

THE OKLAHOMA POULTRY INDUSTRY: AN INDUSTRY IN THE CROSSHAIRS OF ENVIRONMENTAL COMPLIANCE

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I.	Introduction.....	226
	A. Legal Proceedings over the Last Twelve Years	228
	B. The Tyson Litigation.....	229
	C. Understanding the Recent Tyson Decision	230
II.	Overview of Developments and Players.....	232
	A. The Oklahoma Attorney General and Governor	232
	B. Special Interest Groups	233
	C. The Oklahoma Water Resources Board	234
	D. The Oklahoma Department of Agriculture, Food, & Forestry	235
III.	Poultry Laws in Oklahoma	236
	A. Oklahoma Registered Poultry Feeding Operations Act	237
	B. Oklahoma Poultry Waste Transfer Act	240
	C. The Oklahoma Waste Applicators Certification Act	241
	D. Educational Training Programs Act	244
	E. Eucha-Spavinaw Management Act	245
	F. The Oklahoma Scenic Rivers Act	246
	G. Oklahoma Water Quality Standards.....	250
	H. Recent Changes to Oklahoma Nuisance Law	250
	I. The 2012 Oklahoma/Arkansas Agreement	253
IV.	The Tyson Litigation and Alternatives	254
	A. Using Existing Poultry Laws v. the Tyson Litigation	254
V.	Conclusion	256

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I. INTRODUCTION

Poultry has attained a unique status in Oklahoma.¹ Originally, the American Indians were the first people to engage in poultry production in the Oklahoma territory before statehood.² As more farmers and settlers arrived after the land lotteries, the poultry industry began to grow exponentially.³ Currently, the poultry industry in Oklahoma is a booming industry at three billion dollar per year, providing a large source of tax revenue for both Oklahoma and Arkansas.⁴ Poultry producers have modernized their operations and increased their presence in strategic regions of northeastern Oklahoma. The industry structure is comprised of a few large poultry conglomerates like Tyson Foods, who then enter into production contracts with many individual poultry producers. This practice allows companies to increase the quantity of birds that can be produced, but it simultaneously creates more environmental waste from the larger scale production.⁵

Over the past few decades, the Illinois River Watershed (hereinafter “IRW”) in northeastern Oklahoma has become an increasingly popular tourist attraction, and consequently an economic booster to the area by attracting fisherman, campers, bird watchers, kayakers, and hunters.⁶ The IRW is also home to

1. *E.g.*, *Lock v. Falkenstine*, 380 P.2d 278, 282 (Okla. Crim. App. 1963). The Oklahoma courts ruled that a gamecock was not an animal under the statute; therefore, cock fighting was made legal in Oklahoma. However, in 2002, the Oklahoma electorate voted and passed Title 21, Sections 1692.1-1692.9 of the Oklahoma Statutes banning cockfighting, upheld two years later by the Oklahoma Supreme Court in *Edmondson v. Pearce*, 2004 OK 23, 91 P.3d 605, 640-41. A bizarre case involving chickens from the Oklahoma Supreme Court, which was later reversed by the United States Supreme Court, upheld Jack T. Skinner’s sentence of a forced vasectomy under the then active Oklahoma eugenics laws because of two crimes—one of which he perpetrated in 1926 by stealing chickens. *Skinner v. Okla. ex rel. Williamson*, 115 P.2d 123 (Okla. 1941), *rev’d*, 316 U.S. 535, 537 (1942). Needless to say, Oklahoma has had a long history of determining how to apply the law to poultry.

2. *See, e.g.*, Larry O’Dell, *Poultry Industry*, in OKLAHOMA HISTORICAL SOCIETY’S ENCYCLOPEDIA OF OKLAHOMA HISTORY AND CULTURE, <http://digital.library.okstate.edu/encyclopedia/entries/P/PO028.html> (last visited Sept. 15, 2010) (describing the history of Oklahoma’s poultry industry).

3. *Id.*

4. *Poultry Farmer* (Oklahoma Horizon television broadcast Nov. 2, 2008), *available at* http://www.okhorizon.com/2008/Show0844/transcripts/0844_VA02_PoultryFarmer_transcript.txt.

5. *See* Jillian Hishaw, *Piling It On Thick: An Overview of Arkansas Poultry Litter Regulations*, 11 DRAKE J. AGRIC. L. 225, 226 (2006).

6. Okla. Scenic Rivers, The Illinois River Management Plan 1999, <http://www.oklahomascenicrivers.net/programs.asp> (last visited Sept. 15, 2010).

many poultry operators. These poultry operations create poultry litter containing high levels of phosphorous, which is used by farmers as a source of fertilizer in the IRW and surrounding areas. The phosphorous in the poultry litter eventually pollutes the IRW and results in negative environmental consequences like eutrophication. Over the past few years, the Oklahoma legislature has recognized the importance of the IRW and has designated certain areas as scenic river areas.⁷ This has been an ongoing attempt by many different groups to protect the IRW and find workable solutions for reducing the phosphorous pollution levels. The IRW region is not only economically important for tourism, but it is also an important source of drinking water in the region, making its preservation a serious priority.

The recent Tyson litigation has attempted to crack down on poultry pollution in the IRW by holding large companies responsible and forcing them to pay for the environmental damage caused by their industry.⁸ However, the litigation has conveniently ignored current state laws that already regulate the poultry industry, and has instead focused on getting the phosphorous contained in poultry litter categorized as a pollutant under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA").⁹ The strategy of the litigation is that a conviction under CERCLA would circumvent state laws and demand immediate expensive compliance by the poultry conglomerates. This strategy is flawed because it assumes that the laws already in existence are inadequate and not capable of bringing the poultry industry into compliance. Such laws have had a tremendous effect in acknowledging the current pollution problems and laying the foundation to build a comprehensive regulatory scheme for environmental compliance by the poultry industry. This Article will discuss why the Tyson litigation strategy is flawed, and how laws and regulations in place in Oklahoma are more appropriately suited for legally addressing the poultry litter pollution in the IRW.

Further, the litigation has completely ignored the individual poultry producers who are contracting with the larger poultry companies. These individual poultry producers are the source of the pollution, and any environmental change will have to address their activities. Ironically, all of the poultry operators and applicators that are in business in Oklahoma are likely in compliance with Oklahoma state law as administered by Oklahoma state agencies. The administrative state agencies have specialists who regulate the poultry industry and have decades of experience in the business of poultry pollution. Therefore, the litigation

7. OKLA. STAT. tit. 82, § 1452 (2010).

8. *E.g.*, *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003).

9. *See id.*; Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2006).

has created a tension between the attorney general and Oklahoma state agencies over who is better suited to bring the poultry industry into environmental compliance and on what terms. This Article will explain why Oklahoma state agencies are better suited for taking the lead in finding a legal solution to the poultry litter pollution problem.

A. *Legal Proceedings over the Last Twelve Years*

In order to understand the complexities involved with finding a workable solution to the IRW phosphorous pollution problem, it is imperative to look at the past and acquire a limited understanding of how past events have shaped the current situation. With that in mind, it is important to emphasize that Oklahoma's experience with the poultry industry, both inside the state and with bordering states, has been tumultuous. The history of the problem goes back further than twelve years,¹⁰ but the discussion in this Article will focus on 1997 to the present. Most recently, the approach has shifted to attacking non-point source water pollution like phosphorous runoff. In *City of Tulsa v. Tyson Foods, Inc.*, the city sued Tyson Foods and various other poultry companies for polluting the water sources that Tulsa uses to supply drinking water to its residents.¹¹ Eventually, the parties involved reached a settlement, and the final decision was vacated.¹² However, many of the same legal arguments made in that case are currently being made in the *Oklahoma v. Tyson Foods, Inc.* case [hereinafter Tyson litigation].¹³ The Tyson litigation began in 2005 when Oklahoma Attorney General Drew Edmondson decided to sue Tyson Foods and other poultry producers for polluting parts of the IRW in northeastern Oklahoma.¹⁴ The decision to sue was based

10. The problem goes back to the 1980's when the State of Oklahoma challenged the EPA's granting of a National Pollutant Discharge Elimination System (NPDES) permit to the city of Fayetteville, Arkansas to discharge effluent into part of the Illinois River Watershed upstream from Oklahoma. *Arkansas v. Oklahoma*, 503 U.S. 91, 95 (1992).

11. *City of Tulsa*, 258 F. Supp. 2d at 1270.

12. P.J. Lassek, *Judge OKs Lawyer Fees in Water Suit*, TULSA WORLD, Feb. 5, 2005, available at http://www.tulsaworld.com/news/article.aspx?articleID=050205_Ne_A16_Judge1746 (discussing the 7.3 million dollar contingency payment to the city's attorney at the firm of McKinney and Stringer, which was affirmed by the judge as "reasonable" and "properly calculated" even though the city only received \$200,000 after the law firm collected their attorney fees).

13. See, e.g., Complaint at 14-18, *Oklahoma v. Tyson Foods, Inc.*, No. 4:05-CV-00329-GKF-PJC (N.D. Okla. June 13, 2005).

14. *Value Added—Interview with Drew Edmondson—Poultry Lawsuit* (Oklahoma Horizon television broadcast Nov. 2, 2008), available at http://www.okhorizon.org/2008/Show0844/VA01_IntvWDrewEdmonson.htm.

on a strategic decision to go after the large poultry companies and force them to pay for the costs of polluting the IRW.¹⁵

B. *The Tyson Litigation*

In some respects, the Tyson litigation represents the proverbial “fuel to the fire” scenario. The disputes are not by any means new, but the problem has continued to grow as the poultry industry continues to expand. In a 2008 interview, Attorney General Drew Edmondson disclosed that initially he wanted to negotiate a settlement in the Tyson litigation.¹⁶ When communication broke down though, Attorney General Edmondson stated, “I pulled the trigger.”¹⁷ The Attorney General has publicly acknowledged that serious consequences could result if the court rules in favor of the State of Oklahoma, but the Attorney General insists that large operations like Tyson are no different from any other multi-billion dollar business and that they should have to comply with environmental standards in disposing of their waste just like every other industry.¹⁸ One article described the poultry industry on the Arkansas side of the IRW as being “[h]ome to 7,000 chicken farms and three leading poultry corporations” that produce “5,100 tons of poultry manure, 3,600 pounds of zinc, 3,300 pounds of iron, and 300 pounds of arsenic” daily, which are dumped and eventually pollute the IRW in some way.¹⁹ Another article described the animal waste problem as:

All of the animal waste must be disposed of in some manner, presumably in one that is economically feasible. A few disposal methods are used, but the most common is to take advantage of the wastes’ nutrient content by applying the wastes to land as a fertilizer for crop and pasture growth. The land application of animal waste can be problematic because nutrients from the waste, especially phosphorous and nitrogen, can embed in soils and run off into nearby lakes, rivers, and estuaries. Once the nutrients enter a water body, they can promote the growth of aquatic plants in the same way they promote the growth of terrestrial plants, and in so doing can create, or help create, water quality problems such as “eutrophication.”²⁰

The Tyson litigation, if decided, could have a substantial impact on environmental law in the United States, establishing the burden of proof necessary to

15. *See id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Hishaw, *supra* note 5, at 225.

20. Harrison M. Pittman, *Poultry Litter and Water Quality in the Ozark Mountains: Allegory for and Prelude to the National Debate Over How Best to Address Water Pollution Throughout the United States*, 2 J. FOOD L. & POL’Y 157, 166 (2006) (citations omitted).

demonstrate causation in environmental pollution cases. One commentator has correctly summarized the importance of the case:

The reason is obvious—an unfavorable ruling in this case could adversely affect almost all American agricultural producers by exposing them to new unprecedented liability for environmental damage, encouraging new federal and state regulations, and destroying their ability to compete in the international market. The underlying issue, whether phosphate contained in animal manure is a hazardous material under the Comprehensive Environmental Response Cleanup and Liability Act (CERCLA), is of great interest to the agricultural community.²¹

The outcome of the litigation is far from certain. There still remains a strong possibility that the case could settle before any decision is reached, but the risk to agriculture remains significant. Further, recent developments in the litigation suggest that it may be difficult to reach the goals originally set forth, which seems to indicate that it may be an appropriate time to shift the focus back to state agency enforcement mechanisms.

C. *Understanding the Recent Tyson Decision*

The most recent holding in the Tyson litigation may have cut out all of the incentives for the parties to the litigation, since contingency fees will not be able to be paid through the awarded damages as originally planned. The Attorney General's Office originally spelled out ten counts in the Tyson litigation.²² After the recent court decision, four counts were completely dismissed, and another four counts had the damages dismissed.²³ This translates into minimal penalties only being available under one federal statute and two state environmental law violations, in addition to the possibility of various injunctions.²⁴ In short, the aftermath of the recent decision looks like the following:²⁵

Count 1	CERCLA	Dismissed
Count 2	CERCLA	Dismissed

21. Jess M. Kane, *Analysis of the Law Concerning the Illinois River Watershed Litigation*, AGRIC. L. UPDATE (AALA, Brownsville, Or.), March 2009, at 1 (citation omitted).

22. *Oklahoma v. Tyson Foods, Inc.*, 258 F.R.D. 472, 473-74 (N.D. Okla. 2009).

23. *Id.* at 484.

24. *See id.*

25. *See id.* at 473-74, 484.

Count 3	SOLID WASTE DISPOSAL ACT	Civil Penalties & Injunction Available
Count 4	OKLAHOMA'S LAW OF NUISANCE	Damages Dismissed; Injunction Granted
Count 5	FEDERAL COMMON LAW OF NUISANCE	Damages Dismissed; Injunction Granted
Count 6	OKLAHOMA'S LAW OF TRESPASS	Damages Dismissed; Injunction Granted
Count 7	STATE ENVIRONMENTAL AND AGRICULTURAL STATUTES AND REGULATIONS	Civil Penalties & Injunction Available
Count 8	STATE ENVIRONMENTAL AND AGRICULTURAL STATUTES AND REGULATIONS	Civil Penalties & Injunction Available
Count 9	DISMISSED BY STATE MOTION	Dismissed
Count 10	RESTITUTION AND DISGORGEMENT UNDER STATE COMMON LAW OF UNJUST ENRICHMENT	Dismissed

This greatly impacts the Tyson litigation because, by eliminating the damages from the federal laws, the court's decision has destroyed much of the motivation and incentive for various parties to take part in the litigation. Such setbacks undermine the momentum of the litigation, because the lawyers listed as counsel in the opinion will no longer be able to claim any contingency fees from all the work they put into winning the suit. Further, the main areas where litigation can still find redress are under state law remedies, and under the state laws addressed in this Article, the damages that can be awarded are minimal.

II. OVERVIEW OF DEVELOPMENTS AND PLAYERS

A. *The Oklahoma Attorney General and Governor*

To understand the current litigation, it is essential to discuss the Attorney General and Governor. As political figures, both are responsible for making decisions not only based on the law, but also for their constituencies due to the realities of political office. While primarily this Article will discuss the Attorney General, it is equally important to mention the importance that the Governor has in the IRW dispute as the head of the State of Oklahoma, as provided through powers listed in the Oklahoma Constitution.²⁶

Both of these positions are elected by the people of the State of Oklahoma. Thus, environmental policy and enforcement priorities can change when a new Attorney General or Governor comes into power. Both of these elected officials have played an important role in the poultry industry of Oklahoma by setting priorities and determining the strategy to meet environmental goals for the IRW. At the simplest level, the Governor is the head of state and sets policy, while the Attorney General enforces the laws.

The Attorney General is the state's attorney and is responsible for enforcing the laws of the State of Oklahoma. Attorney General Drew Edmondson, who comes from a strong political family in Oklahoma,²⁷ was elected Attorney General in 1994 as a candidate of the Democratic Party.²⁸ He has been elected to three consecutive terms thereafter.²⁹ Attorney General Edmondson has been an active force in Oklahoma by enforcing the laws of the State of Oklahoma,³⁰ and

26. See, e.g., OKLA. CONST. art. VI, §§ 1-2, 6-14.

27. Attorney General Edmondson's older brother James Edmondson is currently the Vice-Chief Justice of the Oklahoma Supreme Court. See generally The Supreme Court of the State of Oklahoma, Chief Justice James E. Edmondson, District No. 7, <http://www.oscn.net/oscn/schome/Edmondson.htm> (last visited Sept. 15, 2010). His father, Ed Edmondson, was a former U.S. Congressman, and he is a nephew of former U.S. Senator and Governor of Oklahoma J. Howard Edmondson. See generally Biographical Directory of the U.S. Congress, Edmondson, Edmond Augustus, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=E000054> (last visited Sept. 15, 2010); Okla. Dep't of Libraries Online, Governor James H. Edmondson, <http://www.odl.state.ok.us/oar/governors/Edmondson.htm> (last visited Sept. 15, 2010).

28. Okla. Office of the Attorney General, About the AG, <http://www.oag.state.ok.us/oagweb.nsf/profile.html> (last visited Sept. 15, 2010).

29. *Id.*

30. Democratic Attorney General Drew Edmondson sued former Republican Governor Frank Keating, successfully arguing that the Governor could not change the structure of the cabinet without approval from the legislature. *Keating v. Edmondson*, 2001 OK 110, 37 P.3d 882, 885.

in June of 2009, he announced his candidacy for Governor of Oklahoma.³¹ A key Oklahoma political figure, Attorney General Edmondson has been the driving force behind the enforcement and accountability of the poultry industry's litter disposal in Oklahoma and has taken a strong stance on the importance of the IRW.

The Governor is the state's chief executive of the Oklahoma executive branch of government. Governor Brad Henry was elected to office in 2002 as a Democrat and reelected in 2006.³² The Governor has many responsibilities, but most importantly for the poultry industry, the Governor sets the policy and direction of government agencies and appoints the heads of state agencies.³³ The heads of the agencies are then in charge of making sure that the Governor's policy vision is carried out and implemented in a way that will meaningfully achieve the goals that have been set.

B. *Special Interest Groups*

Special interest groups play an important role in environmental policy at the local and national level. They represent both sides of the ideological and political spectrum and have a strong voice in legislatures. Alternatively, much of the recent actions involving environmental enforcement across the country are a result of private individuals policing habitual environmental polluters and turning them over to the appropriate authorities.³⁴ The Oklahoma Department of Environmental Quality (hereinafter Dep't of Env'tl. Quality) maintains a toll-free hotline, which is operated twenty-four hours a day and can be used to anonymously report environmental pollution.³⁵ Further, pro-farm lobbying groups have been successful for decades in exempting agriculture from any meaningful compliance with environmental laws at the federal and state levels. Only recently have these exemptions begun to be challenged through non-point source pollution.

31. Press Release, Edmondson 2010, It's Official! Edmondson Announces Run for Governor (June 10, 2009), *available at* http://www.edmondson2010.com/latest_news/details/2009-06-its-official-edmondson-announces-run-for-governor.

32. Governor Brad Henry, About, http://www.gov.ok.gov/gov_henry.php (last visited Sept. 15, 2010).

33. *See, e.g.*, OKLA. CONST. art. VI, § 8.

34. *See* Okla. Dep't of Env'tl. Quality, Environmental Complaints Program Impact, <http://www.deq.state.ok.us/ECLSnw/Complaints/Impact.htm> (last visited Sept. 15, 2010).

35. *Id.*

C. The Oklahoma Water Resources Board

The Oklahoma Water Resources Board (hereinafter Water Res. Bd.) was created by statute and given many duties and powers,³⁶ making it incredibly important to the Tyson litigation. Because water pollution is a growing concern in the IRW, it is very important how the Water Res. Bd. uses these delegated powers. In general, the Water Res. Bd. has the authority to do all things in its judgment that are necessary to the accomplishment of its duties.³⁷ Specifically, the Water Res. Bd. can make contracts within the scope of its authority,³⁸ negotiate contracts with the federal government for development, storage, and distribution of water resources,³⁹ “develop statewide and local plans to assure the best and most effective water use and control of water,”⁴⁰ promulgate rules,⁴¹ “institute and maintain, or to intervene in, any actions or proceedings in or before any court, board, commission or officer” in regards to water resources,⁴² establish application fees for permits to perform authorized functions,⁴³ “adopt, modify or repeal and promulgate standards of quality of the waters of the state and to classify such waters according to their best uses,”⁴⁴ review disputes involving water resources,⁴⁵ provide workshop training for board members of rural water districts,⁴⁶ and “accredit persons having requisite knowledge in floodplain management . . . and prevention of flood hazards.”⁴⁷ The Water Res. Bd. is required to divide the state into water districts in conformance with the drainage areas.⁴⁸ The Water Res. Bd. is also required to submit an annual report to the Governor that details the operations of its office.⁴⁹ Procedurally, the Oklahoma Administrative Procedures Act governs the Water Res. Bd. in the exercise of its powers.⁵⁰ It requires the Water Res. Bd. to “compile, index and publish all available data concerning

36. OKLA. STAT. tit. 82, §§ 1085.1-1085.2 (2010).

37. *Id.* § 1085.2(1).

38. *Id.* § 1085.2(2).

39. *Id.* § 1085.2(3).

40. *Id.* § 1085.2(4).

41. *Id.* § 1085.2(7).

42. *Id.* § 1085.2(8).

43. *Id.* § 1085.2(9).

44. *Id.* § 1085.2(16).

45. *Id.* § 1085.2(17).

46. *Id.* § 1085.2(18).

47. *Id.* § 1085.2(20).

48. *Id.* § 1085.3.

49. *Id.* § 1085.8.

50. Tit. 75, §§ 250-323; tit. 82, § 1085.10.

the water resources of⁷ the State of Oklahoma, like rainfall reports, stream flow, water reservoirs, etc.⁵¹

D. *The Oklahoma Department of Agriculture, Food, & Forestry*

Primarily, the Oklahoma Department of Agriculture, Food, and Forestry (hereinafter Department of Ag) is responsible for regulating and enforcing poultry laws in the State of Oklahoma. The Department of Ag enforces the existing state poultry laws and regulations through a dedicated team of experts from many divisions that inspect and keep records to make sure each poultry producer inside the State of Oklahoma is in compliance. The Department of Ag also tries to influence agriculture throughout Oklahoma by providing assistance to farmers to keep their operations in compliance, as well as literature, specialists, and training programs to ensure a future oriented relationship between both parties. Even though these goodwill gestures help create a cooperative culture in the Oklahoma agriculture sector, poultry operations must still meet certain obligations and legal requirements imposed by statute and interpreted through regulations.

When Oklahoma became a state, the drafters of the Oklahoma constitution sealed the power to govern agriculture solely with the Department of Ag.⁵² Therefore, unlike other Oklahoma government agencies,⁵³ the Department of Ag has its own in-house legal counsel that is responsible for enforcing the agriculture laws and regulations of the State of Oklahoma.⁵⁴ In reality though, much of the agricultural legal enforcement responsibilities are shared between the Department of Ag, the Dep't of Env'tl. Quality, and the Attorney General's Office. For example, the recent Tyson litigation involves both the Attorney General's Office and the Dep't of Env'tl. Quality. The Department of Ag has taken no part in the litigation even though it is technically the only Oklahoma agency with jurisdiction over agriculture.

The Tyson litigation has therefore created a jurisdictional tension over agricultural enforcement in Oklahoma. Further, the litigation completely ignores already-existing poultry laws and regulations and established enforcement mechanisms. The Attorney General's decision to sue the large poultry companies is an encroachment of the Department of Ag's powers under the Constitution, and completely disregards legal enforcement mechanisms that are already in place

51. Tit. 82, § 1085.11.

52. See OKLA. CONST. art. VI, § 31.

53. In many states the Attorney General's Office is solely responsible for enforcing the laws, and inside the Attorney General's Office there will typically be different divisions that are responsible for certain areas of law, such as agriculture.

54. See Okla. Dep't of Agric., Food & Forestry, Office of General Counsel, <http://www.oda.state.ok.us/ogc.htm> (last visited Sept. 15, 2010).

and specially designed to regulate the poultry industry. Such regulation is controlled by the Department of Ag through a complex series of statutes and regulations that are implemented through their various divisions.⁵⁵

III. POULTRY LAWS IN OKLAHOMA

Currently, and preceding the Tyson litigation, Oklahoma has numerous laws that regulate the poultry industry. Most are found in Title 2, Article 10 of the Oklahoma Statutes. However, Oklahoma has other non-agricultural laws that place additional requirements and restrictions on the poultry industry.⁵⁶ By statute, the State Board of Agriculture is the “official state agency in all matters related to the health of birds [and] hatching eggs,” which is where the agency derives much of its poultry authority.⁵⁷ The Department of Ag’s primary responsibility with regard to poultry is enforcing the acts that have been promulgated by the Oklahoma legislature, and promulgating regulations interpreting those statutes.

Poultry regulation in Oklahoma varies depending on several factors. In a nutshell, the largest poultry producers in the State of Oklahoma require a Concentrated Animal Feeding Operation (CAFO) license. Poultry operations that do not meet the size requirements for a CAFO are still required to register under the Oklahoma Registered Poultry Feeding Operations Act,⁵⁸ so essentially many more poultry operations are registered under this Act compared to the CAFO Act. This statutorily mandated registration and CAFO licenses provide the Department of Ag with a comprehensive list of the poultry industry in Oklahoma. Therefore, they are best positioned to create, enforce, and amend poultry laws in ways that achieve environmental compliance without crippling the poultry business. The Tyson litigation strategy has ignored examining these legal requirements inside the state and has instead focused on federal environmental laws.

55. The Department of Ag has twelve different divisions inside the agency including: Administrative, Agricultural Environmental Management Services, Animal Industry Services, Consumer Protection, Food Safety, Forestry Services, General Counsel, Laboratory, Market Development, Public Information, Statistics Services, and Wildlife Services. OKLA. ADMIN. CODE § 35:1-3-4 (2010).

56. *See, e.g.*, Oklahoma Small Business Regulatory Flexibility Act, OKLA. STAT. tit 75, §§ 501-506 (2010).

57. OKLA. STAT. tit. 2, § 10-2 (2010).

58. *Id.* § 10-9.3.

A. *Oklahoma Registered Poultry Feeding Operations Act*

Even though the most recent court decision in the Tyson litigation has effectively eliminated damages from the legal calculus, it does provide an opportunity to further understand already-existing laws like the Oklahoma Registered Poultry Feeding Operations Act (hereinafter RPFO Act).⁵⁹ The Tyson litigation was premised on forcing large companies to pay for the costs of polluting, but the litigation could have focused instead on registered poultry producers under RPFO Act. Every single poultry operation that meets the qualifications under the RPFO Act is required to register with the Department of Ag,⁶⁰ and thereafter has to comply with Oklahoma poultry laws. Suing the companies for pollution seems contrary to common sense, because every poultry applicator in Oklahoma has already had to provide detailed plans regarding their poultry operations and waste management practices “designed to protect the [Oklahoma] natural resources.”⁶¹ Moreover, all poultry waste pollution is exhaustively monitored by the Department of Ag,⁶² and individual poultry producers are fined and have their permits revoked if they do not comply.⁶³ Thus, based on the RPFO Act’s detailed list of individual Oklahoma poultry producers and the detailed plans they submit regarding their operations, all poultry producers in Oklahoma that are currently in business are in compliance with the RPFO Act and other Oklahoma laws, which regulate poultry litter waste to a level that is appropriate. If poultry litter is polluting the IRW, possibly a better approach would be to strengthen the RPFO Act by requiring more stringent plans from individual poultry producers, since they are the ones directly responsible for the poultry waste pollution.

Strengthening laws like the RPFO Act makes sense legally because it gives predictability and consistency to the producers, and it allows for incremental compliance. The RPFO Act is complex and does an excellent job of imposing stringent requirements on the poultry industry. Specifically, to operate a poultry operation in Oklahoma, it is essential that the producer meets the legal requirements set out in the RPFO Act.⁶⁴ It is only possible to become a commercial poultry operation upon satisfaction of some preliminary requirements,⁶⁵ and then

59. *See id.* §§ 10-9.1 to 10-9.12.

60. *Id.* § 10-9.3.

61. *Id.* §§ 10-9.1(B)(1), 10-9.5, 10-9.7.

62. *See id.* §§ 10-9.7, 10-9.10.

63. *See id.* § 10-9.11.

64. *Id.* §§ 10-9.1 to 10-9.12.

65. *Id.* § 10-9. “[The Department of Ag] shall not accept or approve any . . . registration . . . to be located within one (1) mile upstream of the Pensacola Project Boundary . . .” *Id.* The Pensacola Project Boundary and the Grand River Dam Authority are located in northeastern Oklahoma.

the producer must go through the necessary registration steps with the State Board of Agriculture.⁶⁶ This gives the Department of Ag the authority over entry into the Oklahoma poultry business.

The registration requirements state that it “shall be unlawful . . . to . . . operate a new poultry feeding operation without having first registered with [the Department of Ag],”⁶⁷ and existing operations were also required to register within six months after the Act became effective.⁶⁸ As stated previously, the RPFO Act makes an exception to the registration requirement if any poultry operation has a valid license by the Oklahoma Concentrated Animal Feeding Operations Act (hereinafter CAFO Act).⁶⁹ A poultry feeding operation is defined under the RPFO Act as a:

[F]acility where the following conditions are met:

- a. poultry have been, are or will be confined and fed or maintained for a total of forty-five (45) days or more in any twelve-month period,
- b. crops, vegetation, forage growth or post-harvest residues are not sustained in the normal growing season over any portion of the property or facility, and
- c. producing over ten (10) tons of poultry waste per year⁷⁰

The requirements listed above are important because they clearly describe what is considered a poultry operation needing regulation in Oklahoma. In response to demands to strengthen such regulation, the ten-ton per-year requirement is an excellent example of one area that could be strengthened to better address the poultry pollution problem in the IRW. For instance, instead of suing the poultry companies, the legislature could be lobbied or rulemaking proposed to amend the ten ton limit to a smaller amount, or all poultry operators, regardless of size, could simply be required to register in the hope of bringing more poultry operators under the RPFO Act registration and subsequently under the education and monitoring capabilities of the Department of Ag. This small change could have substantial impacts, because forcing smaller poultry producers to also register and comply with the RPFO Act could result in decreased phosphorous pollution.

If smaller poultry operations were brought into compliance, after initial registration each poultry operation would have to reregister annually in order to

66. *Id.* § 10-9.3.

67. *Id.* § 10-9.3(A).

68. *Id.* § 10-9.3(B).

69. *Id.* § 10-9.3(C).

70. *Id.* § 10-9.1(B)(20).

continue their operations.⁷¹ If there is common ownership of two or more poultry facilities, they would also be considered a single poultry facility and the amount of poultry litter would be calculated cumulatively.⁷² Additionally, if there was an increase of greater than ten percent of the original registered capacity, then the facility would be required to reregister.⁷³ The RPFO Act requires certain informational and procedural requirements to be satisfied for registration to be valid.⁷⁴ For example, the RPFO Act requires poultry feeding operations to submit addresses, a legal diagram of the facility, an Animal Waste Management Plan, a statement of ownership, an environmental history including awards and citations, and other records at the discretion of the Department of Ag.⁷⁵ Any false statements, false representations, omissions, or other tampering with the requirements would result in serious legal penalties and fines of up to ten thousand dollars.⁷⁶ All poultry feeding operators would also be required to attend educational courses on poultry waste handling.⁷⁷

“All poultry feeding operations [in the state] shall utilize Best Management Practices and shall meet the . . . rules promulgated by [the Department of Ag] pursuant to the [RPFO Act].”⁷⁸ The criteria for Best Management Practices includes, but is not limited to, not discharging poultry waste in the waters of the state, isolating poultry waste from surface drainage, not allowing any direct contact between poultry and waters of the state, requirements for handling, treatment, management, and removal of poultry waste, and special exceptions for emergency situations.⁷⁹

Additionally, “[e]very poultry feeding operation shall have an Animal Waste Management Plan,” in which minimum requirements must be met in order for a poultry feeding operation to be in compliance.⁸⁰ First, the poultry feeding operation has to have a description of waste handling procedures and equipment used.⁸¹ Further, the poultry feeding operation shall provide the “calculations and assumptions for determining land application rates,” the “nutrient analysis data for soil and poultry waste testing,” the legal description of the land involved, and the land application rates of poultry waste “based on the available nitrogen and

71. *Id.* § 10-9.4(A).

72. *Id.* § 10-9.4(B)(1)-(2).

73. *Id.* § 10-9.4(B)(3).

74. *Id.* § 10-9.5.

75. *Id.* § 10-9.5(B)(1)-(11).

76. *Id.* § 10-9.5(C).

77. *Id.* § 10-9.5(F).

78. *Id.* § 10-9.7(A).

79. *Id.* § 10-9.7(B).

80. *Id.* § 10-9.7(C).

81. *Id.* § 10-9.7(C)(1).

phosphorous content.”⁸² Procedures in the Animal Waste Management Plans must also ensure the handling and utilization of poultry waste complies with poultry waste storage rules promulgated by the Department of Ag.⁸³ Poultry waste application is strictly prohibited when the ground is saturated, when it is raining, or when the ground is frozen.⁸⁴ Discharge and runoff is unacceptable, so applying waste on land that is excessively erosive is prohibited.⁸⁵ “Records shall be maintained of all poultry wastes” on land owned, operated, or sold by the operator.⁸⁶ Also, any analysis that is required by the RPFO Act “shall be performed by a qualified environmental testing laboratory,”⁸⁷ and any other information that is deemed necessary by the Department of Ag shall also be submitted with the Animal Waste Management Plan.⁸⁸

Finally, to encompass poultry feeding operations even in non-nutrient limited watersheds and with non-nutrient-vulnerable groundwater, they are all required to complete soil testing at least once every three years to determine soil PH, poultry waste concentrations, application rate, and to have a plan for disposal of dead carcasses in accordance with the RPFO Act.⁸⁹

B. *Oklahoma Poultry Waste Transfer Act*

The above Act handles registration and operation of a poultry operation inside the State of Oklahoma, but Oklahoma has enacted other laws which attempt to provide incentives for transferring waste outside of certain areas. One example is the Oklahoma Poultry Waste Transfer Act which tries to attack the problem of what to do when chicken waste begins to pile up.⁹⁰ The Oklahoma Poultry Waste Transfer Act’s main purpose is “to encourage the transfer of poultry waste out of designated nutrient-limited watersheds and nutrient-vulnerable groundwater as designated in the most recent Oklahoma’s Water Quality Standards.”⁹¹

A nutrient-limited watershed is “a watershed of a water body which is designated as ‘nutrient-limited’ in the most recent Oklahoma’s Water Quality

82. *Id.* § 10-9.7(C)(2)-(5).

83. *Id.* § 10-9.7(C)(6)(a).

84. *Id.* § 10-9.7(C)(6)(b).

85. *Id.* § 10-9.7(C)(6)(c)-(d).

86. *Id.* § 10-9.7(C)(7).

87. *Id.* § 10-9.7(C)(8).

88. *Id.* § 10-9.7(C)(9).

89. *Id.* § 10-9.7(D)-(F).

90. Oklahoma Poultry Waste Transfer Act, OKLA. STAT. tit. 2, §§ 10-9.13 to 10-9.15 (2010).

91. *Id.* § 10-9.13(A).

Standards,⁹² and a nutrient-vulnerable groundwater is “groundwater which is designated ‘nutrient-vulnerable’ in the most recent Oklahoma’s Water Quality Standards.”⁹³ These areas are sensitive and the Act is attempting to encourage the transfer of poultry waste to other less sensitive areas.

Under the Act, the Department of Ag is required to “develop a plan to encourage the transfer of poultry waste out of designated nutrient-limited watersheds and nutrient-vulnerable groundwater as designated by the most recent Oklahoma’s Water Quality Standards.”⁹⁴ The first premise of the Act creates the Poultry Waste Transfer Fund, which is severely restricted to use only in implementing the Act.⁹⁵ Essentially, this fund provides the financial basis to encourage poultry producers to transfer poultry waste outside of the sensitive areas. Next, the Act has a reporting requirement to the Governor and Legislature on a three-year basis.⁹⁶ This section is important because the three-year reporting requirement is comparable to the National Environmental Policy Act (NEPA),⁹⁷ in that it requires those involved to detail and reflect on their business operations’ effect on the environment so that improvements can be identified.

Essentially, the main goal of this Act is the “transfer of poultry waste out of designated environmentally sensitive watersheds” in order to help reduce the amount of pollution and phosphorus in specified areas.⁹⁸ In terms of the Tyson litigation, this Act reinforces the preexisting state system of laws and regulations designed to address the problem of poultry pollution through a comprehensive system of registration, enforcement, and transfer of waste away from sensitive areas. It also provides another example of a potential restriction that could be amended to decrease pollution. For example, the State of Oklahoma could strengthen this Act by providing a citizen complaint provision or increased monetary incentives for poultry producers to transfer their wastes to other areas.

C. *The Oklahoma Waste Applicators Certification Act*

Oklahoma state law allows poultry waste to be deposited by certified waste applicators. The RPFO Act defines a certified poultry waste applicator as “a person who has been certified by the Board to land apply poultry waste and

92. *Id.* § 10-9.1(B)(17).

93. *Id.* § 10-9.13(B)(18).

94. *Id.* § 10-9.13(B).

95. *Id.* § 10-9.14.

96. *Id.* § 10-9.15.

97. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (2006).

98. OKLA. STATE SENATE, LEGISLATIVE SUMMARY: AGRICULTURE & RURAL DEVELOPMENT (1998), available at http://www.oksenate.gov/publications/legislative_summary/LegisRevu98.dir/lr98agri.html.

includes a commercial poultry waste applicator and a private poultry waste applicator.⁹⁹ The RPFO Act defines a commercial poultry waste applicator as “any person who engages in commercial land application of poultry waste.”¹⁰⁰

It is important to distinguish the differences between a commercial and private poultry waste applicator. For instance, “[a]ny farmer while working for a neighbor in agricultural production, and not advertising, nor holding himself or herself out to be in the business of land applying poultry waste, shall not be classified as a commercial poultry waste applicator, but as a private poultry waste applicator.”¹⁰¹

The Oklahoma Poultry Waste Applicators Certification Act sets the standards to be applied to applicators, and fines and punishment that result for noncompliance.¹⁰² The Act requires poultry producers in Oklahoma to obtain a poultry waste applicators certificate in order to lawfully apply poultry waste to land, or to “act, operate, or do business or advertise as a commercial poultry waste applicator.”¹⁰³ The Act makes it a misdemeanor punishable by a fine of up to five thousand dollars for any person to do business or advertise without such certification.¹⁰⁴ This portion of the Act could be amended to make state poultry regulation more stringent by increasing monetary penalties. If monetary penalties were increased it would give farmers greater incentive to comply with the laws, and the fines collected would give the Department of Ag more money to enforce poultry laws in general. The fines collected could also contribute to the poultry waste transfer fund and provide greater monetary incentives for poultry operators to dispose of waste in non-sensitive areas.

The certifications are approved by the Department of Ag, remain in effect for five years for private applicators, one year for commercial applicators, and can be renewed by application.¹⁰⁵ Before any poultry applicator can apply poultry waste to land they “shall obtain the most recent soil and poultry waste tests.”¹⁰⁶ “Land application of poultry waste in a non-nutrient-limited watershed and non-nutrient-vulnerable groundwater shall not be made” at a rate above the USDA Natural Resources Conservation Service Waste Utilization Standards.¹⁰⁷ Further, the Department of Ag has the authority to “promulgate rules pursuant to the Administrative Procedures Act” in order to “prohibit the land application of

99. Tit. 2, § 10-9.1(B)(5).

100. *Id.* § 10-9.1(B)(6).

101. *Id.*

102. *Id.* §§ 10-9.16 to 10-9.21.

103. *Id.* § 10-9.17(A).

104. *Id.*

105. *Id.* § 10-9.17(E).

106. *Id.* § 10-9.19(1).

107. *Id.* § 10-9.19(2).

poultry waste in nutrient-limited watersheds and nutrient-vulnerable groundwater based upon lower soil phosphorous levels than are allowed in this section for non-nutrient-limited watersheds and non-nutrient-vulnerable groundwaters.¹⁰⁸ Land application of poultry waste at all times is required to be in compliance with the Animal Waste Management Plan and the Conservation Plan.¹⁰⁹ Most importantly for this Article, the Department of Ag is given the authority to administer and enforce the Act, negotiate reciprocal agreements with other states and the federal government, and conduct on-site testing of applied poultry waste.¹¹⁰ The authority given to the Department of Ag is significant because it suggests that entity is better equipped to handle the poultry waste regulation and enforcement than the Oklahoma Attorney General. Demonstrably, the Department of Ag can revoke certification if at any time the poultry applicator violates the Act, or was found to have made false statements during the application process.¹¹¹ Further, in order to get certification the poultry producer must meet the educational requirements.¹¹² These educational requirements are strictly enforced

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108. *Id.* § 10-9.19(3).
109. *Id.* § 10-9.19a(1) to (2).
110. *Id.* § 10-9.20.
111. *Id.* § 10-9.21.
112. OKLA. ADMIN. CODE § 35:17-7-8 (2010).

- (a) All certified poultry waste applicators shall attend educational courses on poultry waste handling provided by Oklahoma Cooperative Extension Service.
- (b) All poultry waste applicators shall obtain no less than nine (9) hours of education in the first year and no less than three (3) hours each year thereafter.
- (c) The Oklahoma Cooperative Extension Service shall develop the educational training course to aid in certification.
- (1) Curricula for the training course shall include the Oklahoma Cooperative Extension Service Waste Management Facts series and record books or their current equivalent.
- (2) Courses for poultry waste management shall include the following topics:
- (A) Environmental process relevant to protecting water quality in poultry production;
- (B) Basic handling systems to manage poultry waste from all types of poultry operations;
- (C) Nutrient management, including sampling procedures, application rate determination, equipment calibration, and record keeping systems;
- (D) Relevant laws and rules applicable to poultry waste management in the State of Oklahoma; and
- (E) Any other related subject as determined by Oklahoma Cooperative Extension Service in consultation with the Department.
- (d) At the completion of each course, the certified poultry waste applicator shall receive a certification verifying completion. The certificates shall be kept on site for five (5) years.
- (e) Failure to obtain the prerequisite and annual training and education as provided in this subsection shall be deemed a violation of the Oklahoma Poultry Waste Applicators Certification Act.
- (f) An operator may carry forward up to three (3) education hours to the next calendar year.

by the Department of Ag, and failure to comply can result in substantial fines and injunctions.¹¹³

Applicator certifications are reviewed and approved by the Department of Ag as mentioned above, and after being distributed, the Department of Ag monitors the applicators to make sure they operate according to the laws of the State of Oklahoma.¹¹⁴ Because all waste applicators that maintain their certification in Oklahoma are operating in accordance with Oklahoma law, Attorney General Edmondson's decision to file his claim under CERCLA was designed to effectively circumvent Oklahoma laws and hold an industry accountable for actions that were legal under state law.

D. Educational Training Programs Act

Educational training programs are a fundamental part of the poultry laws and regulations in the State of Oklahoma. These programs legally require poultry operators and applicators to maintain educational training to make sure that they are in compliance with the state's environmental goals with respect to poultry. Designed and taught by specialists, the educational training programs stem from the legislative assertion that it is "public policy to maintain and protect the high quality of the surface and groundwater of this state for present and future uses."¹¹⁵ The Act then goes on to state:

Because of the potential threat of water contamination it is imperative for the protection of the public health and safety of the citizens of this state, that educational train-

(g) All operators shall obtain the required education no later than December 31st of each calendar year.

(h) Any certified poultry waste applicator who has completed education requirements of the Oklahoma Registered Poultry Feeding Operations Act shall be deemed to be in compliance with the education requirements of this section.

Id.

113. See generally Okla. Coop. Extension Serv., Poultry Waste Management Website, <http://www.poultrywaste.okstate.edu/> (last visited Sept. 15, 2010) (providing poultry waste management training details). Generally, the continuing education class system holds classes at various locations throughout the State of Oklahoma. *Id.* A poultry producer is required to attend a certain hourly minimum of classes at any location in the state. See *id.* Attendance is documented by a roll sheet, which is then turned over to the Department of Ag to record for the producers' individual hourly requirement. As the yearly deadline approaches, the Department of Ag will tally the hours; anyone who did not meet their requirements is fined under the Act and has to make up the hours missed the previous year as well as the hours for the new year. Fines usually start small and begin to snowball as more hours are missed.

114. See tit. 2, § 10-9.20(C).

115. *Id.* § 10-9.22(A)(1).

ing programs on poultry waste management consistent with this act be made available and provided to operators of poultry feeding operations and land applicators of poultry waste.¹¹⁶

The Act requires the Oklahoma Cooperative Extension Service to provide the Secretary of the Environment with a yearly written report of educational activities involving poultry operators and waste applicators.¹¹⁷ The report is required to include the number of operators and applicators who enrolled in courses in the first year, successfully completed those courses, enrolled in courses required in subsequent years, and successfully completed those courses.¹¹⁸ The Act also creates an “Agriculture Regulation Revolving Fund,” which is a continuing fund that consists of:

[F]ees and fines assessed on concentrated animal feeding operations, registered poultry feeding operations, and any other monies deposited . . . pursuant to law. All monies accruing to the credit of the fund are [to be used by the Department of Ag] for the regulation, enforcement, and administration of the State Department of Agriculture Water Quality Division.¹¹⁹

As the above description indicates, a comprehensive act mandates that applicators receive educational training that the State of Oklahoma has deemed appropriate in an attempt to ensure legal compliance with their state law responsibilities. Even with such strict requirements, the Attorney General still filed suit against the poultry industry.

E. *Eucha-Spavinaw Management Act*

The Eucha-Spavinaw Management Act provides an interesting glimpse of what may be upcoming in the Tyson litigation. Following the conclusion of the *City of Tulsa* case,¹²⁰ the Oklahoma legislature passed the Eucha-Spavinaw Management Act.¹²¹ The primary reasons for the Act were to codify the settlement and the phosphorous index that was created by the court during the litigation.¹²² The phosphorous-risk index was created by a team from Oklahoma State University and the University of Arkansas “to govern the conditions under which

116. *Id.* § 10-9.22(A)(2).

117. *Id.* § 10-9.23.

118. *Id.*

119. *Id.* § 10-9.24.

120. *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003).

121. *See* tit. 2, §§ 10-10.1 to 10-10.5.

122. Press Release, Water Protections Become Law (June 7, 2007), available at <http://www.ok-littermarket.org/upload/Water%20Protections%20Become%20Law.pdf>.

animal waste or fertilizer may be applied to the watershed.”¹²³ The stated purpose of the Act is “to preserve and promote the purposes and agreements of the parties set forth in the Settlement Agreement,”¹²⁴ but it only applies “to all persons utilizing poultry waste for land application purposes in the Eucha-Spavinaw Watershed.”¹²⁵ The Department of Ag administers and enforces the Act and is authorized to accept gifts or donations of property or money to carry out the provisions of the Act.¹²⁶ “The land application rate for all poultry waste in the Eucha-Spavinaw Watershed shall be specified in the animal waste management plan and shall follow the requirements and limitations of the applicable Eucha-Spavinaw phosphorous index (PI).”¹²⁷ Further, the Act requires that soil testing in the Eucha-Spavinaw Watershed shall be conducted as required under the RPFO Act for nutrient-limited watersheds, and that records shall be maintained according to the RPFO Act as well.¹²⁸

F. *The Oklahoma Scenic Rivers Act*

The Oklahoma Scenic Rivers Act (hereinafter Scenic Rivers Act) is the primary statutory authority for the Oklahoma Scenic Rivers Commission (hereinafter Scenic Rivers Comm’n).¹²⁹ The main objectives of the Act are (1) to designate certain areas in Oklahoma as “scenic river areas,”¹³⁰ (2) to promote the conservation, development, and public use of such areas by providing authority to the Scenic Rivers Comm’n, the Oklahoma Wildlife Conservation Commission (hereinafter Wildlife Conserv. Comm’n), and the Oklahoma Tourism and Recreation Department (hereinafter Tourism & Recreation Dep’t),¹³¹ (4) to prohibit and penalize certain acts that would deteriorate the quality of the “scenic river area,”¹³² (5) to involve the public in designating additional “scenic river areas” through specific notice,¹³³ and (6) to provide for restoration of impaired watersheds in the “scenic river areas.”¹³⁴

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123. *Id.*
124. Tit. 2, § 10-10.3(A).
125. *Id.* § 10-10.3(B).
126. *Id.* § 10-10.4.
127. *Id.* § 10-10.5(A).
128. *Id.* § 10-10.5(B).
129. Scenic Rivers Act, OKLA. STAT. tit. 82, §§ 1451-1471 (2010).
130. *See id.* § 1452.
131. *Id.* §§ 1454, 1460.
132. *See, e.g., id.* § 1455.
133. *See id.* § 1458.
134. *See id.* § 1457.

The first step for a water body to be protected under the Scenic Rivers Act is to be designated as a “scenic river area.”¹³⁵ This requires a two-step process, in which the water body must be a “stream or river and the public use and access areas located within the area designated.”¹³⁶ It must also be found by the Oklahoma legislature to “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.”¹³⁷

The statute places additional procedural requirements that must occur before a “scenic river area” can be presented to the legislature for approval.¹³⁸ To meet these procedural requirements, the Scenic Rivers Comm’n and Tourism & Recreation Dep’t shall:

[G]ive reasonable notice in newspapers of general circulation in every county in which land and streams are situated that would be affected by the proposed “scenic river area”. The notice shall include a map or drawing of the proposed area and shall give the time and place of a meeting in each county affected, at which time and place the Commission shall present their plans for the proposed area.¹³⁹

Currently, there are five areas that are listed under the Act as “scenic river areas.”¹⁴⁰ Pointedly, parts of the Illinois River are listed as protected “scenic river areas” under the Act.¹⁴¹

135. *See id.* § 1452.

136. *Id.* § 1452(C).

137. *Id.* § 1452(A).

138. *Id.* § 1458.

139. *Id.*

140. *Id.* § 1452(B).

1. The Flint Creek and the Illinois River above the confluence of the Barren Fork Creek in Cherokee, Adair and Delaware Counties;
2. The Barren Fork Creek in Adair and Cherokee Counties from the present alignment of Highway 59 West to the Illinois River;
3. The Upper Mountain Fork River above the 600-foot elevation level of Broken Bow Reservoir in McCurtain and LeFlore Counties;
4. Big Lee’s Creek, sometimes referred to as Lee Creek, located in Sequoyah County, above the 420-foot MSL elevation, excluding that portion necessary for a dam to be built in the State of Arkansas with a crest elevation of no more than the 420-foot MSL elevation. The Oklahoma Water Resources Board shall make such classifications, designations or adjustments to Oklahoma’s water quality standards as required to allow the impoundment of water by said dam; and
5. Little Lee’s Creek, sometimes referred to as Little Lee Creek, located in Adair and Sequoyah Counties, beginning approximately four (4) miles east-southeast of Stilwell, Oklahoma, and ending at its conjunction with Big Lee’s Creek approximately two (2) miles southwest of Short, Oklahoma.

After a water body is designated as a “scenic river area,” then specific legal obligations and protections are triggered.¹⁴² First, the Act requires that “[t]he stream or river in the area designated be preserved in its free-flowing condition,”¹⁴³ which essentially gives the Scenic Rivers Comm’n the legal authority to prevent activities that would affect the “free-flowing condition.” Second, the Act precisely states, “[t]he stream or river shall not be impounded by any large dam or structure except as specifically authorized by the Legislature.”¹⁴⁴ This language is particularly noteworthy, because “structure” is not clearly defined in the statute or case law. Under certain facts, boat docks, industrial fishing nets, house boats, bird watching stands, etc., could theoretically qualify as preventing the “free-flowing condition.”

Next, because a water body is listed under the Scenic Rivers Act, the Scenic Rivers Comm’n, Wildlife Conserv. Comm’n, and Tourism & Recreation Dep’t are responsible:

[T]o assist in the public use and enjoyment of such areas, [by] acquir[ing], develop[ing], and maintain[ing] public access points, easements or park areas in or near “scenic river areas”. Such acquisitions shall be by private treaty only, and the use of the power of eminent domain for these purposes is specifically prohibited by the Scenic Rivers Act.¹⁴⁵

Moreover, the property rights of private landowners in “scenic rivers areas” are unaffected, and any unauthorized use by the public or state is trespass.¹⁴⁶

Coinciding with “public use” is littering by people using a “scenic river area,” so the Scenic Rivers Act sets forth specific requirements for littering.¹⁴⁷ First, the Act lists littering as “one of the most immediate threats” to a “scenic river area.”¹⁴⁸ Next, the Scenic Rivers Act gives power to police, government officials, and even landowners to file a complaint to enforce its restrictions.¹⁴⁹ The last two parts of Section 1455 address specific acts that constitute littering and thereby violate the Scenic Rivers Act.¹⁵⁰ Both parts essentially prohibit deliberate littering and use of glass containers in any “scenic river area.”¹⁵¹ Howev-

Id.

141. *Id.* § 1452(B)(1)-(2).
142. *See id.* § 1453.
143. *Id.* § 1453(A)(1).
144. *Id.* § 1453(A)(2).
145. *Id.* § 1454(C).
146. *Id.* § 1456.
147. *Id.* § 1455.
148. *Id.* § 1455(A).
149. *Id.* § 1455(B).
150. *Id.* § 1455(C)-(D).
151. *Id.*

er, subsection C is interesting because it states, “Any person who deliberately places, throws, drops, deposits or discards any garbage, trash, waste, rubbish, refuse, debris or other deleterious substance on or near a scenic river area shall be subject to the provisions of Section 1761.1 of Title 21 of the Oklahoma Statutes.”¹⁵² The language “deliberately . . . deposits or discards . . . on or near a scenic river” is interesting in regards to the Tyson litigation,¹⁵³ because deposits of chicken waste onto farmland could be seen as a violation and enforceable by public interest groups and private landowners. Those groups could then seek penalties under the provisions of Section 1761.1 of Title 21 of the Oklahoma Statutes.¹⁵⁴ However, if liability were to result from this portion of the Act, it would have to navigate around Section 1464, which states:

A. Nothing in the Scenic Rivers Act shall be construed to unduly restrict or adversely affect the use of property within the jurisdiction of any Scenic Rivers Commission for farming, ranching, forestry, silviculture and other agricultural uses so long as they are not inconsistent with the purposes of the Scenic Rivers Act.

B. Present farming, ranching, forestry, silviculture and other agricultural uses and practices, including existing building and replacement structures, are hereby exempt from the provisions of any Scenic Rivers Commission.

C. The Scenic Rivers Act shall not be construed in any way to affect existing rights between a landowner and utility or pipeline companies.¹⁵⁵

Thus, in order to challenge poultry waste in terms of the Scenic Rivers Act, a person would have to first show that the action is “inconsistent” with the Act,¹⁵⁶ and that poultry waste application does not fit with “[p]resent farming . . . [or] other agricultural uses and practices” that are exempt from the Scenic Rivers Act.¹⁵⁷ This would be difficult to show, because one would have to show poultry waste application not as fertilizer for farming, but rather as the dumping of discarded unbeneficial waste. Additionally, this kind of hypothetical challenge would only be possible in areas immediately around “scenic river areas” where runoff is possible. If poultry waste could be found to be littering, “any person who willfully violates any rule or order issued pursuant to the Scenic Rivers Act” that results in a conviction shall be guilty of a misdemeanor.¹⁵⁸

152. *Id.* § 1455(C).

153. *Id.*

154. *Id.*

155. *Id.* § 1464.

156. *Id.* § 1464(A).

157. *Id.* § 1464(B).

158. *Id.* § 1467.

G. *Oklahoma Water Quality Standards*

Most importantly, the Water Res. Bd. has the authority to promulgate Oklahoma Water Quality Standards (hereinafter WQS), “which establish classifications of uses of waters of the state, criteria to maintain and protect such classifications, and other standards or policies pertaining to the quality of such waters.”¹⁵⁹ The Water Res. Bd. shall “maintain and protect the quality of the waters of the state.”¹⁶⁰ The rules promulgated by the Water Res. Bd. may be amended to upgrade the quality of waters.¹⁶¹ However, the statute only allows the Water Res. Bd. to downgrade the WQS for a particular water body if the Federal Water Pollution Control Act allows it.¹⁶² The Water Res. Bd. shall not downgrade WQS in “scenic river areas.”¹⁶³ When the Water Res. Bd. adopts new WQS they are required to conduct public hearings and follow the Administrative Procedures Act.¹⁶⁴ Further, when the Water Res. Bd. promulgates new WQS, or any modifications to existing WQS, they shall give reasonable time for persons discharging waste into waters to comply.¹⁶⁵ Importantly, any discharge that is in accord with the standards set by the Water Res. Bd. through WQS shall not be deemed to be pollution.¹⁶⁶ Finally, any WQS promulgated by the Water Res. Bd. shall designate “[w]atersheds that are nutrient-limited . . . and . . . [g]roundwaters that are nutrient-vulnerable.”¹⁶⁷

H. *Recent Changes to Oklahoma Nuisance Law*

One of the complaints filed by the Attorney General was grounded under state nuisance law.¹⁶⁸ However, the Oklahoma legislature had recently amended the requirements for proving a nuisance under Oklahoma law. As a starting point, a nuisance in Oklahoma is defined as follows:

A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:

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159. *Id.* § 1085.30(A)(1).
 160. *Id.* § 1085.30(A)(2).
 161. *Id.* § 1085.30(A)(3).
 162. *Id.* § 1085.30(A)(4)(a).
 163. *Id.* § 1085.30(A)(4)(b).
 164. *Id.* § 1085.30(B)(1).
 165. *Id.* § 1085.30(C)(2).
 166. *Id.* § 1085.30(C)(3).
 167. *Id.* § 1085.30a.
 168. *See, e.g.,* *Oklahoma v. Tyson Foods, Inc.*, 285 F.R.D. 472, 474 (N.D. Okla. 2009).

First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or

Second. Offends decency; or

Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or

Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.¹⁶⁹

The primary changes that will affect the IRW are those to the definition of what constitutes agricultural activities under the Act. The new changes in the Act went into effect on November 1, 2009, shown below in the bold italicized font.

Section 1.1. A. As used in this section:

1. "Agricultural activities" ***includes***, but *is* not limited to, the growing or raising of horticultural and viticultural crops, berries, poultry, livestock, ***aquaculture***, grain, mint, hay, dairy products and forestry activities. ***"Agricultural activities" also includes improvements or expansion to the activities provided for in this paragraph including, but not limited to, new technology, pens, barns, fences, and other improvements designed for the sheltering, restriction, or feeding of animal or aquatic life, for storage of produce or feed, or for storage or maintenance of implements. If the expansion is part of the same operating facility, the expansion need not be contiguous;***

2. "Farmland" ***includes***, but *is* not limited to, land devoted primarily to production of livestock or agricultural commodities; and

3. "Forestry activity" means any activity associated with the reforestation, growing, managing, protecting and harvesting of timber, wood and forest products including, but not limited to, forestry buildings and structures.

B. Agricultural activities conducted on farm or ranch land, if 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 effect on the public health and safety.

If that agricultural activity is undertaken in conformity with federal, state and local laws and regulations, it is presumed to be good agricultural practice and not adversely affecting the public health and safety.

C. No action for nuisance shall be brought against agricultural activities on farm or ranch land which has lawfully been in operation for two (2) years or more prior to the date of bringing the action. The established date of operation is the date on which an agricultural activity on farm or ranch land commenced activity. If the

169. Tit. 50, § 1.

physical facilities of the agricultural activity or the farm or ranch are subsequently expanded or new technology adopted, the established date of operation for each change is not a separately and independently established date of operation and commencement of the expanded activity does not divest the farm or ranch of a previously established date of operation.

D. In any action for nuisance in which agricultural activities are alleged to be a nuisance, and which action is found to be frivolous by the court, the defendant shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred in connection with defending the action, together with a reasonable amount for attorney fees.

E. This section does not relieve agricultural activities of the duty to abide by state and federal laws, including, but not limited to, the Oklahoma Concentrated Animal Feeding Operations Act and the Oklahoma Registered Poultry Feeding Operations Act.¹⁷⁰

The emphasis in the language explicitly exempting “improvements or expansion,” and prohibiting nuisance actions on facilities that have been in operation lawfully for more than two years is interesting in terms of the IRW, because it seems to strengthen the legal protection afforded to poultry producers. Therefore, facilities that are already in operation do not have to worry about expanding their facilities, because legally the changes provide a strong shield against nuisance claims. The practical effects of this law make it more imperative that poultry operators and poultry waste applicators ensure they are in compliance with existing laws and Department of Ag, Dep’t of Env’tl. Quality, and Water Res. Bd. regulations. Failure to keep up with permitting, licensing, and other legal obligations will make the particular facility not in lawful operation under the Act, which exposes poultry producers and applicators to state nuisance claims under the Act (assuming that it can be shown that the unlawful operation occurred during the first two years of operation and is still ongoing).¹⁷¹

Thus, any person that attempts to enter into the poultry production business will have to make sure that he meets every requirement at the outset, because failure to do so could have serious legal consequences. Most importantly, in terms of the Tyson litigation, Count Four will be much more difficult for the attorney general to prove,¹⁷² because as long as the poultry companies can show that they were originally in legal compliance, then there is a presumption against nuisance. Future actions may also be more difficult to prove, because expansions and technology are exempted from exposing poultry operations to nuisance

170. 2009 Okla. Sess. Laws 147 (amending OKLA. STAT. tit. 50, § 1.1 (1980)) (citations omitted).

171. Tit. 50, § 1.1(C).

172. See *Oklahoma v. Tyson Foods, Inc.*, 285 F.R.D. at 474 (listing Count Four as damages and injunctive relief under state nuisance law).

claims. Therefore, it may behoove the State of Oklahoma to consider creating a piece of legislation similar to the Eucha-Spavinaw law directed toward other specific areas of the IRW.

I. *The 2012 Oklahoma/Arkansas Agreement*

Near the end of 2003, the states of Oklahoma and Arkansas entered into an agreement that directs both states to work together with voluntary and mandatory requirements to reduce the phosphorus pollution from poultry waste and to achieve other water quality goals by 2012.¹⁷³ Specifically, in the 2003 agreement both Oklahoma and Arkansas agreed to “(1) [i]mprove water quality[,] (2) [r]educe phosphorus through control of both point and non-point sources[,] (3) [d]evelop coordinated strategies to meet water quality goals in the watersheds[,] and] (4) [d]evelop [a] Watershed Plan according to EPA Clean Water Act (CWA) 319 guidance.”¹⁷⁴ The agreement was largely in response to Oklahoma’s adoption of the first ever water quality standards for phosphorus for the Illinois River outlined as:

(2) Nutrients; numerical criterion applicable to waters designated Scenic Rivers. The thirty (30) day geometric mean total phosphorus concentration in waters designated “Scenic River” in Appendix A of this Chapter shall not exceed 0.037 mg/L. The criterion stated in this subparagraph applies in addition to, and shall be construed so as to be consistent with, any other provision of this Chapter which may be applicable to such waters. Such criterion became effective July 1, 2002 and shall be implemented as authorized by state law through Water Quality Standards Implementation Plans and other rules, permits, settlement agreements, consent orders, compliance orders, compliance schedules or voluntary measures designed to achieve full compliance with the criterion in the stream by June 30, 2012.¹⁷⁵

The above rule was adopted by the Oklahoma Water Resources Board on July 1, 2002 and is to be achieved by June 30, 2012.¹⁷⁶ In the following year, 2004, both states agreed upon a monitoring proposal in which over seventeen state and federal agencies and many other specialists and academics took part in drafting.¹⁷⁷ The proposal was an impressive, comprehensive agreement that addressed serious issues with concrete planning and realistic ideas that created a winning solution for Oklahoma, Arkansas, and poultry producers. The agree-

173. JOINT ARKANSAS/OKLAHOMA SCENIC RIVER MONITORING PROPOSAL 2 (2004), *available at* http://www.owrb.ok.gov/studies/reports/reports_pdf/Scenic_River_Monitoring_Proposal.pdf, [hereinafter MONITORING PROPOSAL].

174. *Id.*

175. OKLA. ADMIN. CODE § 785:45-5-19 (2010).

176. *Id.*

177. MONITORING PROPOSAL, *supra* note 173, at 1.

ment even projected long term funds, years involved, and the amount of labor needed.¹⁷⁸ However, despite years of diligent work by thousands of highly capable and qualified professionals, millions of dollars, landmark agreements, substantial investments of time and energy, and painstaking negotiations between two states that have had a highly confrontational history over water quality, Attorney General Drew Edmondson decided to abandon all efforts and to take the initiative to use state funds to sue the poultry companies.

IV. THE TYSON LITIGATION AND ALTERNATIVES

A. *Using Existing Poultry Laws v. the Tyson Litigation*

The Tyson litigation is simply not worth all the hype and excitement. In fact, the litigation and legal policy developments seem to be needlessly competing against each other to see who can be the first to take credit for preserving the IRW. In many ways, the litigation is running contrary to the positive developments that have occurred inside Oklahoma over the past few years. The judge in the case recently limited the damages that could be awarded,¹⁷⁹ which seriously undercuts one of the primary justifications that Attorney General Edmondson put forth for why the litigation is important. Further, without big money settlements the litigation is really only delaying what the states of Oklahoma and Arkansas have already agreed to in their 2012 joint agreement and the WQS standards set by the Water Res. Bd. Therefore, this Article proposes that the focus of cleaning up the poultry litter pollution problem should be shifted to already-existing laws and phase-in agreements giving operations time to implement new regulations.

First, as discussed above, in order to be a poultry feeding operation under the RPFO Act, the operation must create an excess of ten tons of poultry litter. This standard could be lowered, requiring more poultry producers to be covered under the RPFO Act and subsequently come under the jurisdiction and enforcement of the Department of Ag. This would be beneficial, because it would focus directly on poultry feeding operations, and would apply regardless of concentrated feeding operation status. Further, by slowly bringing smaller poultry feeding operations into compliance under the Act, the Water Res. Bd. would be able to simultaneously monitor water quality in the IRW and determine the exact effect that the increased compliance has on the phosphorus pollution. This would allow already-established methods to be used, allow state administrative agencies to use their expertise, and save money.

178. *See id.* at 7-9.

179. *Oklahoma v. Tyson Foods, Inc.*, 258 F.R.D. 472, 484 (N.D. Okla. 2009).

The major criticism to this idea will be that expanding the definition of poultry feeding operations would not affect the larger pollution problem, since it would only bring a smaller amount of the pollution into regulation. To address that criticism, the Oklahoma legislature could amend the poultry statutes to require the Department of Ag to maintain stricter land application rates, and simultaneously make obtaining a disposal permit more difficult through higher cost and educational requirements for poultry applicators. This would address the poultry feeding operations already under regulation by reducing the amount of poultry waste that can be applied to the land. Additionally, making it more difficult to obtain a disposal permit would raise the cost of using poultry waste, which in turn would force poultry producers to find alternative disposal methods. Such alternative disposal methods include burning the waste and offering state tax incentives to poultry operators who meet their requirements.

Second, another modification on the state level would be to allow the Water Res. Bd. to continue setting the WQS for water areas in the IRW. The Oklahoma Attorney General did not even give the new 2012 WQS for the IRW a chance to be implemented before filing the lawsuit against Tyson Foods. This was a mistake because the litigation has been costly to Oklahoma taxpayers, and furthermore, the EPA approved the WQS as sufficient under the Clean Water Act. Recall that under Oklahoma state law, once the Water Res. Bd. sets a WQS for an area classified as a “scenic river area,” it is not permitted to downgrade the WQS for that region regardless if the goals are met or not.¹⁸⁰ This is a strong incentive to use the WQS as means to ensure more protection to the IRW, because by law it has to eventually meet the requirements.

Third, the agreements reached between Oklahoma and Arkansas were meaningful and well planned. The lawsuit was filed a little under a year after the final agreement between the two states was reached. Practically, this was not enough time to attempt any meaningful compliance through the agreements or to even tell whether they would work. From a business standpoint, it was wasteful to file the lawsuit against the poultry companies, because both states had already invested significant amounts of time and money into reaching mutually beneficial agreements to solve their respective water problems. Add the Oklahoma legislature’s adoption of the court-created phosphorus index and settlement agreement in the *City of Tulsa* case into law to the fact that the 2012 Illinois River phosphorus standards have yet to be met,¹⁸¹ and it appears that the litigation was commenced prematurely.

180. OKLA. STAT. tit. 82, § 1085.30(A)(4)(b) (2010).

181. Tit. 2, § 10-10.3(A); see MONITORING PROPOSAL, *supra* note 173, at 2.

Fourth, after the *City of Tulsa* case, the Oklahoma legislature responded by enacting the Eucha-Spavinaw Management Act.¹⁸² This was an interesting development, because the court holding in a particular case was adopted as statutory law for a particular area of Oklahoma.¹⁸³ A possible solution to the current problem of poultry pollution could be to develop tailored pieces of legislation for particular regions as was done in the Eucha-Spavinaw Management Act. This would have the benefit of concentrating on problematic areas, while at the same time allowing the poultry industry to grow in areas other than those targeted as sensitive. For example, the Oklahoma legislature could tailor an act that specifically addresses the areas of the Illinois River that are considered valuable. Doing this would prevent the “gung ho” attack on the entire poultry industry that Attorney General Edmondson has adopted, and replace it with phased-in areas where poultry waste application is permissible and other areas where it is not permissible.

Fifth, the Water Res. Bd. could further ratchet up the discharge standards in waters of the state. This is probably the most unreasonable suggestion, since the Water Res. Bd. has already done an excellent job of setting WQS for the Illinois River and other areas. However, it is an option for consideration.

Finally, it should be remembered that if the amount of money expended on the current litigation had been redirected towards advancing the goals of already-existing regulations, agreements, and laws, the agencies involved could have conducted further research and studies to determine how to more appropriately handle the poultry litter pollution dilemma. Thus, one solution would be to cut off the litigation funds and reallocate them to the state programs.

V. CONCLUSION

The Tyson litigation has complicated a complex problem by creating interstate jurisdictional disputes and not allowing existing state laws to be enforced upon an industry within Department of Ag’s jurisdiction. This is troublesome because legally the poultry operators inside Oklahoma are in compliance with state laws. Trying to redefine CERCLA to reach poultry litter is ignoring mechanisms that were created to give state agencies the authority to incrementally force environmental compliance over time. Also, Oklahoma and Arkansas have reached meaningful agreements on how to move forward regarding the pollution problem. Prolonged litigation would be worse than a negative ruling in the litigation, because it would stifle attempts inside of Oklahoma and Arkansas to strengthen and tailor already-existing environmental legislation and agreements.

182. Tit. 2, § 10-10.3(A).

183. *Id.*

A better course of action lies in upgrading and maintaining the laws and agreements in place for meaningful compliance. This would require all parties involved to take a cool-headed, realistic approach toward solving a decades-old problem. This approach would allow everyone who enjoys clean water, pristine lakes, and robust, healthy parks to contribute to a real plan aimed at achieving long term environmental goals in the IRW. One can only hope that common sense will prevail and the parties involved will find a solution that simultaneously attacks poultry litter pollution while also allowing the poultry industry to thrive inside of Oklahoma and Arkansas.