

WRITTEN STATEMENT

of

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before the

SENATE COMMITTEE  
ON ENVIRONMENT AND PUBLIC WORKS

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## STATEMENT SUMMARY

Chairman and Members of the Committee: Thank you for the opportunity to discuss the impacts of animal feeding operations on water quality. In particular, I am very concerned about efforts to amend CERCLA to re-define the term “hazardous substance” to exclude manure and anything that may be contained in or commingled with manure. Proposals such as Senate Bill 807, which is currently pending in the Senate, would eliminate an important tool in remedying the serious effects of pollution caused by industrial-scale animal feeding operations in the State of Oklahoma and throughout the United States.

As the Attorney General of Oklahoma, I have a unique perspective on the challenges presented by contamination from industrial animal feeding operations. For the past several decades, many of Oklahoma’s eastern waterways have been severely impaired by the effects of poultry waste disposal. This pollution originates in northwestern Arkansas and eastern Oklahoma, where every year large-scale poultry operations dump massive amounts of poultry waste on fields and pasturelands. (*See Exhibit A.*) Often, there is no legitimate agricultural purpose or benefit associated with this practice. As a result of such practices, many of those fields and pasturelands have been transformed into virtual poultry-waste landfills.

This poultry waste can contain a number of substances such as phosphorus, nitrogen, arsenic, and pathogenic bacteria. Running off fields and pastures, this waste travels down through creeks and streams and into some of Oklahoma’s most important and scenic waterways.

Unfortunately, the disposal of this waste has had, and continues to have, serious effects on Oklahoma's Illinois River Watershed and Lake Tenkiller, which are natural resources of unparalleled importance to the State of Oklahoma. Several rivers in the watershed, including Baron Fork Creek, Flint Creek and the Illinois River itself have been declared "State Scenic River Areas" by Oklahoma law. The Illinois River Watershed is noted for its aesthetic, ecological, recreational, and public-water-supply values, and the quality of its water is essential to the economy of the whole region. As a result of industrial-scale animal feeding operations, water quality in this area is seriously impaired. Elevated levels of phosphorus cause algae blooms that disrupt the ecosystem, and pathogenic bacteria threaten human health.

After several unsuccessful years trying to negotiate a resolution to this problem, in 2005, the State was forced to sue the integrated poultry companies to stop them from polluting Oklahoma's waterways. One of the most important tools available to the State is Section 107 of CERCLA, which allows Oklahoma to recover response costs and damages to its natural resources.

Now, there are proposals in Congress to eliminate CERCLA as a tool for responding to contamination from industrial-scale animal feeding operations in the future. For example, Senate Bill 807 proposes to exclude "manure" from the definition of hazardous substances, even though CERCLA already provides an exemption for the normal application of fertilizers, such as animal manure. (See 42 U.S.C. § 9601(22).) But apart from being an unnecessary change to CERCLA, amending CERCLA to exclude "manure" will severely limit Oklahoma's ability—and other States' ability—to respond to the release of hazardous substances from industrial-scale animal feeding

operations. As I will describe, the release of hazardous substances from this industry is a serious problem across the nation. CERCLA currently provides a mechanism for the States to respond to the problem and hold these companies responsible, rather than using taxpayer funds to clean up the industry's pollution.

The integrated animal agriculture companies should be held responsible for their releases of hazardous substances into the environment, such as arsenic and phosphorus, in the same manner that every other industry is held responsible for releases of hazardous substances. Again, CERCLA already provides an exemption for the normal application of fertilizer, but it does not provide an exemption for massive disposal of animal waste and the resulting releases of hazardous substances. Further, the majority of animal feeding operations are not subject to the permitting requirements of the Clean Water Act, which focus primarily on nutrient pollution, and, thus, are not adequately addressed by other federal laws.

Because of CERCLA's importance in protecting our environment, and the devastating pollution caused by the industrial-scale animal feeding operations in the United States, I urge you to reject any attempts to exempt releases of hazardous substances associated with the improper disposal of animal waste from CERCLA.

## **I. THE GROWING PROBLEM OF POLLUTION FROM ANIMAL FEEDING OPERATIONS**

### **A. Pollution from animal feeding operations is a nationwide problem.**

In 2003, the EPA explained in its rules governing concentrated animal feeding operations that "agriculture . . . is the leading contributor to identified water quality impairment in the nation's rivers and streams, lakes, ponds, and reservoirs."<sup>1</sup> The

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<sup>1</sup> 68 Fed. Reg. 7176-01, 7237 (2003) (NPDES Guidelines for CAFOs).

agricultural sector is reported to contribute to the impairment of 129,000 miles of the Nation's rivers and streams, 3.2 million lake acres, and more than 2,800 estuarine square miles.<sup>2</sup> As a comparison, agriculture is reported to impair nearly four times as many river and stream miles as the pollution resulting from urban runoff and storm sewers.<sup>3</sup>

In particular, animal feeding operations are major sources of groundwater and surface water pollution. The USDA estimates that confined livestock and poultry operations generate about 500 million tons of manure annually, which is three times more raw waste than is generated by humans in the United States.<sup>4</sup> The pollution that results from this waste is staggering. According to the EPA in its 2000 Water Quality Inventory Report, the amount of pollution specifically attributed to animal feeding operations by reporting states is roughly comparable to the amount of pollution attributed to the entire mining and resource extraction industry in the United States.<sup>5</sup>

Further illustrating the truly interstate nature of this problem, many poultry industry operations are grouping along state borders. (*See Exhibit B.*) As in many areas across the United States, there is major expansion going on along the borders of Oklahoma, Arkansas, and Missouri.

**B. The manure generated at animal feeding operations has increased dramatically and so has the resulting contamination.**

Pollution from animal feeding operations has dramatically increased, and for a logical reason.<sup>6</sup> Traditionally, animal manure has been applied directly to the land, because while animal manure is a waste, it can also be used in appropriate circumstances

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<sup>2</sup> 68 Fed. Reg. 7176-01, 7237 (2003) (citing the 2000 National Water Quality Inventory Report, "NWQIR", available at <http://www.epa.gov/305b/2000report/>).

<sup>3</sup> 2000 NWQIR at 14.

<sup>4</sup> 68 Fed. Reg. 7176-01, 7180 (2003).

<sup>5</sup> 2000 NWQIR at pg. 14.

<sup>6</sup> "Proposed Regulation to Address Water Pollution from Concentrated Animal Feeding Operations" EPA 833-F-00-016 (2000).

as a fertilizer. In fact, land application is the predominant means of animal manure disposal.<sup>7</sup> But while the amount of animal manure has risen significantly (20% increase between 1982 and 1997), the amount of available cropland and pastureland has declined significantly (nearly 40% during the same time period).<sup>8</sup> In short, more animal waste is being applied to less land. And when waste is excessively or improperly land-applied, the nutrients and other materials contained in the waste become pollutants that, as one court noted, “can and often do run off into adjacent waterways or leach into soil and groundwater.”<sup>9</sup>

The poultry industry is a telling example of this explosive trend. In 1934, the United States produced an estimated 34 million broilers.<sup>10</sup> Compare that to 2006, when the United States produced over 8.8 billion broilers. In Arkansas alone, where many watersheds drain into Oklahoma, there were over 1.2 billion broilers produced in 2006.<sup>11</sup>

This dramatic increase in broiler production has led to a corresponding increase in pollution from poultry operations. For example, the USDA estimates that confined poultry operations account for the majority of on-farm excess nitrogen.<sup>12</sup> But nationwide, on-farm use is able to absorb less than 10% of the total available nitrogen.<sup>13</sup> That means that more than 90% of the nitrogen generated by poultry waste cannot be absorbed by the land available on-farm.

And nitrogen is just one potentially harmful constituent of poultry waste. In addition to nitrogen, the primary pollutants most commonly associated with animal waste

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<sup>7</sup> 66 Fed. Reg. 2960, 2976-79.

<sup>8</sup> 68 Fed. Reg. at 7180.

<sup>9</sup> *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 495 (2d Cir. 2005).

<sup>10</sup> USDA, Economics, Statistics, and Market Information System (2007), available at [usda.mannlib.cornell.edu](http://usda.mannlib.cornell.edu), “Poultry Production and Value, 04.27.2007\_revision”.

<sup>11</sup> *Id.*

<sup>12</sup> 68 Fed. Reg. at 7180.

<sup>13</sup> *Id.*

are phosphorus, ammonia, organic matter, solids, pathogens, odorous compounds, trace metals, pesticides, antibiotics, and hormones.<sup>14</sup> Trace elements in manure that are of environmental concern include arsenic, copper, selenium, zinc, cadmium, molybdenum, nickel, lead, iron, manganese, aluminum, and boron.<sup>15</sup>

In order to achieve the growth rates which make it possible for a single poultry house to raise 5.5 flocks in a year, broiler feed has been carefully engineered. Arsenic, copper, selenium, and zinc have all been added to the feed to promote growth and inhibit parasites.<sup>16</sup> These metals are not naturally occurring in animal waste. A recent U.S. EPA National Exposure Research Laboratory report states that:

Organic arsenic compounds are extensively added to the feed of animals (particularly poultry and swine) in the United States to improve growth rates by controlling parasitic diseases. The resulting arsenic-bearing wastes are currently introduced to the environment, and even used to fertilize croplands.<sup>17</sup>

Many of the above-mentioned pollutants can seriously impact human health and the environment. Excess phosphorus and nitrogen causes eutrophication that affects “the dissolved oxygen content of a water body to levels insufficient to support fish and invertebrates.”<sup>18</sup> Eutrophication can also cause the growth of toxic organisms such as cyanobacteria, which can be harmful to both humans and wildlife.<sup>19</sup> Eutrophication also impacts drinking water by “clogging treatment plant intakes, producing objectionable tastes and odors, and increasing production of harmful chlorinated byproducts (e.g.,

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<sup>14</sup> 68 Fed. Reg at 7181.

<sup>15</sup> 66 Fed. Reg. at 2978.

<sup>16</sup> 66 Fed. Reg. at 2985.

<sup>17</sup> Momplaisir, G. M; C. G. Rosal; E. M. Heithmar “Arsenic Speciation Methods for Studying the Environmental Fate of Organoarsenic Animal-Feed Additives,” U.S. EPA, NERL- Las Vegas, 2001; (TIM No. 01- 11). Available at: <http://www.epa.gov/nerlesd1/chemistry/labmonitor/labresearch.htm>.

<sup>18</sup> 66 Fed. Reg. at 2982.

<sup>19</sup> 66 Fed. Reg. at 2981.

trihalomethanes) by reacting with chlorine used to disinfect drinking water.”<sup>20</sup> Trihalomethanes can cause cancer.<sup>21</sup> Selenium is associated with liver dysfunction and loss of hair and nails, and zinc can result in changes in copper and iron balances, particularly copper deficiency anemia.<sup>22</sup> All of these substances can be present in poultry waste—the same waste that is intentionally dumped on fields by the integrated poultry industry and that then runs into streams, rivers, and lakes, many of which are public water supplies.

Importantly, Senate Bill 807 would insulate all of these dangerous substances from the provisions of CERCLA because the bill proposes to exempt “manure,” which is defined to include anything that might be contained in or commingled with manure. (*See* proposed Sec. 313(a)(4) of bill.)

**C. The increased pollution is the result of the large, industrial-scale producers – not the smaller family farms.**

Importantly, this rising tide of agricultural pollution is being caused by modern, industrial-scale integrated agricultural operations, not the smaller, traditional family farms. The scale of present-day industrialized animal feeding operations dwarfs the historically smaller, family-run farms in terms of environmental pollution. As the Second Circuit Court of Appeals recently wrote, speaking of the current large-scale animal feeding operations: “[s]uch ‘agricultural enterprises’ are not, however, of a kind the Founding Fathers likely would have envisioned populating America’s ‘yeoman republic.’”<sup>23</sup>

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<sup>20</sup> 66 Fed. Reg. at 2982.

<sup>21</sup> <http://www.epa.gov/safewater/hfacts.html>

<sup>22</sup> 66 Fed. Reg. at 2984.

<sup>23</sup> *Waterkeeper Alliance, Inc.*, 399 F.3d at 492.

In the first half of the twentieth century a farm might have a chicken coop or brooder house that might hold 500 chickens; a large one might hold 1,400 birds.<sup>24</sup> A modern poultry house can house a 25,000-bird flock at one time producing an average of 5.5 flocks per year and 125 tons of poultry waste annually.<sup>25</sup>

Today, in Eastern Oklahoma and Northwest Arkansas, each poultry operation will generally have more than one house. (*See Exhibit C*, aerial photographs of typical industrial-scale poultry feeding operations.) The industry average is 2.3 houses per operator and some of these operations have four or more houses at one location.<sup>26</sup> The EPA has found that the trend for “animal feeding operations” has been “toward fewer but larger operations” resulting in concentration of “more manure nutrients and other waste constituents within some geographic areas.”<sup>27</sup> Moreover, large operations often “do not have sufficient land to effectively use the manure as fertilizer.”<sup>28</sup>

EPA has further noted that this concentration has resulted in “widespread phosphorus saturation of the soils” in some areas of the United States and that “research shows a high correlation between areas with impaired lakes, streams and rivers due to nutrient enrichment and areas where there is dense livestock and poultry production.”<sup>29</sup> The USDA has estimated that confined poultry operations “account for the majority of

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<sup>24</sup> “Early Poultry Houses”, Iowa Barn Foundation, 2004, available at [http://www.iowabarnfoundation.org/magazine/early\\_poultry\\_houses.htm](http://www.iowabarnfoundation.org/magazine/early_poultry_houses.htm)

<sup>25</sup> “Nutrient Analysis of Poultry Litter and Possible Disposal Alternatives”, Avian Advice, University of Arkansas, Fall 2003, Vol. 5, No. 3, p. 1.

<sup>26</sup> Holleman, John T., *In Arkansas Which Comes First, The Chicken or the Environment*, TULANE ENVIRONMENTAL L. R., Vol. 6, p. 21, 26.

<sup>27</sup> 68 Fed. Reg. at 7180.

<sup>28</sup> *Id.*

<sup>29</sup> 68 Fed. Reg. at 7196.

on-farm excess nitrogen and phosphorus . . .” because of the generally higher nutrient composition of poultry waste and the lack of land available for application.<sup>30</sup>

In the United States, in 1997, 165 counties had the potential for excess manure nitrogen and 374 counties had the potential for excess manure phosphorus primarily because of the lack of available land application areas.<sup>31</sup> In 1999, the USDA, speaking about the build up of phosphorus in soils where the wastes from concentrated animal production facilities were disposed of, warned:

Phosphorus accumulation on farms has built up soil P to levels that often exceed crop needs. Today there are serious concerns that agricultural runoff (surface and subsurface) and erosion from high P soils may be major contributing factors to surface water eutrophication. . . . By the time these water-quality impacts are manifest, remedial strategies are difficult and expensive to implement; they cross political and regional boundaries; and because of P loading, improvement in water quality will take a long time.<sup>32</sup>

The family farm with its hundreds of birds had plenty of uses for the manure the birds produced. With a single poultry house producing 125 tons of manure every year, the poultry industry often lacks appropriate locations to properly to dispose of its waste. The University of Arkansas Extension Service explained the problem as follows:

The Arkansas poultry industry generates 1.4 million tons of broiler litter annually. While litter is still a valuable fertilizer resource that is needed in many areas, litter generated in poultry producing regions cannot be properly utilized in those regions alone. By some estimates, alternative uses for perhaps as much as half of the litter generated in concentrated production areas must be found.<sup>33</sup>

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<sup>30</sup> 68 Fed Reg. at 7180.

<sup>31</sup> 68 Fed. Reg. at 7180-81.

<sup>32</sup> “Agricultural Phosphorus and Eutrophication”, USDA, ARS 146, July 1999, p. 4.

<sup>33</sup> “Nutrient Analysis of Poultry Litter and Possible Disposal Alternatives”, *supra* at pg. 4.

In 2003, the Arkansas Legislature designated the majority of the watersheds bordering Oklahoma as Nutrient Surplus Watersheds, which are defined as an area “which has been determined to be an area 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.”<sup>34</sup> Further, as a result of the massive amount of phosphorus produced in this area and the fact that the area is highly conducive to loss of nutrients from fields; the USDA identified several of Oklahoma’s eastern watersheds as potential priority water resources for protection of water quality from animal manure.<sup>35</sup> The Arkansas River sub-region, which includes the Illinois River, has been given the second highest priority in the United States based on the need to address pollution from animal wastes.<sup>36</sup>

**D. CERCLA already provides an exemption for the normal application of fertilizer.**

In spite of this growing problem of pollution from industrial-scale animal feeding operations, the integrated agriculture industry is again petitioning Congress for an animal-manure exemption from CERCLA. The proponents of this exemption argue that an amendment to CERCLA is necessary because of the historic and beneficial use of manure as a fertilizer. But CERCLA already provides an exemption for the normal application of fertilizer.<sup>37</sup> A farmer applying manure as a fertilizer does not incur

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<sup>34</sup> Ark. Code § 15-20-1103 & 1104.

<sup>35</sup> Potential Priority Water Resource Subregions/Watersheds for Protection of Water Quality From Contamination by Manure Nutrients, [http://www.nrcs.usda.gov/TECHNICAL/land/pubs/wshedpap\\_w.pdf](http://www.nrcs.usda.gov/TECHNICAL/land/pubs/wshedpap_w.pdf) (November 2000) (See Map 9 and 10).

<sup>36</sup> *Id.* (Map 10).

<sup>37</sup> Section 9601(22) of CERCLA.

CERCLA liability simply by properly spreading manure on crops or cropland at agronomic rates in compliance with best management practices.

The meaning of CERCLA's current exclusion is illuminated in the Senate Report for the CERCLA legislation as follows:

Certain feedstocks used to produce fertilizer (nitric acid, sulfuric acid, phosphoric acid, anhydrous ammonia) are hazardous substances as defined by the bill, and certain fertilizer products may be listed as hazardous substances as well. . . . Under this exclusion, however, the "normal field application" of fertilizer is not a "release" as defined in the bill. . . . The term "normal field application" means the act of putting fertilizer on crops or cropland, and does not mean any dumping, spilling, or emitting, whether accidental or intentional, in any other place or of significantly greater concentrations or amounts than are beneficial to crops.<sup>38</sup>

In passing the CERCLA legislation, the Senate bill was adopted by the House without amendment, and when this happens, "the Senate report is powerful evidence of congressional intent."<sup>39</sup>

The current "normal application of fertilizer" provision of CERCLA is adequate to protect all legitimate uses of animal manure. This provision does not indicate Congressional intent to completely exempt animal manure and associated releases of hazardous substances from CERCLA. Proposals such as Senate Bill 807 would represent a 180-degree change in this carefully considered environmental law

**E. The Clean Water Act does not regulate most confined animal feeding operations.**

Proponents of the exemption also suggest that CERCLA should not apply to releases of hazardous substances from the disposal of animal manure because the industry

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<sup>38</sup> S. Rep. No. 96-848, at 46 (1980).

<sup>39</sup> *State of Colorado v. United States Department of Interior*, 880 F.2d 481, 487 (D.C. Cir. 1989).

is already heavily regulated by the Clean Water Act. This is simply not true. The majority of the estimated 238,000 animal feeding operations are not currently regulated by the EPA under the Clean Water Act. In 2003, EPA passed a new CAFO rule expanding coverage under the Clean Water Act, but even under that new rule, only 15,500 animal feeding operations are reported to be regulated.<sup>40</sup> This means that EPA's CAFO rule only regulates 6.5% of all animal feeding operations in the United States.

## **II. THE SERIOUS EFFECTS OF POLLUTION FROM POULTRY WASTE DISPOSAL ON THE STATE OF OKLAHOMA**

In my statement so far, I have attempted to illustrate the growing problem of pollution from animal feeding operations across the country. Now, I will highlight the particular effects of poultry waste disposal on the State of Oklahoma, and how the State is using CERCLA to remedy this pollution. If animal manure is exempted from the provisions of CERCLA, however, poultry waste and its harmful effects will be completely outside the provisions of CERCLA, and Oklahoma will lose an important tool to use in the future to protect its citizens and natural resources from the release of hazardous substances by animal feeding operations.

### **A. Oklahoma has been seriously damaged by the effects of large-scale, industrial poultry production.**

The Illinois River Watershed, known as the "IRW", consists of approximately 1,000,000 acres of land that straddles the Arkansas-Oklahoma border. In 1970, the Oklahoma Legislature designated the Illinois River and portions of its tributary rivers, Baron Fork Creek and Flint Creek, as "State Scenic River Areas."<sup>41</sup> The designation as "Scenic River Areas" reflects a recognition by the Oklahoma Legislature that these rivers

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<sup>40</sup> U.S Environmental Protection Agency, *Summary of the Second Circuit's Decision in the CAFO Litigation*, [http://www.epa.gov/npdes/pubs/summary\\_court\\_decision.pdf](http://www.epa.gov/npdes/pubs/summary_court_decision.pdf).

<sup>41</sup> 82 Okla. Stat. § 1452 (1970).

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.”<sup>42</sup> Early travelers to the region described the Illinois as an exceptional river as follows: “On the east side of the Arkansas is the Illinois River, rising in the mountainous regions southeast of Fort Gibson, said to be one of the prettiest rivers on the continent, sparkling with crystal waters.”<sup>43</sup> (See **Exhibit D**, photograph of the Illinois River.)

Our State Scenic Rivers are also designated as “outstanding resource waters” for protection of their beneficial uses such as aesthetics, recreation, public water supply, and fish and wildlife propagation.<sup>44</sup> Tourism has been especially important to Oklahoma’s economy because the Illinois River is a noted recreational destination for floating, fishing, camping, swimming, diving, hiking, and sightseeing. In addition, the IRW also serves as an important source of drinking water to Oklahoma citizens. There are a number of communities and rural water districts that depend on the IRW.

The Illinois River feeds into the 12,900-acre Tenkiller Ferry Lake, which has been described as the emerald jewel in Oklahoma’s crown of lakes. Like the river from which it is formed, before it began to deteriorate, Tenkiller was known for its pristine waters:

Tenkiller is Oklahoma’s most beautiful lake. . . . For a distance of more than 30 miles above the dam near Gore that holds back its deep, crystal clear waters, it stretches in

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<sup>42</sup> *Id.*

<sup>43</sup> Reports of the Board of Indian Commissioners. Appendix 37. Second Annual Report 1870 (Fort Gibson, Indian Territory, December 16, 1870), reprinted in *Chronicles of Oklahoma* Vol. 5, No. 1 (March 27) at 80.

<sup>44</sup> See Okla. Admin. Code 785:45-3-2.

a northeasterly direction through the fabled and picturesque Cookson Hills.<sup>45</sup>

Lake Tenkiller serves as a valuable source of drinking water, and currently, the primary recreational activities at Lake Tenkiller include boating, fishing, camping, swimming, and sightseeing.

**B. Poultry Integrator Company Operations in the Illinois River Watershed.**

In this river basin are some of the most concentrated poultry growing operations in the country. It is the home of Tyson Foods and several other poultry integrator companies. Arkansas is ranked second in broiler production in the United States and Washington and Benton Counties through which the Illinois River and its major tributaries flow form the center of this industry in Arkansas. As of 2002, there were an estimated 2,871 poultry houses in the IRW. (See **Exhibit E**, poultry houses in Oklahoma and Arkansas.) The estimated phosphorus in the waste produced by poultry in the IRW is the equivalent to the waste stream of 10.7 million people. That is more people than live in all of Arkansas, Kansas, and Oklahoma combined.

In the IRW, the poultry companies own millions of chickens and turkeys that generate hundreds of thousands of tons of waste. As explained above, the constituents of the poultry waste can include, but are not limited to, phosphorus, nitrogen, arsenic, zinc, copper, hormones, and microbial pathogens. Phosphorus, arsenic, zinc, and copper are designated hazardous substances under CERCLA.<sup>46</sup> Generally, this waste has been improperly stored in large piles that are not protected from the elements and disposed of on lands within the IRW in excess of crop agronomic needs and soil capacity. (See

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<sup>45</sup> C. Brill, *1957 Brill's Oklahoma Outdoor Guide* at 169 (Oklahoma City Consolidated Publishing Company).

<sup>46</sup> 40 C.F.R. § 302.4

**Exhibits A and F**, photographs of waste-disposal practices.) These practices are causing an accumulation of hazardous substances, pollutants and contaminants in the soils and are causing runoff and release of large quantities of phosphorus and other waste constituents into the waters of the IRW.

**C. Effects of Poultry Integrator Companies on the Illinois River Watershed.**

The IRW is highly susceptible to pollution from land application of animal waste because of the geology of the area. As one commentator notes, “[t]he fractured limestone geology of the region allows a direct linkage from surface waters to groundwaters.”<sup>47</sup> In layman’s terms, the geology of the area allows contaminants placed onto the land to easily (and quickly) flow into the groundwater and surface waters. The importance of this fact has been described as follows:

From a geologic standpoint, the center of the poultry industry could not be placed in a worse area. These two counties [Benton and Washington] are located in the Ozark Highlands region of the state. This area is noted for its mountainous terrain with steep gradients and fast-flowing, spring fed streams. A large percentage of the streams from within this region are designated as extraordinary resource waters.<sup>48</sup>

As a result of the waste disposal practices of the poultry industry, this once-pristine watershed is seriously impaired. The surface water impacts caused by the phosphorus released from the poultry industry’s operations are well-known and well-documented in both government reports and peer reviewed literature. Releases of phosphorus have caused violations of state water quality standards, periodic algae blooms, excessive algal growths, and other adverse impacts in the waters of the IRW,

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<sup>47</sup> Holleman, John T., *In Arkansas Which Comes First, The Chicken or the Environment*, TULANE ENVIRONMENTAL L. R., Vol. 6, p. 26.

<sup>48</sup> *Id.*

resulting in eutrophication, degradation in water quality and sediments, injury to biota, and impaired beneficial uses of the water. (See **Exhibits G & H.**) Many samples of runoff taken in the 2005-2006 timeframe at the edge of fields where poultry waste has been applied in the IRW show bacteria counts in the range of those reported for raw sewage (or surface waters into which raw sewage has been spilled). Segments of the Illinois River, Baron Fork Creek, and Flint Creek are impaired by bacterial contamination and are not meeting the standards for primary body contact recreation. Additionally, bacteria, nutrients, and metals have been reported to chronically exceed background levels in certain locations in the groundwater in the IRW.<sup>49</sup>

In spite of the amount of waste produced by the industry in this region, the hazardous nature of that waste, the dangers of bacterial contamination and the unsuitable nature of the geology in this region for such practices, the poultry industry continues to dispose of large volumes of untreated animal waste by spreading it onto the ground in the IRW. Although poultry waste is not the only source of contamination, it is clearly the predominant source in the watershed.

Moreover, it is important to note that the IRW is not the only watershed affected by the poultry waste disposal practices of this industry. Several other watersheds in eastern Oklahoma are impacted to varying degrees by poultry operations. (See **Exhibit I**, poultry houses in other Oklahoma watersheds.)

#### **D. CERCLA's key role in Oklahoma v. Tyson**

The State of Oklahoma first began discussions with the poultry industry to stop pollution of the State's natural resources by improper animal waste disposal in November

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<sup>49</sup> Graening, G.O., Brown, A.V. 2001, *Protection of Cave Springs Cave Biota and Groundwater Basin*, Arkansas Water Resources Center Publication No. MSC-297. p. 1.

2001. In the years that followed, Oklahoma attempted a number of settlement mechanisms in order to prevent litigation, including informal negotiations through the Arkansas Attorney General, a joint negotiation with Arkansas and Oklahoma agencies with the assistance of Region VI of the U.S. Environmental Protection Agency, and a formal mediation with the assistance of retired United States District Judge Thomas Brett, assisted by former Region EPA VI Administrator, Gregg Cooke. All of these efforts failed to bring resolution to this very serious problem.

On June 13, 2005, the State of Oklahoma filed a lawsuit against fourteen poultry companies for pollution of the IRW. The case, *State of Oklahoma v. Tyson Foods, Inc.*, et al., Case No. 4:05-cv-000329-GKF-SAJ, was filed in federal District Court for the Northern District of Oklahoma. The Complaint alleges that the poultry companies are legally responsible for the waste, the improper disposal of the waste and the resulting pollution, damage and injury to natural resources in the IRW. Accordingly, the lawsuit does not name any individual farmers, commonly referred to as “contract poultry growers” or “contract poultry producers,” with whom the poultry companies often contract to raise their birds and manage their waste. Rather, the lawsuit is directed at the actions of the poultry companies who either own or control the poultry operations in the IRW.

The Amended Complaint includes four counts based on federal law, including cost recovery and natural resource damage claims under CERCLA, 42 U.S.C. § 9607, an Imminent and Substantial Endangerment claim for injunctive relief and other available remedies under the Solid Waste Disposal Act, 42 U.S.C. § 6972 ((a)(1)(B) and (b)(2)(A)), and equitable relief, costs and damages under the federal common law of

nuisance. The Complaint also includes state law claims. The State seeks, among other things, abatement, remediation, damages, declaratory relief, costs, penalties, and equitable relief. In sum, the State is seeking to stop the actions of the poultry companies which are causing pollution, to clean up the pollution, to restore the natural resources that have been injured, and to compensate the public for the damages done by the industry's practices.

### **III. CONCLUSION**

In conclusion, I would like to emphasize that pollution from industrial-scale animal feeding operations is a serious and growing problem. States, like Oklahoma, need legal tools to help stop and clean up animal-waste contamination, which is destroying significant and irreplaceable public resources such as the Illinois River Watershed. Fortunately, CERCLA is there to provide one tool to help states, like Oklahoma, to remedy this problem.

Unfortunately, there appears to be a coordinated effort to weaken CERCLA by exempting all animal waste, and anything that might be included in or commingled with that waste, from its provisions. Proponents of this effort claim that it is aimed at helping the family farmer, and that its purpose is simply to clarify that the already-overregulated animal agriculture industry is exempt from CERCLA. But these are all mischaracterizations. These efforts are not an effort to protect the family farmer. They are a transparent attempt to protect the industrial-scale animal feeding operation practice of dumping animal waste in an environmentally damaging manner. No other industry in the country has that kind of protection. Since adoption of the federal clean water and air legislation, no other industry has so callously polluted our land and waters. Nor is the

proposed exemption designed to clarify the intent of CERCLA; rather it represents a 180 degree change from established CERCLA precedent

Thank you again for the opportunity to present my views to the Committee on this issue of national importance.