from land applied poultry waste because of the terrain and geology of this area,

the manner of land application, and the nature of poultry waste. *See* Ex. 67 (3/5/09 Fisher Aff., ¶ 6); Ex. 72 (5/14/09 Fisher Aff., ¶¶ 7-27); *see also* Ex. 93 (Young P.I. Test., pp. 1312 & 1315-16); Ex. 94 (Rutherford 8/1/08 Depo., pp. 66-67); Ex. 95 (Fox 4/9/09 Depo., p. 146).

47. Defendants have long been aware that the land application of poultry waste in the IRW presented a serious risk of potential environmental impact due to phosphorus run-off and leaching. *See* Ex 74 (Mullikin 7/18/02 Depo., pp. 167-69) (testifying that integrators, including Peterson, started gaining awareness of the problems with excess phosphorus in northwest Arkansas in the mid-1990s); Ex. 96 (GE0044775) (George's president and chief operating officer acknowledging in 2005 that "[t]hese studies indicate that in certain watersheds the excess [phosphorus] can dissolve into run-off rainwater and get into the streams creating an imbalance in streams and rivers."); Ex. 35 (Mullikin 11/14/07 Depo., pp. 57-58) (Peterson head of environmental affairs stating that the reason for his 1998 memo stating that there was an environmental need to stop applying poultry waste to local fields was "[b]ecause, once again, of the loading of the soils, the lands, the pasture lands of phosphates and then it getting into the waterways."); Ex. 94 (Rutherford 8/1/08 Depo., p. 14) (testifying that Simmons became concerned with regard to phosphorus and its impacts on water quality in the late 1980s); Ex. 25 (Simmons 6/17/08 Depo., pp. 64-65) (testifying that Simmons knew in 1970 that improperly applied poultry waste could pollute the water); Ex. 97 (Simmons 9/4/02 Depo., pp. 82-83); Ex. 98 (Schaffer 7/5/02 Depo., pp. 40-41) (testifying that Tyson as well as the rest of the industry was aware of the potential environmental impacts of poultry farming a couple of years before he joined the company in 1991); Ex. 99 ("Poultry Defendants' Response to Plaintiffs' Motion and Brief for Partial Summary Judgment Against Poultry Defendants on Issue of Liability for Growers' Disposal of Poultry Manure" in *City of Tulsa v. Tyson Foods, Inc.*, N.D. Okla., 01-cv-

0900 (DKT #255), p. 22) (asserting that defendants in that action -- Tyson Foods, Cobb-Vantress, Peterson, Simmons, Cargill, Inc. and George's Inc. -- "were not aware until the 1990s that phosphorus presented potential problems" in the neighboring Eucha-Spavinaw Watershed).

48. That the phosphorus contained in the poultry waste generated by Defendants' birds that has been land applied in the IRW can, and does, run-off and leach into the waters of the State has been confirmed by a multitude of sources, including:

a. Federal and state governments. *See, e.g.*, Ex. 100 (USDA Farm Service Agency, *Final Programmatic Environmental Assessment for Implementation of the Conservation Reserve Enhancement Program Agreement for the Illinois River Watershed in Arkansas* (August 2007), p. 16) ("This watershed is a major poultry growing and cattle producing area, and waterways are subject to impairments related to these activities. . . . The excessive buildup of phosphorus is due to the common practice of fertilizing the soil for grazing purposes by applying poultry litter."); Ex. 100 (USDA Farm Service Agency, *Final Programmatic Environmental Assessment for Implementation of the Conservation Reserve Enhancement Program Agreement for the Illinois River Watershed in Arkansas* (August 2007), pp. A-5-A-6) ("The Illinois River Watershed is part of a major poultry growing and cattle producing area of the State and the nation. Poultry litter has been applied to the nutrient poor, thin, cherty soils of the area and they now grow luxuriant grass and support an important cattle industry. Excessive buildup of phosphorus over the years has polluted the receiving water bodies to the point they are now considered impaired by nutrients. Phosphorus and pathogenic bacteria now impair many of the area streams including the Illinois River. . . . Nonpoint source impacts affecting waters in this segment are primarily from pastureland that is also used for application of poultry litter as fertilizer."); Ex. 101 (USDA Farm Service Agency, *Final Programmatic Environmental*

Assessment for Implementation of the Conservation Reserve Enhancement Program Agreement for Oklahoma (July 2006), pp. 18-19) ("Water quality problems in the Tenkiller and Spavinaw watersheds are due to excessive nutrients, pathogenic bacteria, and sedimentation. These watersheds are major poultry growing and cattle producing areas, and a common practice has been to fertilize the soil for grazing purposes by applying poultry litter. This practice has led to the excessive buildup of phosphorus that currently pollutes waterbodies in the ROI [Region of Influence]. Excess nutrients have also caused low dissolved oxygen levels in these waterways."); Ex. 101 (USDA Farm Service Agency, *Final Programmatic Environmental Assessment for Implementation of the Conservation Reserve Enhancement Program Agreement for Oklahoma* (July 2006), p. 40) ("The number one cause of water impairments within the ROI is excessive nutrient loading (EPA 2002a). This is due in large part to the practice of fertilizing grazing land by applying poultry litter."); Ex. 101 (USDA Farm Service Agency, *Final Programmatic Environmental Assessment for Implementation of the Conservation Reserve Enhancement Program Agreement for Oklahoma* (July 2006), p. A-5) ("The watersheds of Spavinaw and Tenkiller Lakes constitute a major poultry growing and cattle producing area. Poultry litter has been applied to the nutrient poor, thin, cherty soils of the area and they now grow luxuriant grass and support an important cattle industry. Excessive buildup of phosphorus over the years has polluted the receiving waterbodies to the point that they are now considered impaired by nutrients. The Illinois River is impaired by phosphorus and many of the area streams are impaired by pathogenic bacteria. Downstream reservoirs are impaired by phosphorus (high chlorophyll-a concentrations) and low dissolved oxygen levels, primarily due to excess nutrients."); Ex. 102 (USDA Soil Conservation Service & Forest Service, *Illinois River Cooperative River Basin Resource Base Report* (March 16, 1992), p. 32) ("A significant part of

the water quality problems in the basin appear to be a precipitate of the large volume of poultry waste generated and disposed of in the basin each year. . . . Nutrients from animal wastes and other sources enter water courses via leaching through the soil or by surface runoff from land applied waste."); Ex. 103 (USGS, *Environmental and Hydrologic Setting of the Ozark Plateaus Study Unit, Arkansas, Kansas, Missouri, and Oklahoma*, Water Resources Investigations Report 94-4022 (1995), p. 61) ("Production of large numbers of poultry, cattle, and swine in northwestern Arkansas, and increasingly in southwestern Missouri and northeastern Oklahoma, is contributing to elevated nutrient and bacteria concentrations in streams."); Ex. 88 (USGS, *Phosphorus Concentrations, Loads, and Yields in the Illinois River Basin, Arkansas and Oklahoma, 2000-2004*, Scientific Investigations Report 2006-5175 (2006), p. 4) ("Phosphorus concentrations in Ozark streams are typically greater in streams draining agricultural lands than in those draining forested lands (Peterson and others, 1998; 1999) because runoff from pastures fertilized with animal manure are probably substantial sources of phosphorus to the rivers in this basin (Arkansas Department of Environmental Quality, 2000)."); Ex. 104 (Office of the Oklahoma Secretary of the Environment, *Coordinated Watershed Restoration and Protection Strategy for Oklahoma's Impaired Scenic Rivers* (2007 Update), p. 4) ("The single largest contributor of nonpoint source phosphorus pollution is surplus poultry litter generated by the integrators' flocks."); Ex. 105 (Arkansas Natural Resources Commission, *Arkansas NPS Management Program 2006-2010 Update*, (Oct. 1, 2005), p. 10.1) ("Nonpoint source impacts affecting waters in [the Illinois River and its tributaries within Arkansas] are primarily from pasture land that is also used for application of poultry litter as fertilizer"); Ark. Code § 15-20-1102(1)-(3) ("The General Assembly finds that: (1) In certain areas of Arkansas, applications of soil nutrients may have resulted or in the future may result in excessive soil nutrient

concentration; (2) These applications are not the most effective use of nutrients and if continued could negatively impact the area; (3) Land application of poultry litter is a significant source of nutrients in these areas . . . ."); Ex. 129 (Arkansas Water Resource Center, *Phosphorus Management for Agricultural and Water Quality* (April 6 and 7, 1993 Research Conference "Focus on Phosphorus" Proceedings), p. 8 ("Generally, the loss of P in runoff is less than 0.5 lbs acre (Fig. 5) and, thus, not of agronomic nor economic concern to a farmer. However, these losses maintain dissolved P concentrations greater than critical levels associated with accelerated eutrophication (10 to 20 ppb). Consequently, these losses can be of environmental concern to receiving lakes.").

b. Non-retained experts. *See, e.g.*, Ex. 77 (Chaubey 3/2/09 Depo., p. 168) ("[T]here will always be some losses taking place from the areas treating with -- treated with the poultry waste") (emphasis added); Ex. 77 (Chaubey 3/2/09 Depo., pp. 163-64) ("Phosphorus is transported from the areas which are treated with poultry litter"); Ex. 77 (Chaubey 3/2/09 Depo., p. 192) ("Poultry litter is the biggest source of nutrients when you look at all the sources, and given that fact and given the fact that it runs off the fields, it will be logical to conclude that significant amount of phosphorus in the river is coming from the areas that are treated with poultry litter"); Ex. 106 (Storm 9/23/08 Depo., p. 106) ("And when you surface apply a por -- and, you know, you get runoff, you get a portion of that litter that moves into your surface runoff and into your receiving water bodies"); Ex. 106 (Storm 9/23/08 Depo., p. 47) ("[M]ost of the phosphorus that does enter the river will reach the lake, and it's a matter of when it reaches it"); Ex. 92 (Smolen 3/27/09 Depo., pp. 138-39) (testifying that it would be the consensus among water quality professionals who have studied the IRW that land applied poultry waste is the number one source of phosphorus in the waters of the IRW); Ex. 92 (Smolen 3/27/09 Depo., pp.

146-47) ("[T]here is a direct relationship. Increase in soil test phosphorus results in increasing runoff concentration. . . . [I]t is [a relationship that's pretty well understood by scientists . . .]."); Ex. 106 (Storm 9/23/08 Depo., p. 272) (testifying that the source of the phosphorus that has elevated soil test phosphorus "would be primarily from the poultry litter application"); Ex. 107 (Phillips 12/19/07 Aff., ¶ 10) ("[T]he phosphorus affecting water quality problems in the river today may have been land applied two weeks ago or twenty years ago"); Ex. 107 (Phillips 12/19/07 Aff., ¶ 10) ("[I]t is clear that the past application of poultry waste to soils in the watershed has contributed to the historical water quality problems in the watershed. Moreover, these historical applications are also contributing to the current and ongoing degradation in these systems"); Ex. 108 (Derichsweiler 8/8/08 Depo., p. 25) ("We have conducted studies with looking at the loading of phosphorus within the watershed, poultry waste and litter disposal has been identified as generating large quantities [of phosphorus]"); Ex. 108 (Derichsweiler 8/8/08 Depo, p. 56-57 & 60) (testifying that poultry litter is the largest contributor to the phosphorus loading in Lake Tenkiller and that poultry litter is a contributor to the phosphorus levels in the streams of the IRW); Ex. 63 (Parrish 1/14/08 Depo., p. 94) ("It would be very challenging [to set up a zero loss scenario in Eastern Oklahoma]"); Ex. 73 (Zhang 1/16/08 Depo., p. 190) (agreeing that "based upon [his] knowledge of the lay of the land in the Illinois River Watershed . . . most of the fields in that watershed have runoff if there were a large enough rain."); Ex. 54 (Daniel 11/26/07 Depo., pp. 52-53) (agreeing that runoff of dissolved phosphorus can occur even when best management practices are utilized); Ex. 109 (Young 10/2/08 Depo., p. 209-10) ("You know, without question the poultry -- the land application of poultry waste is a significant part of [the water quality problems in the IRW].").

c. Defendants, Defendants' retained experts and Defendants' trade associations. *See* Ex. 110 (Cargill Turkey Products Contract Grower Environmental Best Management Practices Guide, p. CARTP000009 (Cargill admission regarding nutrient runoff to waters -- Filed under seal due to Cargill claim of confidentiality); Ex. 59 (12/5/04 advertisement by several Defendants stating: "Lately, a good deal of concern has been raised about the effect of excess nutrients on the land and waters of Eastern Oklahoma. So where do these nutrients come from? Nutrients can come from many sources, one of which is the use of poultry litter as an organic fertilizer. . . ."); Ex. 60 (9/10/04 advertisement by several Defendants stating: "[W]e have been working with the State of Oklahoma on a multi-million-dollar voluntary proposal to improve the management of poultry-related nutrients that might find their way into Eastern Oklahoma's Scenic River Watersheds. . . . We are prepared to do our part to take care of the poultry portion of the nutrient equation."); Ex. 42 (3/27/98 memo from Mullikin to Henderson) ("I do feel, without any doubt, that as time passes we the integrator will be found to be liable for [poultry waste] and the affect [sic] it has on our environment."); Ex. 111 (GE35775) (George's president and chief operating officer acknowledging in 2005 that "the problem comes when more litter is used than the crops need and phosphorus levels become too high in the soil. During major rain events some of the phosphorus becomes soluble and washes off into the streams and lakes."); Ex. 79 (Keller 10/15/08 Depo., pp. 86-88) ("[P]hosphorus is mobile, causes water quality problems and accumulates in the soil."); Ex. 56 (Poultry Water Quality Handbook, p. PIGEON.0643) ("Poultry wastes also contain significant amounts of phosphorus. . . . Phosphorus has become a major cause of water quality degradation."); Ex. 90 (Connolly 4/9/09 Depo., pp. 235-36) (testifying that all of the studies he looked at conclude that phosphorus runs off fields to which poultry waste has been applied, that the run-off concentrations are substantial

compared to reference fields, and that he has not identified any study where poultry waste has been applied that phosphorus did not run off the field); Ex. 90 (Connolly 4/9/09 Depo., pp. 221-26) (testifying that water extractable phosphorus is a reasonable metric of potential phosphorus loss from fields, and agreeing that the amount of water extractable phosphorus contributed by poultry waste in the IRW is a significant portion of the contribution from all manures); Ex. 11 (Dicks 2/13/09 Depo., p. 42 & 48) (testifying that it is well known in the scientific community and the literature that constituents of poultry waste run off from fields where poultry waste is land applied and that it is not his opinion that none of the waste that is annually land applied in the IRW will not run off into the water); Ex. 112 (9/8/97 letter from Poultry Federation to *Tulsa World*) (stating that based upon Benton County statistical information, it was estimated that among agricultural activities poultry was responsible for 73% of phosphorus contributions).

d. State's retained experts. *See, e.g.*, Ex. 113 (Engel 1/8/09 Depo., p. 239) (". . . as it's land applied, you know, all the literature indicates some of that is going to run off . . ."); Ex. 113 (Engel 1/8/09 Depo., p. 240) (". . . we know that it's being land applied and we know it's running off, everything says it does, you know . . ."); Ex. 114 (Engel 1/9/09 Depo., p. 457) ("You know, the model indicates that that [land applied poultry waste in the IRW] runs off, carries phosphorus. Literature indicates that when it's land applied, it runs off and carries phosphorus, carries bacteria, carries other things. So it does carry a suite of potential contaminants"); Ex. 113 (Engel 1/8/09 Depo., pp. 29-30 & 87-88) ("Poultry waste land application in the IRW is a substantial contributor, paren, 45 percent between 1998 and 2006, and 59 percent between 2003 and 2006, closed paren, to P loads to Lake Tenkiller representing the largest P source."); Ex. 113 (Engel 1/8/09 Depo., pp. 131-32) (testifying that multiple lines of evidence are all saying that "poultry is a significant contributor of phosphorus."); Ex. 45 (Fisher 9/3/08 Depo., pp. 84-85)

("Some fraction of all runoff in my opinion would make it into the drainageways and into Lake Tenkiller"); Ex. 45 (Fisher 9/3/08 Depo., pp. 113-17) (testifying that poultry waste is the "overwhelmingly dominant" contributor to phosphorus loads in the Illinois River / Lake Tenkiller); Ex. 115 (Johnson 8/18/08 Depo., pp. 242-43) (testifying that there will be evidence of constituent runoff following land application if it rains and material has not been incorporated in the soil and time has passed for a reaction to take place in the soil); Ex. 116 (05/15/09 Olsen Aff., ¶ 5-6) ("Land application of poultry waste affects the chemical and bacterial water and sediment composition of the IRW and the affect is observable in surface water, groundwater and sediments collected from the IRW. Poultry waste is the dominant source of contamination in the IRW."); Ex. 117 (Caneday P.I. Test., pp. 597-99) ("My wife and I were driving on a Saturday afternoon in a rain event in September on Chewy Road. . . . And it looked as though the field was literally moving across the road in front of me as the float materials of the litter floated on the rain -- . . . . There were probably two good indicators to me that it was poultry litter. One, I actually did see on that occasion feathers in the litter but the odor is unmistakable. . . . It was coming from my right and moving down the hillside toward the [Illinois] river on Chewy Road right down the roadway.").

49. The levels of phosphorus in the waters of the IRW are very high. *See* Ex. 118 (Stevenson 1/8/09 Depo., p. 116) ("My opinions are that the nutrient concentrations in the Illinois River watershed are very high. . . . These are higher nutrient concentrations for a watershed as a whole than any other watershed that I've had experience with."); Ex. 88 (USGS, *Phosphorus Concentrations, Loads, and Yields in the Illinois River Basin, Arkansas and Oklahoma, 2000-2004*, Scientific Investigations Report 2006-5175 (2006), p. 20) (emphasis added) ("[F]low-weighted phosphorus concentrations in 2000-2002 at <u>all</u> Illinois River

[sampling] stations . . . were equal to or greater than the 75th percentile of all National Water-Quality Assessment program stations in the United States (0.29 mg / L)."); Ex. 47 (AWRC, *Illinois River Phosphorus Sampling Results and Mass Balance Computation*, (2002), p. 11) ("[L]evels of phosphorus [in the Illinois River] at the state line far exceed" Oklahoma's numerical in-stream phosphorus limit).

50. In the IRW, segments of the Illinois River, Baron Fork and Flint Creek, as well as other waters, have been listed by the State as impaired by phosphorus. *See* Ex. 119 (Water Quality in Oklahoma -- 2008 Integrated Report, pp. 7, 55-56, App. B pp. 32-36, App. C pp. 15-16). "Impaired" means that "one or more designated beneficial uses are not being attained." *See* Okla. Admin. Code § 785:46-15-2. These listings attribute "animal feeding operations (NPS)" and "impacts from land application of wastes" as potential sources of the impairments at issue. *See* Ex. 119 (Water Quality in Oklahoma -- 2008 Integrated Report, pp. 7, 55-56, App. B pp. 32-36, App. C pp. 15-16). The U.S. Environmental Protection Agency has approved these listings. *See* Ex. 120 (10/22/08 letter from M. Flores to J. Craig stating that ". . . EPA approves the State's decisions regarding all segments and associated pollutants identified in the final 2008 section 303(d) list"); Ex. 121 (Decision Document for Final EPA Action on Oklahoma 2008 Section 303(d) List).

51. Defendants agree that a violation of a water quality standard constitutes an injury to the particular resource at issue. *See* Ex. 122 (Ginn 4/14/09 Depo., p. 37) ("In other words, if there was an exceedence of a state water quality standard, then that would be an indication that there had been a defined injury to surface water, per se, but only surface water.").

52. Excess phosphorus damages the aquatic environment. *See* Ex. 101 (USDA Farm Service Agency, *Final Programmatic Environmental Assessment for Implementation of the*

Conservation Reserve Enhancement Program Agreement for Oklahoma (July 2006), p. 40) ("The loading of nutrients can instigate eutrophication, which causes waterways to age in succession prematurely and triggers excess plant growth, such as algae blooms and aquatic weeds. Algae blooms occur naturally but with more frequency and severity in the presence of nutrients (NRCS 1994). When the algae die, they sink to the bottom of the waterway which often stimulates an increase in bacteria and other decomposers. As these decomposers increase in numbers, they deplete the dissolved oxygen supply within the waterway (NRCS 1994). Sometimes the respiration from the algae growth creates enough oxygen to offset the use of the oxygen by the decomposers. If there is not a balance, eutrophication can occur. An excess of nutrients can contribute to a variety of other water quality issues, such as decreased water clarity, fish kills, and a bad taste and odor to the water (NRCS 1994)."); Ex. 56 (Poultry Water Quality Handbook, p. PIGEON.0630) ("When nitrogen and phosphorus concentrations in waterbodies rise too high, algae and rooted aquatic plants take over, prematurely aging and choking the waterbody and creating undesirable conditions -- odors, offensive taste, and discoloration -- all of which can make the water unfit for consumption or recreational and aesthetic use. Further, these eutrophic conditions can kill fish, clog water treatment plant filters, and lead to the growth of blue-green algae, a species that can be fatal to livestock."); Ex. 111 (GE35775) (George's president and chief operating officer acknowledging in 2005 that "[t]here has been a lot of scientific work done in the past few years that shows high phosphorus levels in rivers, streams and lakes causes an increase in algae growth which can adversely affect water quality and recreational use."); Ex. 118 (Stevenson 1/8/09 Depo., p. 190) ("Phosphorus is the limiting nutrient for algae, stimulates algal growth, changes DO [dissolved oxygen] and pH, and that changes the invertebrates and fish.").

53. The phosphorus contained in poultry waste generated by Defendants' birds, by virtue of its land application and the fact that it can and does run-off and leach, has been released and come to be located throughout the IRW. *See, e.g.,* Facts, ¶¶ 27-28, 30-33, 39, 42-26 & 48-50; DKT #1913 ("State of Oklahoma's Response in Opposition to 'Defendants' Joint Motion for Summary Judgment on Counts 1 and 2 of the Second Amended Complaint,'" Disputed Material Facts, ¶¶ 19-22) & DKT #1919 (errata to DKT #1913).

54. The phosphorus contained in the poultry waste generated by Defendants' birds that has been land applied in the IRW is likely to cause pollution and may present an imminent and substantial endangerment to the environment. *See, e.g.,* Facts, ¶¶ 22-26, 28 30-33, 35, 39, 42-44, 46, & 48-52.

55. Poultry Defendants had reason to recognize that, in the ordinary course of their respective growers doing their work in the usual or prescribed manner, that a trespass or nuisance is likely to result. *See, e.g.,* Facts, ¶¶ 5, 9, 10(h), 16, 18-26, 28, 30-39, 41-44, & 46-52.

56. In *United States v. Seaboard Foods, LP, et al.*, 5:06-cv-00990-HE (W.D. Okla.) (Sept. 14, 2006), the United States, on behalf of EPA, brought an enforcement action against a manure generator alleging that land-applied swine effluent was a "solid waste" that was creating an imminent and substantial endangerment under 42 U.S.C. § 6973. *See* Ex. 123.

III. The Summary Judgment Standard

The summary judgment standard is well-established:

> Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When applying this standard, a court must examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Wolf v. Prudential Insurance Co. of America*, 50 F.3d 793, 796 (10th Cir. 1995). The movant for summary judgment must meet the initial burden of showing the

> absence of a genuine issue of material fact, then the nonmovant bears the burden of pointing to specific facts in the record "showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Id.*

Lumpkin v. United States Recovery Systems, 2009 U.S. Dist. LEXIS 7578, *2-3 (N.D. Okla. Feb. 3, 2009) (Frizzell, J.).

IV. Argument and Authorities

A. The State is entitled to summary judgment on aspects of its CERCLA claims

The State has brought claims against Defendants for cost recovery and natural resource damages under § 107(a) of CERCLA (codified at 42 U.S.C. § 6907(a)). *See* SAC, Count 1 (cost recovery) & Count 2 (natural resource damages). Liability under § 107(a) for cost recovery by a state requires proof that (1) the site is a facility, (2) defendant is a covered person, (3) the release or threatened release of a hazardous substance has occurred, and (4) the release or threatened release caused the State to incur response costs not inconsistent with the national contingency plan. *See* 42 U.S.C. § 6907(a); *Young v. United States*, 862 F.3d 858, 862 (10th Cir. 2005); *Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1489 (10th Cir. 1990). Liability under § 107(a) for natural resource damages requires proof of the first three elements set out above, as well as proof that natural resources within the trusteeship of the State have been injured and the injury to natural resources resulted from a release of a hazardous substance. *See* 42 U.S.C. § 6907(a); *Coeur D'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d , 1102-03 (D. Idaho 2003).

In this Motion, the State is moving for partial summary judgment on certain common elements of its CERCLA cost recovery and natural resource damages claims previously raised in Defendants' earlier motion for partial summary judgment on aspects of the State's CERCLA claims. Specifically, with respect to these two Counts the State is moving for partial summary judgment (1) that phosphorus in the form of phosphorus compounds that is contained in poultry

waste is a hazardous substance within the meaning of CERCLA, (2) that the IRW and the locations where poultry waste has been land applied constitute facilities within the meaning of CERCLA, and (3) that Defendants cannot establish the affirmative defense that the land application of poultry waste in the IRW constitutes "the normal application of fertilizer."

1. Phosphorus in the form of phosphorus compounds that is contained in poultry waste is a "hazardous substance"

That phosphorus in the form of phosphorus compounds that is contained in poultry waste is indeed a hazardous substance under 40 C.F.R. § 302.4 and 42 U.S.C. § 9601(14) is set out in detail in the "State of Oklahoma's Response in Opposition to 'Defendants' Joint Motion for Summary Judgment on Counts 1 and 2 of the Second Amended Complaint,'" Disputed Material Facts, ¶¶ 4, 6-9 & Argument §§ A & B (DKT #1913) and DKT #1919 (errata to DKT #1913). *See also, e.g.*, Facts, ¶ 27. Rather than repeating those facts, arguments and authorities here, and in order to conserve the Court's time, the State incorporates those facts, arguments and authorities by reference.[10]

2. The State has identified proper "facilities" under CERCLA

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[10] It does bear reiterating that with respect to the phosphorus-is-a-hazardous-substance issue, the only thing that has changed since Chief Judge Eagan wrote her well-reasoned opinion in *City of Tulsa* finding that the phosphorus contained in poultry waste is indeed a hazardous substance under CERCLA is the issuance of a July 18, 2006 EPA guidance memo. As the State amply demonstrated in its Response, pp. 14-14 [DKT #1913], however, that guidance memo is not entitled to any *Skidmore* deference under *McGraw v. Barnhart*, 450 F.3d 493, 500-01 (10th Cir. 2006). It is undisputed that the EPA guidance memo was the product of an entirely one-sided process that involved only the poultry industry and had no input from the State. *See Wyeth v. Levine*, --- U.S. ---, 129 S.Ct. 1187, 1201 (2009) (affording FDA's views of state law no weight and concluding that such views were "inherently suspect" where states and other interested parties were not given notice or opportunity to comment). As such, this Court should follow Chief Judge Eagan's reasoning and find that phosphorus in the form of phosphorus compounds that is contained in poultry waste is indeed a hazardous substance under 40 C.F.R. § 302.4 and 42 U.S.C. § 9601(14).

That the locations where poultry waste has been land applied and come to be located constitute facilities within the meaning of 42 U.S.C. § 9601(9) is set out in detail in the "State of Oklahoma's Response in Opposition to 'Defendants' Joint Motion for Summary Judgment on Counts 1 and 2 of the Second Amended Complaint,'" Disputed Material Facts, ¶¶ 19-22 & Argument §§ D (DKT #1913) and DKT #1919 (errata to DKT #1913). *See also, e.g.*, Facts, ¶¶ 27-28, 30-33, 39, 42-26, 48-50 & 53. As above, rather than repeating those facts, arguments and authorities here, and in order to conserve the Court's time, the State incorporates those facts, arguments and authorities by reference.[11]

3. Defendants cannot establish that the CERCLA fertilizer exemption applies

That Defendants cannot establish the affirmative defense that the land application of poultry waste in the IRW constitutes "the normal application of fertilizer," as is their burden, is set out in detail in the "State of Oklahoma's Response in Opposition to 'Defendants' Joint Motion for Summary Judgment on Counts 1 and 2 of the Second Amended Complaint,'" Disputed Material Facts, ¶¶ 10-18 & Argument §§ C (DKT #1913) and DKT #1919 (errata to DKT #1913). *See also, e.g.*, Facts, ¶¶ 30-33, 35-39 & 41. As above, rather than repeating those facts,

[11] In connection with its argument on "facility," one point that the State would like to underscore is that the Illinois River Watershed is a unitary hydrologic unit. *See, e.g.*, Okla. Admin. Code § 785:45-1-2 ("'Watershed' means the drainage area of a waterbody including all direct or indirect tributaries"); Okla. Admin. Code § 785:45-5-29(b)(19) ("The nutrient limited watershed area for Tenkiller Reservoir is the *entire* watershed and drainage area of Tenkiller Reservoir, including the Illinois River and Caney Creek and all direct and indirect tributaries") (emphasis added); Okla. Admin. Code § 785:45-5, Appendix A (setting out Waterbody ID Numbers). Thus, on this ground the case upon which Defendants principally rely, *New Jersey Turnpike Auth. v. PPG Indus., Inc.*,197 F.3d 96, 105 (3d Cir. 1999), is readily distinguishable from the situation here. In that case, unlike here, there was no allegation or proof that the sites were in any way geologically or hydrologically connected. Indeed, their sole connection between the disparate sites appears to be that they were merely all under the jurisdiction of the New Jersey Turnpike Authority.

arguments and authorities here, and in order to conserve the Court's time, the State incorporates those facts, arguments and authorities by reference.

B. The State is entitled to summary judgment on aspects of its RCRA claim

The State has brought a RCRA citizen suit claim under 42 U.S.C. 6972(a)(1)(B) against Defendants. *See* SAC, Count 3. Liability under 42 U.S.C. § 6972(a)(1)(B) requires proof that:

> (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.

See Burlington Northern and Santa Fe Railway Co. v. Grant, 505 F.3d 1013, 1020 (10th Cir. 2007). In this Motion, the State is moving for partial summary judgment on elements (1) and (2) generally and on element (3) on the issue that the phosphorus in Defendants' land-applied poultry waste may present an imminent and substantial endangerment to the environment in the IRW, leaving for trial the determinations that phosphorus and bacteria in Defendants' land-applied poultry waste "may present" an imminent and substantial endangerment to health in the IRW, and such other matters related to remedy and relief.

1. Defendants are "persons" within the meaning of 42 U.S.C. § 6903(15)

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* Facts, ¶ 1.

2. Poultry waste is a solid waste within the meaning of 42 U.S.C. § 6903(27)

42 U.S.C. § 6972(a)(1) provides for two types of RCRA citizen suits. The first type, set forth in subsection (a)(1)(A), is based upon violations of RCRA permitting requirements. The second type, set forth in subsection (a)(1)(B), is based upon threats of an imminent and substantial endangerment to health or the environment. The State has brought the second type of RCRA citizen suit, also known as an "endangerment" claim. *See* SAC, Count 2. As noted above, the existence of a "solid or hazardous waste" is a necessary element of an endangerment claim. *See* 42 U.S.C. § 6972(a)(1)(B). The State's RCRA claim is based upon poultry waste being a "solid waste."

Because the State's RCRA claim is an endangerment claim, the statutory definition of "solid waste" found in 42 U.S.C. § 6903(27) -- rather than any narrower regulatory definition of "solid waste" -- provides the applicable definition. *See Connecticut Coastal Fishermen's Association v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1314-15 (2d Cir. 1993) ("the broader statutory definition of solid waste applies to citizen suits brought to abate imminent hazard to health or the environment").

The statutory definition of "solid waste" 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 other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880) [33 U.S.C.S. § 1342], or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C.S. §§ 2011 *et seq*.].

42 U.S.C. § 6903(27) (emphasis added).

a. Poultry waste is a "discarded material . . . resulting from . . . agricultural operations"

Under 42 U.S.C. § 6903(27), the term "solid waste" includes "discarded material . . . resulting from . . . agricultural operations." Poultry waste fits this definition. Poultry waste clearly results from agricultural operations. *See, e.g.*, Facts, ¶ 22. Thus, the sole question is whether it is a "discarded material." Although RCRA does not define "discarded," there is a significant body of caselaw that has clarified the meaning of the term. One of the earliest cases addressing the term, *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) ("*AMC*"), remains the guidepost. In that case, the D.C. Circuit noted that "[t]he ordinary, plain-English meaning of the word 'discarded' is 'disposed of,' thrown away' or 'abandoned," *id.* at 1184, and concluded that materials "have not yet become part of the waste disposal problem" -- *i.e.*, discarded -- where they are "destined for beneficial reuse or recycling in a continuous process by the generating industry itself." *Id.* at 1186 (emphasis in original). This test has subsequently been applied in multiple circuits.

In *United States v. ILCO*, 996 F.2d 1126 (11th Cir. 1993), the Eleventh Circuit utilized the *AMC* test and made the point that the fact that someone in another industry may find value in material does not preclude material from being viewed as "discarded." *ILCO* involved lead parts that had been reclaimed from spent car and truck batteries by a smelter for recycling in another industrial process. The Eleventh Circuit reasoned:

> Somebody has discarded the battery in which these components are found. This fact does not change just because a reclaimer has purchased or finds value in the components. . . . It is unnecessary to read into the word "discarded" a congressional intent that the waste in question must finally and forever be discarded, as ILCO seems to argue. It is perfectly reasonable for EPA to assume Congress meant "discarded once." Were we to rule otherwise, waste such as these batteries would arguably be exempt from regulation under RCRA merely because they are potentially recyclable. Previously discarded solid waste, although it may at some point be recycled, nonetheless remains solid waste.

Id. at 1131-32 (emphasis in original).

In *Owen Electric Steel Company of South Carolina, Inc. v. Browner*, 37 F.3d 146 (4th Cir. 1994), the Fourth Circuit applied the *AMC* test and found that unless a material is destined for immediate reuse in the generating industry it "is justifiably seen as 'part of the waste disposal problem.'" *Owen Electric* involved slag created in the steel-making process that was subsequently sold to another industry for use as a road base material and for other commercial purposes. The Fourth Circuit reasoned:

> From these cases, we glean that the fundamental inquiry in determining whether a byproduct has been "discarded" is whether the byproduct is immediately recycled for use in the same industry; if not, then the byproduct is justifiably seen as "part of the waste disposal problem," *AMC I*, 824 F.2d at 1186, and therefore as a "solid waste."

Id. at 149 (emphasis in original).

In *American Mining Congress v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) ("*AMC II*"), the D.C. Circuit interpreted the *AMC* test and found that the mere potential of being reused in the future does not preclude material from being deemed "discarded." *AMC II* involved sludges from wastewater generated by smelting operations that may at some time be reclaimed. The D.C. Circuit reasoned:

> Nothing in *AMC* prevents the agency from treating as "discarded" the wastes at issue in this case, which are managed in land disposal units that are part of wastewater treatment systems, which have therefore become "part of the waste disposal problem," and which are not part of ongoing industrial processes.

Id. at 1186 (emphasis in original).

Recently, the Ninth Circuit, in *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004), relying on *AMC*, *AMC II* and *ILCO*, held that because the same growers reuse the grass residue in a continuous process for Kentucky bluegrass production, grass residue remaining after Kentucky bluegrass harvest is not "discarded," and hence not a "solid waste," within meaning of RCRA. *Id. at* 1045 ("Because there is undisputed evidence that the Growers reuse the grass

residue in a continuous farming process effectively designed to produce Kentucky bluegrass, there is no genuine issue of material fact as to whether grass residue is 'discarded material'"). Moreover, the Ninth Circuit stated: "We recognize that the issue of monetary value does not affect the analysis of whether materials are 'solid waste' under RCRA." *Id.* at 1043 fn. 8.

Applying the teaching of *AMC*, *AMC II*, *ILCO*, *Owen Electric* and *Safe Air* here, it is clear that poultry waste is a "discarded material." Poultry waste is unequivocally not being reused by Defendants or poultry growers in a continuous process for growing poultry; it is undisputed that poultry waste has *no* further use in the poultry growing process. *See* Facts, ¶ 25. The mere fact that poultry waste has the potential, in appropriate circumstances (not present here),[12] to be reused in an entirely different agricultural enterprise at some later time in no way diminishes the fact that poultry waste when it leaves the poultry growing house is being discarded and is "part of the waste disposal problem." *See AMC*, 824 F.2d at 1186. As such, poultry waste is a "discarded material," and thus a "solid waste" for purposes of the State's RCRA claim.[13]

b. There is no animal manure exception to 42 U.S.C. § 6903(27)

It is anticipated that Defendants, relying solely on a snippet of legislative history, will argue that there is an animal manure exception to 42 U.S.C. § 6903(27). There is not. As is

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[12] Defendants do not dispute that poultry waste has been overapplied on lands in the IRW. *See* Facts, ¶ 39.

[13] It is anticipated that Defendants will cite to *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003). Reliance on that case, however, is unavailing. The factual predicate of that case was that the recycled materials at issue were identical to the virgin materials being used to produce zinc fertilizers. *Id.* That case, dependent on an EPA regulatory scheme, is plainly not analogous to the factual scenario here. In any event, there can be no contention that poultry waste is identical to commercial fertilizer. Unlike commercial fertilizer, poultry waste is a poor and unbalanced fertilizer. *See* Facts, ¶ 36. The differences between poultry waste and commercial fertilizer cannot be characterized as "so slight as to be substantially meaningless." *See Safe Food*, 350 F.3d at 1270.

evident from the plain language of the statutory definition of "solid waste," there is nothing exempting animal manures. In fact, as detailed above, the statutory definition of "solid waste" specifically includes "discarded materials" resulting from "agricultural operations." Ignoring this plain language, Defendants have argued in the past that manures are excluded from RCRA's statutory definition of "solid waste" on the basis of a brief passage in H.R. Rep. No. 94-1491, 94th Cong., 2d Sess., at 2, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240. To lift an isolated passage from the legislative history to attempt to engraft an exception onto the statutory definition of "solid waste," however, is contrary to the rules governing statutory construction. As held in *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994), "it is the statute, and not the Committee Report, which is the authoritative expression of the law . . . ." (Emphasis in original) (interpreting RCRA provision and noting "[a]s the Court of Appeals cogently put it: 'Why should we, then, rely upon a single word in a committee report that did not result in legislation? Simply put, we shouldn't.' 948 F.2d at 351"); *see also Exxon Mobil Corp. v. Allapattah Services*, 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material").

Significantly, Congress knew how to create an exemption to the statutory definition of "solid waste" where it wanted to. In fact, Congress explicitly carved out several exemptions in the definition. *See* 42 U.S.C. § 6903(27) (setting out three specific exemptions). None of these exemptions pertain to animal manures. The statutory definition of "solid waste" is clear on its face, and resort to legislative history to engraft an additional exemption onto this statutory definition would be improper as a matter of law.

The Environmental Protection Agency ("EPA") agrees the statutory definition of "solid waste" contains no manure exemption. *See* Fact, ¶ 56. Recently, in *United States v. Seaboard*

Foods, LP, et al., 5:06-cv-00990-HE (W.D. Okla.) (Sept. 14, 2006), the United States, on behalf of EPA, brought an enforcement action against a manure generator alleging that land-applied swine effluent was a "solid waste" that was creating an imminent and substantial endangerment under 42 U.S.C. § 6973.[14] *See* Ex. 123. Specifically, the United States alleged that "[s]wine effluent that has been over-applied on fields or otherwise permitted to leach into ground water, such as from a leaking lagoon, barn, or other infrastructure such as piping, is a 'discarded material' from 'agricultural operations' and thus is a 'solid waste' as defined by Section 1004(27) of RCRA, 42 U.S.C. § 6903(27)." *Id.* This allegation demonstrates that it is EPA's position not only that 42 U.S.C. § 6903(27) provides the operative definition of "solid waste" for RCRA endangerment actions, but also that there is no animal manure exemption in that statutory definition. This Court should defer to EPA's position on this matter. *See Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 558 (10th Cir. 1986).

3. Defendants have contributed / are contributing to the handling or disposal of poultry waste in the IRW

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").

[14] 42 U.S.C. § 6973 is the federal government analog to the 42 U.S.C. § 6972(a)(1)(B) endangerment citizen suit provision. *See, e.g., Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1314-15 (2d Cir. 1993).

> 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 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</u>.

Id. (emphasis added).

Inherent in Defendants' business model for raising their birds in the IRW is the generation of an enormous quantity of phosphorus-laden poultry waste that will be disposed of in a very limited geographical region that is highly susceptible to water pollution from phosphorus. To wit: (1) Defendants place tens of millions of birds in the IRW annually, *see* Facts, ¶ 9; (2)

Defendants own these birds, *see* Facts, ¶ 10(a); (3) Defendants provide the food for their birds, *see* Facts, ¶ 10(b); (4) Defendants' birds produce hundreds of thousands of tons of poultry waste in the IRW annually, *see* Facts, ¶¶ 22 & 24; (5) Defendants specify clean-outs and cake-outs of the poultry waste from the poultry houses, *see* Facts, ¶¶ 10(i); (6) Defendants' contracts with their growers in the IRW generally do not transfer title to this poultry waste, *see* Facts, ¶¶ 14-16; (7) Defendants decide where poultry houses are located within the IRW, *see* Facts, ¶ 10(h); (8) Defendants know that it is the practice to apply the poultry waste generated by their birds on the land in the IRW, *see* Facts, ¶ 28; (9) significant amounts of poultry waste from each Defendants' birds has been land applied in the IRW, *see* Facts, ¶ 32; (10) poultry waste is generally land applied in close proximity to the poultry house where it has been generated and in a concentrated time-frame, *see* Facts, ¶¶ 30-31; (11) poultry waste has been over-applied in the IRW, *see* Facts, ¶ 39; (12) the IRW is highly susceptible to water pollution from phosphorus, *see* Facts, ¶ 5 & 46; (13) Defendants have demonstrated that they can control the land application of poultry waste, *see* Facts, ¶ 17; and (14) Defendants strongly influence the distribution of poultry waste disposal in the IRW, *see* Facts ¶ 34. These undisputed facts taken together clearly demonstrate that Defendants "have a part or share in producing" not only the enormous volumes of 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, and entry of summary judgment on this issue is warranted.

4. The phosphorus in poultry waste from Defendants' birds that is land applied "may present" an imminent and substantial endangerment to the environment in the IRW

RCRA is "a comprehensive environmental statute designed to make certain that solid and hazardous wastes are not disposed of in a manner harmful to the public health or the environment." *Burlington Northern*, 505 F.3d at 1019. "RCRA is a remedial statute, which should be liberally construed." *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989), *reh'g denied*. The focus of RCRA is risk avoidance in the disposal of solid and hazardous wastes. *See, e.g., Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (Section 6972(a) was "designed to provide a remedy that ameliorates present or obviates the risk of future "imminent" harms . . ."); *Burlington Northern*, 505 F.3d at 1021 ("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 and internal quotation marks omitted); *Interfaith Community Organization v. Honeywell International, Inc.*, 399 F.3d 248, 260 (3d Cir. 2005) (Section 6972(a)(1)(B) is "'intended to confer upon the courts the authority to eliminate any risks posed by toxic wastes . . .'") (quoting S. Rep. No. 98-284, 98th Cong., 1st Sess. at 59 (1983)).

One need look no further than the Tenth Circuit's *Burlington Northern* decision for a thorough analysis of what the State needs to prove in order to establish that the disposal of the Defendants' poultry waste "may present an imminent and substantial endangerment to health or the environment." *See Burlington Northern*, 505 F.3d at 1019-21. With respect to the term "may," the Circuit 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.'"

Id. at 1020 (citations omitted) (emphasis in original).

With respect to the term "imminent," this Court 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* [*v. City of Burlington*], 935 F.2d [1343,] [] 1355-56 [(2d Cir. 1991)]); *see also United States Navy* [*v. Price*], 39 F.3d [1011,] [] 1019 [(9th Cir. 1994)]. 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).

Id. at 1020-21 (emphasis added).

With respect to the term "substantial," this Court 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" 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.'"

Id. at 1021(citations omitted).

And finally, with respect to the term "endangerment," this Court 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 [204,] [] 211 [(3d Cir. 1982)]. In other words, injunctive relief is authorized when there may 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 any risk posed by toxic wastes." *Dague*, 935 F.2d at 1355 (emphasis in original).

Id. at 1020 (emphasis added).

Thus, under its RCRA claim, the State does not need to prove the disposal of the Defendants' poultry waste is in fact causing an imminent and substantial endangerment to health or the environment. Rather, it need merely prove that the disposal of Defendants' poultry waste "may present" an imminent and substantial endangerment to health or the environment -- that is, a potential threat of harm.[15] With respect to whether phosphorus in Defendants' land-applied poultry waste may present an imminent and substantial endangerment to the environment, factors to be considered thus include: (1) that poultry waste contains significant quantities of phosphorus, *see* Facts, ¶ 26; (2) that enormous quantities of poultry waste are disposed of in the IRW, *see* Facts, ¶¶ 22-24, 26, 28, 30 & 32-33; (3) that this poultry waste is not worked into the soil but rather is disposed of by simply applying it to the surface of the land in the IRW, *see* Facts, ¶ 35; (4) that this poultry waste is disposed of in the IRW in a concentrated time frame that coincides with the heaviest rainfalls, *see* Facts, ¶ 31; (5) that poultry waste has been over-applied in the IRW, *see* Facts, ¶ 39; (6) that the waters of the IRW are vulnerable to pollution from phosphorus as a result of the soil, terrain and geology of the disposal sites, *see* Facts, ¶¶ 9 & 46; (7) that there are pathways to the waters of the IRW that the phosphorus in the disposed of poultry waste can and does travel, *see* Facts, ¶ 46; (8) that phosphorus in the poultry waste disposed of in the IRW can and does run-off and leach into the waters of the State, *see* Facts, ¶

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[15] RCRA does not require the State to prove that Defendants' poultry waste is the sole cause of the endangerment that may be presented. *See Oklahoma v. Tyson Foods, Inc.*, 2009 U.S. App. LEXIS 10170, *20 (10th Cir. May, 13 2009); *see also, e.g., Maine People's Alliance v. Holtrachem Manufacturing Co.*, 211 F.Supp.2d 237, 255 (D. Me. 2002) ("under RCRA, [the plaintiff] must establish only that [the defendant] released waste 'of a type that could contribute to' the endangerment that may exist") (citing *Prisco v. A & D Carting Corp.*, 168 F.3d 593, 609 (2d Cir. 1999)) (emphasis added). *Cf. Trinity American Corporation v. U.S. Environmental Protection Agency*, 150 F.3d 389, 400-01 (4th Cir. 1998) (in emergency order action brought under Safe Drinking Water Act, EPA not required to determine that polluter was the sole cause of the hazardous situation that agency sought to remedy, but rather only that polluter contributed to the hazardous condition).

48;[16] (9) that poultry waste is the dominant source of phosphorus in the IRW, *see* Facts, ¶¶ 44; (10) that the highest phosphorus loadings to the waters of the IRW occur during high-flow events, and the largest contributor to these loadings is from non-point sources, *see* Facts, ¶¶ 42-43; (11) that segments of the Illinois River, Baron Fork and Flint Creek, as well as other waters, have been listed by the State as impaired by phosphorus, and these listings attribute "animal feeding operations (NPS)" and "impacts from land application of wastes" as potential sources of the impairments at issue, *see* Facts, ¶¶ 50-51; (12) that there are high concentrations of phosphorus in the waters of the IRW, *see* Facts, ¶ 49; and (13) that elevated levels of phosphorus present environmental endangerments to the waters of the IRW, *see* Facts, ¶ 52. All of these factors, taken together, point to the indisputable conclusion that phosphorus from land-applied poultry waste "may present" an imminent and substantial endangerment to the waters of the IRW -- a standard that should be "liberally construed" and that is intended to eliminate "any risks" posed by toxic wastes. Partial summary judgment on the State's RCRA claim is thus warranted.

C. The State is entitled to summary judgment on aspects of its state law nuisance claim, its federal common law nuisance claim, its trespass claim, and its claim for violation of 27A Okla. Stat. § 2-6-105

1. Under the principles set forth in Restatement (Second) of Torts § 427B and similar caselaw, Defendants are liable for the conduct of their contract growers under Counts 4, 5, 6 and 7 on the ground that they were aware or should have been aware that in the ordinary course of doing the contract work a trespass or nuisance would be likely to result

Defendants have made clear that they intend to attempt to escape liability for the management of this poultry waste by characterizing the growers who raise Defendants' birds as "independent contractors" and by arguing that they are not liable for the acts of independent

[16] *See also Coeur D'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1113 (D. Idaho 2003) ("The Defendants were aware that water runs downhill and that the hazardous substances dumped would not stay in the location they were dumped").

contractors. Defendants' argument must fail, however, because it ignores a well-established exception to the independent contractor rule, namely that where -- as is the case here -- the employer exercises control over the contractor, the employer is liable for the acts of the contractor. Based upon Defendants' responses in discovery, however, it appears that this issue of Defendants' control over its contract growers will be a contested fact issue for trial. But the need to resolve this contested fact issue as to Defendants' control with respect to Counts 4, 5, 6, and 7 of the State's Second Amended Complaint can be avoided by virtue of the fact that Defendants are in any event liable as a matter of law under the principles set forth in Restatement (Second) Torts § 427B and similar caselaw.[17]

Counts 4, 5, 6 and 7 are all grounded in nuisance and trespass. The law is well established that one is liable for the acts of one's independent contractor if one is aware or should be aware that in the ordinary course of doing the contract work a nuisance or trespass is likely to result. Restatement (Second) of Torts, § 427B provides:

> One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve a trespass upon the land of another or the creation of a public or a private nuisance, is subject to liability for harm resulting to others from such trespass or nuisance.

(Emphasis added.) Comment b to § 427B explains:

> This exception applies to work which involves a trespass on the land of another, or either a public or a private nuisance. It applies in particular where the contractor is directed or authorized by the employer to commit such a trespass, or to create such a nuisance, and where the trespass or nuisance is a necessary result

[17] Of course, nothing herein should be construed as a waiver by the State of its well-founded "control" theory of liability. *See, e.g., Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F.Supp.2d 693 (W.D. Ky. 2003) (holding that Tyson was subject to CERCLA's reporting requirements with regard to ammonia released from grower operations under contract with Tyson); *Tyson Foods, Inc. v. Stevens*, 783 So.2d 804 (Ala. 2000) (upholding jury verdict that a Tyson hog grower was not an independent contractor but rather Tyson's agent in common law nuisance and trespass case). The State expressly does not abandon its liability theory based upon "control," and reserves all rights to litigate the issue in the event that it is necessary.

> of doing the work, as where the construction of a dam will necessarily flood other land. It is not, however, necessary to the application of the rule that the trespass or nuisance be directed or authorized, or that it shall necessarily follow from the work. It is sufficient that the employer has reason to recognize that, in the ordinary course of doing the work in the usual or prescribed manner, the trespass or nuisance is likely to result.

Similarly, 58 Am. Jur. 2d, *Nuisances*, § 127 states:

> Where an independent contractor's work, performed in the ordinary manner, creates a nuisance, the contractor's employer may be held liable for that nuisance. Thus, an employer or contractor who farms out work and who knows or has reason to know that it will create a nuisance is subject to liability for the harm caused others by the nuisance; in such cases it is immaterial whether the employer owns the land from which the nuisance emanates. It is also immaterial in determining liability for nuisance that the employer refrains from directing the employee or contractor in the execution of the work procured to be done.

See also Tankersley v. Webster, 243 P. 745, 747 (Okla. 1925) (acknowledging the rule that "where the performance of [a] contract, in the ordinary mode of doing the work, necessarily or naturally results in producing the defect or nuisance which caused the injury, then the employer is subject to the same liability as the contractor."); *Weinman v. De Palma*, 232 U.S. 571, 575 (1914) ("the 'independent contractor' doctrine [does not] apply where the work that the contractor is to do of itself amounts to a nuisance or necessarily operates to injure or destroy the property of plaintiff."); *McQuilken v. A&R Development Corp.*, 576 F.Supp. 1023, 1033 (E.D. Pa. 1983) ("An employer or contractor is held liable for "farming out" work which he knows, or has reason to know, will create a nuisance.").

Bleeda v. Hickman-Williams & Co., 205 N.W.2d 85 (Mich. App. 1972); *Peairs v. Florida Publishing Co.*, 132 So.2d 561 (Fla. 1st DCA 1961); *Shannon v. Missouri Valley Limestone Co.*, 122 N.W.2d 278 (Iowa 1963), are particularly illustrative and instructive of the principle at work. *Bleeda* involved a claim that dust and odors from a coke screening plant were creating a nuisance for residents living in the vicinity of the plant. The defendant was the plant's only customer.

The defendant did not own the plant or equipment used in the screening operation, had no employees involved in the screening process, and did not exercise any control over the manner in which the screening was done. The defendant did, however, own and at all times retain title to the coke. The defendant maintained that the plant was an independent contractor, and that therefore it was not liable for the dust and odors. 205 N.W.2d at 86-87.

In reversing the summary judgment order, the *Bleeda* court found that the defendant had engaged a contractor which the defendant knew employed a method of screening that produced the complained of conditions. *Id.* at 87. The court reasoned that "an employer or contractor who farms out work and knows or who has reason to know that it will create a nuisance is subject to liability for the harm caused others by the nuisance." *Id.* at 89. Moreover, the court noted that it was aware of no authority supporting the proposition that an employer is relieved of liability "simply because the nuisance did not emanate from the employer's property." *Id.*

Peairs involved a claim that a newspaper publisher carelessly permitted a wire loop used to bind bundles of its papers to remain in a restaurant parking lot that was also used as a newspaper distribution drop point. A patron tripped on the loop and fractured both her wrists. There was evidence that it was against the publisher's policy to leave wires and other trash around the distribution drop points, and the circulation manager had given instructions to the district managers to see that the wires and trash were picked up. Some independent newspaper carriers' contracts had been terminated for failure to comply with this instruction, and the district manager for the area at issue had on several occasions found wires and trash in the parking lot and warned the independent carriers. 132 So.2d at 562-63.

In the course of reversing the trial court's grant of a directed verdict, the *Peairs* court reiterated the established rule that "[t]he independent contractor doctrine does not relieve the

employer of responsibility for the negligent acts of the contractors where the work done under the contract, of itself, operates to injure the property of another." 132 So.2d at 565. Significantly, the court went on to explain that "[w]here a company gains knowledge of a dangerous situation created by its independent contractor, it may incur liability through its failure to halt the operation or correct it . . . ." *Id.* (quotations omitted).

Shannon involved a claim that a limestone company was liable in nuisance for the dust created by the transport through a neighborhood of rock that it had sold to independent truckers. The undisputed record showed that the truckers "own their own trucks, pay all their own expenses, work when called, work for others, buy and sell their own rock, are paid by the ton mile, and file income tax returns as self-employed individuals." 122 N.W.2d at 279-80.

In affirming the verdict in favor of the residents of the neighborhood, the *Shannon* court restated that an exception to the independent contractor rule is "where the work contracted to be done is likely to create a nuisance." 122 N.W.2d at 280. It went on to state that it is the duty of the employer, upon receiving notice, "to take reasonably prompt and efficient means to suppress the nuisance." *Id.* at 281. The court concluded that "[i]f the [limestone] company did not know such would be the result of that much truck traffic when the work was originally started, there is every reason to believe it was fully aware of the situation before this suit was started. No reason appears why it should not abate this nuisance." *Id.*

As the undisputed evidence shows, this exception to the independent contractor rule, as articulated in Restatement of Torts (Second) § 427B and cases above, plainly applies in the present situation:

- Defendants have long known (or should have known) that in the ordinary course of their contract growers raising Defendants' birds in the IRW, enormous quantities of poultry

waste are generated, which have no further use in the poultry growing process and must be disposed of. *See, e.g.*, Facts, ¶¶ 22-25.

- Defendants have long known (or should have known) that it is the practice in the IRW that the majority of this poultry waste is applied to the land in the IRW in close proximity to where it has been generated and in a concentrated time-frame that coincides with the largest amounts of rainfall. *See, e.g.*, Facts, ¶¶ 30-32 & 34.
- Defendants have long known (or should have known) that the practice of land applying this poultry waste in the IRW can, and does, result in the run-off of phosphorus from the land and into the rivers and streams of the IRW and Lake Tenkiller. *See, e.g.*, Facts, ¶¶ 28, 32, 34-37, 39, 42-44 & 46-51.
- Defendants have long known (or should have known) that elevated levels of phosphorus cause injuries to the aquatic environment, that the waters of the IRW have been injured by elevated levels of phosphorus, and that land-applied poultry waste is a source of these elevated levels of phosphorus. *See, e.g.*, Facts, ¶¶ 5, 28, 30, 32, 39, 42-44, 46-52 & 55.
- Despite having clear reason to recognize that the past land application poultry waste from Defendants' birds by their contract growers (and persons to whom the contracts growers have transferred the poultry waste) has been polluting the waters of the IRW, Defendants have failed to halt the practice, and in fact have continued to place <u>new</u> flocks of birds with their contract growers knowing that the majority of the poultry waste from these birds will continue to be land applied in the IRW, continue to run-off into the waters of the IRW, and continue to cause pollution of the waters of the IRW. *See, e.g.*, Facts, ¶¶ 9, 20 & Facts cited, *supra*.

Simply put, poultry waste necessarily follows the raising of poultry, and enormous amounts of poultry waste necessarily follow from the raising of enormous numbers of poultry. Rather than ensuring that the poultry waste is appropriately managed, Defendants leave these enormous amounts of poultry waste behind. Defendants knew -- or at a minimum had reason to recognize -- that their contract growers' practice of land applying this poultry waste in the IRW (or transferring poultry waste to others for land application in the IRW) has been causing and is continuing to cause a nuisance and trespass. (Indeed, they were sued for similar practices in the adjoining watershed and settled that suit.) Yet, despite being under a duty to do so, they have failed to halt or suppress the practice. Thus, even assuming arguendo that Defendants were correct in their assertion that their growers were independent contractors, Defendants are still liable as a matter of law for any nuisance or trespass caused by the known or foreseeable contract activities of their growers. *See, supra,* Restatement (Second) of Torts, § 427B; 58 Am. Jur. 2d, *Nuisances*, § 127; *Tankersley, Weinman, McQuilken, Bleeda, Peairs* & *Shannon*. Indeed, this is precisely the result reached by Chief Judge Eagan in *City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1296-97 (N.D. Okla. 2003), *vacated in connection with settlement*:[18]

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[18] The reasoning found in the Court's March 14, 2003 order (DKT #444) in *City of Tulsa v. Tyson Foods, Inc.*, found at 258 F.Supp.2d 1263, should be viewed as persuasive authority. The order was vacated at the unopposed request of the defendants and solely as part of the settlement of that action. *See* DKT #472 & DKT #473 at ¶ 8. It was not vacated as a result of a motion for reconsideration or any stated need to correct or negate the substance of the opinion. After a thorough review of its own decisions on the issue of vacating decisions, as well as those of the Supreme Court and the other Circuits, the Tenth Circuit cogently explained:

> The furthering of settlement of controversies is important and desirable, but there are significant countervailing considerations which we must also weigh. A policy permitting litigants to use the settlement process as a means of obtaining the withdrawal of unfavorable precedents is fraught with the potential for abuse. We agree with the Seventh Circuit that "an opinion is a public act of the government, which may not be expunged by private agreement." *Memorial Hospital, 862 F.2d at 1300*. "When the parties' bargain calls for judicial action, . . . the benefits of

> The Court concludes that the exception applies in this case. Poultry waste "necessarily follows" from the "growing" of poultry. *See Bleeda*, 205 N.W.2d at 89. Although Poultry Defendants cite other sources of phosphorus in the Watershed, they admit in their response brief that they were aware in the 1990s that "phosphorus presented potential problems to the Watershed" and, therefore, attempted to address the problem by educating their growers regarding better litter management. Given these admissions, the Court finds Poultry Defendants had "reason to recognize that, in the ordinary course of [the growers] doing the work in the usual or prescribed manner, the trespass or nuisance is likely to result." Restatement (Second) Torts § 427B, cmt. b (1965); *Tankersley*, 243 P. at 747. As the Court concludes that the § 427B exception applies herein, the factual questions regarding the Poultry Defendants' degree of control over their growers need not be addressed at the jury trial. Accordingly, the Court grants plaintiffs' motion for partial summary judgment on the issue of the Poultry Defendants' vicarious liability for any trespass or nuisance created by their growers because they were aware that in the ordinary course of doing the contract work, a trespass or nuisance was likely to result.

This Court should rule similarly here. Defendants are liable for any nuisance or trespass of their growers stemming from the land application of poultry waste.

2. Defendants are liable under federal common law nuisance because phosphorus from the land application of poultry waste for which Defendants are responsible is causing a "significant threat" of injury to the State's natural resources

Liability under the State's federal common law nuisance claim (SAC, Count 5) requires proof that "the defendant is carrying on an activity this is causing an injury or <u>significant threat of injury</u> to some cognizable interest of the complainant." *See State of Illinois v. City of*

> settlement to the parties are not the only desiderata." *Id. at 1302*. "The precedent, a public act of a public official, is not the parties' property." *Id.* Moreover, the reasoning in the published opinion "may be helpful to other courts to the extent that it is persuasive." *Clark Equipment Co. v. Lift Parts Mfg. Co., Inc., 972 F.2d 817, 820 (7th Cir. 1992)*. We agree with Judge Easterbrook's view that the parties "are not free to contract about the existence of these decisions." *Memorial Hospital, 862 F.2d at 1303*.

Oklahoma Radio Associates v. Magnolia Broadcasting Company, Inc., 3 F.3d 1436, 1444 (10th Cir. 1993). In any event, the order is available in the Federal Supplement, Second Series, contains extensive reasoning on issues pertinent to this action, and may be helpful to this Court to the extent it finds that reasoning persuasive.

Milwaukee, 599 F.2d 151, 165 (7th Cir. 1979) (emphasis added) (citing *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (U.S. 1907) (vacated by Supreme Court on CWA preemption grounds); *see also Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971) (recognizing that a threatened nuisance -- the prospective use of a certain pesticide on lands that drained into a river flowing into Texas -- could be enjoined).

In this Motion, in addition to assigning Defendants' liability for their contract growers' conduct under this Count, *see, supra,* Section IV.C.1, the State is moving for summary judgment that Defendants are liable to the State for injunctive relief under federal common law nuisance because phosphorus from the land application of poultry waste for which Defendants are responsible is causing a significant threat of injury to the State's natural resources in the IRW. Left for trial are whether bacteria and phosphorus from the land application of poultry waste for which Defendants are responsible is causing a significant threat of injury to public health in the State and whether phosphorus and bacteria from Defendants' poultry waste is causing and has caused an environmental and public health injury to the State, as well as specific remedies and any other relief under Count 5.

The federal common law nuisance liability standard -- "causing a significant threat of injury" -- is akin to the risk-based RCRA standard discussed above -- "may present an imminent and substantial endangerment to health or the environment." The threat of injury which entitles the State to injunctive relief under federal common law nuisance, like the RCRA standard, plainly does not require proof of actual causation of present injury. Thus, for all the reasons set forth in Section IV.B.4, *supra*, the State is also entitled to partial summary judgment on this aspect of its federal common law nuisance claim.

3. Defendants are liable under 27A Okla. Stat. § 2-6-105 because poultry waste for which Defendants are responsible has been placed

in locations where it is "likely" to cause pollution by phosphorus to the waters of the State

Liability under the State's 27A Okla. Stat. § 2-6-105 claim (SAC, Count 7) requires proof that Defendants have "cause[d] pollution of any waters of the state or . . . place[d] or cause[d] to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state." *See* 27A Okla. Stat. § 2-6-105(A) (emphasis added); *see also Burlington Northern*, 505 F.3d at 1024 ("[P]ollution need not have already occurred before conduct 'likely to cause' pollution can be deemed a public nuisance [under 27A Okla. Stat. § 2-6-105(A)."). Any such action is a public nuisance. 27A Okla. Stat. § 2-6-105(A).

In this Motion, in addition to assigning Defendants' liability for their contract growers' conduct under this Count, *see, supra,* Section IV.C.1, the State is moving for summary judgment that Defendants are liable to the State for injunctive relief under 27A Okla. Stat. § 2-6-105 because poultry waste for which Defendants are responsible has been placed or caused to been placed in the Oklahoma portion of the IRW such that phosphorus from that waste is likely to cause pollution to the waters of the State.[19] Left for trial are whether Defendants have placed or caused poultry waste in the Oklahoma portion of the IRW such that bacteria from Defendants' poultry waste is likely to cause pollution of the waters of the State and whether such phosphorus and bacteria is causing and has caused pollution of the waters of the State, as well as specific remedies and any other relief under Count 7.

The standard under 27A Okla. Stat. § 2-6-105(A) -- "place[d] or cause[d] to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state" -- is akin to the risk-based RCRA standard discussed above -- "may present an imminent

[19] This Court has previously ruled that 27A Okla. Stat. § 2-6-105 cannot be applied extraterritorially. *See* June 15, 2007 Hrg. Trans., p. 44; 6/28/07 Minute Order [DKT #1202].

and substantial endangerment to health or the environment." The threat of injury which entitles the State to injunctive relief under 27A Okla. Stat. § 2-6-105(A), like the RCRA standard, plainly does not require proof of actual causation of present injury. Thus, for all the reasons set forth in Section IV.B.4, *supra*, the State is also entitled to partial summary judgment on this aspect of its 27A Okla. Stat. § 2-6-105(A) claim.

4. Defendants are liable under state law nuisance because there is a "reasonable degree of probability" that phosphorus from the land application of poultry waste for which Defendants are responsible will cause injury to the State's interests in the natural resources in the IRW

Liability for injunctive relief under the State's state law nuisance claim (SAC, Count 4) requires proof of "a reasonable degree of probability" that a defendant's conduct will cause injury to another's interests if not enjoined. *See Sharp v. 251st Street Landfill*, 925 P.2d 546, 548-49 (Okla. 1996); *Burlington Northern*, 505 F.3d at 1022-23.

In this Motion, in addition to assigning Defendants' liability for their contract growers' conduct under this Count, *see, supra*, Section IV.C.1, the State is moving for summary judgment that Defendants are liable to the State for injunctive relief under state law nuisance because there is a reasonable degree of probability that phosphorus from the land disposal of poultry waste for which Defendants are responsible will cause injury to the State's interests in the natural resources in the IRW. Left for trial are whether there is a reasonable degree of probability that bacteria and phosphorus from the land application in the IRW of poultry waste for which Defendants are responsible will cause injury to the public health of the State and whether phosphorus and bacteria from the land application in the IRW of poultry waste for which Defendants are responsible is causing and has caused environmental and public health injury to the interests of the State, as well as specific remedies and any other relief under Count 4.

The standard under state law nuisance -- "a reasonable probability that the injury sought to be prevented will be done if no injunction is issued" -- is akin to the risk-based RCRA standard discussed above -- "may present an imminent and substantial endangerment to health or the environment." The threat of injury which entitles the State to injunctive relief under state law nuisance, like the RCRA standard, plainly does not require proof of actual causation of present injury. Thus, for all the reasons set forth in Section IV.B.4, *supra*, the State is also entitled to partial summary judgment on this aspect of its state law nuisance claim.

In answer to the State's state law nuisance claim, Defendants may claim that 50 Okla. Stat. § 1.1 creates an affirmative defense. It does not. This statute provides "[a]gricultural activities conducted on farm or ranch land, <u>if</u> consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse affect on the public health and safety." 50 Okla. Stat. § 1.1(B) (emphasis added). The statute also states that if an agricultural activity "is undertaken in conformity with federal, state and local laws and regulations, it is presumed to be good agricultural practice . . . ." 50 Okla. Stat. § 1.1(B).

This statute is essentially a codification of the "coming to the nuisance" defense with respect to agricultural activities. However, "to the extent that [a defendant's] actions have created a public nuisance, the 'coming to the nuisance' doctrine is inapplicable" as "[t]here is no such thing as a prescriptive right to maintain a public nuisance." *See Fischer v. Atlantic Richfield Co.*, 774 F. Supp. 616, 620 (W.D. Okla. 1989) (citations omitted). Thus, with respect to the State's state law public nuisance claim 50 Okla. Stat. § 1.1 does not apply.

However, even assuming arguendo that 50 Okla. Stat. § 1.1 could apply, in light of the fact that the specific poultry waste land applications in the IRW are not permitted or authorized

by the State, *see* Facts, ¶ 29, that these poultry waste land application practices, in fact, violate federal and state laws, including, but not limited to 42 U.S.C. § 6972(a)(1)(B) (unlawful to dispose of poultry waste that may present an imminent and substantial endangerment), 27A Okla. Stat. § 2-6-105 (unlawful for any person to . . . place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state), and 2 Okla. Stat. § 10-9.7(B)(1) (no discharge of poultry waste to waters of the State), and that Defendants have no information about the specific circumstances under which poultry waste for which they are responsible is land applied in the IRW (other than of course the fact that the majority of it is land applied in the IRW), *see* Facts, ¶¶ 40, 28, 30, 32, 36-40, Defendants' practices are not entitled to any presumption of being a "good agricultural practice."

Consequently, to avail themselves of this affirmative defense Defendants must establish, <u>for each land application site</u>, that the poultry waste disposal practices for the disposal of poultry waste for which they are responsible are "good agricultural practices" without the benefit of any presumption. This is impossible because, as pointed out above, Defendants uniformly disclaim knowing where in the IRW the poultry waste generated by their birds is land applied, how much has been land applied, or the soil test phosphorus for any application location. *See* Facts, ¶ 40; *see also* Facts, ¶ 41. Moreover, Defendants bear the burden of showing that the poultry waste disposal practices -- land applying enormous amounts of poultry by spreader trucks throughout the IRW -- were established "prior to nearby nonagricultural practices." This will be impossible, since the Illinois River has been used for recreation since (at least) the arrival of non-Indian settlers in the IRW, and as a water supply since the early 20th century -- well before Defendants began industrial poultry production began in the IRW. *See* Facts, ¶ 4. Chief Judge Eagan denied a similar request by the poultry integrator defendants for partial summary judgment on this

affirmative defense in the *City of Tulsa* case, finding that the "good agricultural practices" prong was disputed, and that Defendants had not established that land application of poultry litter by its growers was "established prior to the use of the lakes as a municipal water supply." *See City of Tulsa*, 258 F. Supp. 2d at 1261. Simply put, section 1.1 of title 50 of the Oklahoma Statutes provides no escape hatch for Defendants.

V. Conclusion

WHEREFORE, in light of the foregoing, the State's Motion for Partial Summary Judgment should be granted.

Respectfully submitted,

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