No. 133, ORIGINAL

In The
Supreme Court of the United States

STATE OF ARKANSAS,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

APPENDIX TO OKLAHOMA'S RESPONSE IN OPPOSITION TO ARKANSAS'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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APPENDIX TO OKLAHOMA'S RESPONSE IN OPPOSITION TO ARKANSAS'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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

1. STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,

Plaintiff,

v.

1. TYSON FOODS, INC.,
2. TYSON POULTRY, INC.,
3. TYSON CHICKEN, INC.,
4. COBB-VANTRESS, INC.,
5. AVIAGEN, INC.,
6. CAL-MAINE FOODS, INC.,
7. CAL-MAINE FARMS, INC.,
8. CARGILL, INC.,
9. CARGILL TURKEY PRODUCTION, LLC,
10. GEORGE'S, INC.,
11. GEORGE'S FARMS, INC.,
12. PETERSON FARMS, INC.,
13. SIMMONS FOODS, INC., and
14. WILLOW BROOK FOODS, INC.,

Defendants.

Case No. 4:05-cv-00329-JOE-SAJ

PLAINTIFF'S RESPONSE IN OPPOSITION TO "TYSON FOODS, INC.'S MOTION TO DISMISS COUNTS 4-10 OF THE FIRST AMENDED COMPLAINT"

* * *

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), by and through counsel, and respectfully submits that Defendant Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint ("Tyson Motion") is not well-taken and should be denied.[1]

I. Introduction

The State has brought suit against the Poultry Integrator Defendants, including Defendant Tyson Foods, Inc. ("Defendant Tyson Foods"), to hold them accountable for the past and continuing injury and damage to those portions of the Illinois River Watershed ("IRW") located *in Oklahoma* caused by the improper storage, handling and disposal of poultry waste at poultry operations for which they are legally responsible. This improper storage, handling and disposal of poultry waste has occurred, and continues to occur, both *in Oklahoma and in Arkansas.* Further, this improper storage, handling and disposal of

[1] This Memorandum in Opposition is intended to respond not only to the Tyson Motion, but also to all of the other Poultry Integrator Defendants which have joined and/or adopted the Tyson Motion.

poultry waste occurs at poultry operations constituting both "point sources" and "non-point sources,"[2] although it is the State's understanding that the number of poultry operations constituting "non-point sources" far out-number those poultry operations constituting "point sources." As will be seen below, differentiating between the two types of sources is key to a proper resolution of the Tyson Motion.

The State's First Amended Complaint ("FAC") describes in great detail the Illinois River Watershed, *see* FAC, ¶¶ 22-31, the Poultry Integrator Defendants' domination and control of the actions and activities of their respective growers, *see* FAC, ¶¶ 32-45, the Poultry Integrator Defendants' poultry waste generation, *see* FAC, ¶¶ 46-47, the Poultry Integrator Defendants' improper poultry waste disposal practices and their impact, *see* FAC, ¶¶ 48-64, and the reason for this lawsuit, *see* FAC, ¶¶ 65-69.

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[2] Under the Federal Water Pollution Control Act, commonly known as the Clean Water Act ("CWA"), there are two types of pollutants: "point source" pollutants and "non-point source" pollutants. A "point source" is defined in the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) Included within this definition of "point sources" are concentrated animal feeding operations ("CAFOs"). 33 U.S.C. § 1362(14). In contrast, "non-point sources" are not defined in the CWA. *American Wildlands v. Browner*, 260 F.3d 1192, 1193 (10th Cir. 2001). "Non-point source pollution has been described as nothing more than a water pollution problem not involving a discharge from a point source." *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005). With the exception of discharges from CAFOs, agricultural storm water discharges are statutorily exempted as point sources under the CWA. 40 C.F.R. § 122.3(e); *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994) (agricultural run-off is considered non-point source pollution which is exempt from the CWA); *Hiebenthal v. Meduri Farms*, 242 F.Supp.2d 885, 888 (D. Ore. 2002). A CAFO is defined under the CWA at 40 C.F.R. § 122.23.

The basis of the Poultry Integrator Defendants' legal liability is set forth in the State's 10-count FAC. Count I asserts a cost recovery claim under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). *See* FAC, ¶¶ 70-77. Count 2 asserts a natural resource damages claim under CERCLA. *See* FAC, ¶¶ 78-89. Count 3 asserts a citizen suit claim under the Solid Waste Disposal Act. *See* FAC, ¶¶ 90-97. Count 4 alleges that the Poultry Integrator Defendants' conduct "constitutes a private and public nuisance under applicable state law.'" *See* FAC, ¶¶ 98-108. Count 5 alleges that the Poultry Integrator Defendants' conduct "constitutes a nuisance under applicable federal law." *See* FAC, ¶¶ 109-18. Count 6 alleges that the Poultry Integrator Defendants' conduct "constitutes a trespass under applicable state law."[3] *See* FAC, ¶¶ 119-27. Count 7 alleges that the Poultry Integrator Defendants, "by and through their wrongful poultry waste disposal practices," have caused pollution of the land and waters within the IRW in Oklahoma in violation of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1. *See* FAC, ¶¶ 128-32. Count 8 alleges that the Poultry Integrator Defendants, "by and through those [wrongful waste disposal] practices that occurred in Oklahoma," have caused releases of poultry waste to the waters of the IRW in Oklahoma in violation of the Oklahoma Registered Poultry Feeding Operations Act and its accompanying regulations. *See* FAC, ¶¶ 133-36. Count 9 alleges that the

[3] Thus, as regards counts 4 and 6, the FAC does not specify the jurisdiction of the common law it invokes or make a choice of law – although as explained in section III.A.3 of this brief the State believes Oklahoma law applies to its common law claims as regards non-point source pollution irrespective of whether the source of the pollution is located in Oklahoma or Arkansas.

Poultry Integrator Defendants, "by and through those [wrongful waste disposal] practices that occurred in Oklahoma," have caused releases of poultry waste to the waters of the IRW in Oklahoma in violation of the regulations of the Oklahoma Concentrated Feeding Operation Act. *See* FAC, ¶¶ 137:-9. And count 10 asserts a claim against the Poultry Integrator Defendants for unjust enrichment/restitution/disgorgement. *See* FAC, ¶¶ 140-47.

The Tyson Motion seeks dismissal of counts 4 and 6-10 of the FAC to the extent the claims "pertain to activities occurring in Arkansas or Pollution allegedly emanating from Arkansas" on the grounds that (1) such claims are allegedly pre-empted by the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*, and (2) the application of Oklahoma law to conduct in Arkansas allegedly constitutes "an impermissible attempt at extraterritorial regulation." Tyson Motion, p. 2.[4] Defendant Tyson Foods also seeks dismissal of count 5 of the State's First Amended Complaint on the ground that there no longer exists a federal common law of nuisance applicable to claims of interstate water pollution. Tyson Motion, p. 2.

The Tyson Motion should be denied because: (1) with respect to point source pollution the CWA action does not pre-empt the application of source-state law to source-state polluters; (2) with respect to non-point source pollution the

[4] In its blunderbuss attack on the State's case, Defendant Tyson Foods apparently neglected to note the plain language of counts 8 and 9 of the FAC, thereby confusing the issues the Court must actually decide. Counts 8 and 9 are limited to "those [wrongful waste disposal] practices that *occurred* in Oklahoma." *See* FAC, ¶¶ 134, 135 & 138 (emphasis added). The Tyson Motion is thus irrelevant as to these two counts.

CWA does not pre-empt the application of affected-state law to source-state polluters; (3) provided that the choice of law analysis properly calls for the application of affected-state law to source-state polluters where non-point source pollution is at issue – as it does here – the application of affected-state law does not constitute "an impermissible attempt at extraterritorial regulation;" and (4) the federal common law of nuisance applicable to claims of interstate water pollution has not been displaced where non-point source pollution is at issue.

II. Legal Standards

A. Legal standard pertaining to Fed. R. Civ. P. 12(b)(6) motions

The standard for analyzing a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is well established:

> [A]ll well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the non-moving party. A 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted.

Sutton v. Utah State School for Deaf and Blind, 173 F.3d 1226, 1236 (10th Cir. 1999) (citations and quotations omitted).

"[T]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim. Granting defendant's motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Cottrell, Ltd. v. Biotrol International, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999) (citations and quotations omitted). "The threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *Robey v. Shapiro, Marianos & Cejda, LLC*, 340 F.Supp.2d 1062, 1064 (N.D. Okla. 2004) (citation and quotations omitted). "A motion to dismiss for failure to state a claim is viewed with disfavor, and is rarely granted." *Lone Star Industries, Inc. v. Harman Family Trust*, 960 F.2d 917 (10th Cir. 1992) (citation and quotations omitted).

B. Legal standard pertaining to pre-emption

Similarly, there is a presumption against finding pre-emption.[5] *International Paper Co. v. Ouellette*, 107 S.Ct.

[5] As explained by the Supreme Court in *Gade v. National Solid Wastes Management Association*, 112 S.Ct. 2374, 2383 (1992):

> Pre-emption may be either expressed or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95, 103 S.Ct. 2890, 2899, 77 L.Ed.2d 490 (1983); *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 152-153,102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'"

(Continued on following page)

805, 811 (1987) ("courts should not lightly infer pre-emption"). Pre-emption may be found, however, "when federal legislation is 'sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.'" *International Paper*, 107 S.Ct. at 811 (citation omitted).

III. Argument

A. The CWA does not have the pre-emptive reach Defendant Tyson Foods claims it does

In order to understand the pre-emptive reach of the CWA, one first must understand the structure and history of the CWA. The Federal Water Pollution Control Act was originally enacted in 1948. Pub. Law 845. The Federal Water Pollution Control Act, now commonly known as the CWA, was extensively amended by Congress in 1972. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. Law 92-500. Specifically, "[t]he Amendments established a new system of regulation under which it is illegal

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id., at 153, 102 S.Ct., at 3022 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)), and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941); *Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302, 2306, 101 L.Ed.2d 123 (1988); *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704, 1711, 29 L.Ed.2d 233 (1971).

There is no suggestion by Defendant Tyson Foods that the CWA contains any explicit pre-emptive language. Thus, if pre-emption is to be found, it must be of the implied variety.

for anyone to *discharge* pollutants into the Nation's waters except pursuant to a permit." *City of Milwaukee v. Illinois ("Milwaukee II")*, 101 S.Ct. 1784, 1789 (1981) (emphasis added); *see also International Paper*, 107 S.Ct. at 810 ("One of the primary features of the 1972 amendments is the establishment of the National Pollutant Discharge Elimination System (NPDES), a federal permit program designed to regulate the *discharge* of polluting effluents") (emphasis added); *Middlesex County Sewage Authority v. National Sea Clammers Association*, 101 S.Ct. 2615, 2622 (1981) ("The Amendments shifted the emphasis to 'direct restrictions on *discharges*' ") (emphasis added). Notably, the term "discharge of pollutants" is a defined term in the CWA meaning "any addition of any pollutant to navigable waters from any *point source*." 33 U.S.C. § 1362(12) (emphasis added). Simply put, the 1972 amendments provided for regulation of only point sources; they did not provide for regulation of non-point sources. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 371 (10th Cir. 1979) ("Because nonpoint sources of pollution ... are virtually impossible to isolate to one polluter, no permit or regulatory system was established as to them [under the CWA]").[6]

Under the 1972 amendments, point source pollution (in contrast to non-point source pollution) was, and continues to be, subject to a carefully devised, detailed regulatory scheme

[6] Indeed, the 1972 Amendments merely encouraged states to develop "area-wide waste treatment management" ("AWTM") plans to identify non-point source pollution and to establish or designate an agency or other organization to develop and implement these AWTM plans, using the promise of federal grants to the states to accomplish these tasks. 33 U.S.C. § 1288; *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1096-97 (9th Cir. 1998).

established in the CWA. Specifically, the CWA generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained a National Pollutant Discharge Elimination System ("NPDES") permit from the EPA. 33 U.S.C. § 1311(a). The CWA Act provides that the EPA may delegate to a state the authority to administer the NPDES program with respect to point sources within its state if the EPA determines that the proposed state program complies with the requirements set forth in 33 U.S.C. § 1342(b). The EPA retains authority, however, to block the issuance of any permit to which it objects. 33 U.S.C. § 1342(d). The source state of a point source discharge may require discharge limitations more stringent than those required by the EPA. 40 C.F.R. § 122.1(f).

In February 1987, the CWA was amended again. *See* Water Quality Act of 1987, Pub. Law 100-4. With respect to non-point source pollution, the 1987 amendments still did not set forth a federal regulatory program. Nor, contrary to the representations in the Tyson Motion, did they set forth a mandatory state regulatory program for non-point source pollution. Rather, they asked each state to (1) make a report of the navigable waters within the state with non-point source pollution problems, (2) develop a management program for controlling pollution added from non-point sources to the navigable waters within the state and improving the quality of such waters, and (3) in return, become eligible for federal grants to implement these management programs. *See* 33 U.S.C. § 1329. Significantly, however, a state *was, and is, not required to participate in* the CWA non-point source program. *See, e.g.*, 33 U.S.C. § 1329(d)(3) and discussion, *infra*, Section III.A.2.

1. With respect to point source pollution originating in Arkansas, the CWA pre-empts the State's claims based on Oklahoma law but not the State's claims based on Arkansas law

After a review of the comprehensive nature of the mandatory NPDES permitting program, the Supreme Court stated "we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" *International Paper*, 107 S.Ct. at 812. Accordingly, the State does not dispute that the CWA pre-empts application of Oklahoma state common law to an out-of-state *point* source discharge affecting Oklahoma. *International Paper*, 107 S.Ct. at 816 ("The Act pre-empts state law to the extent that the state law is applied to an out-of-state point source").

Defendant Tyson Foods is flat wrong, however, when it asserts that "[i]n the area of water pollution from 'point sources,' the Supreme Court has ruled, in *International Paper v. Ouellette*, 479 U.S. 481, that State law actions to remedy such pollution are preempted by the CWA." Tyson Motion, p. 5. As the Supreme Court quite clearly stated: "[N]othing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." *International Paper*, 107 S.Ct. at 814 (emphasis in original) (relying on saving clause found at 33 U.S.C. §§ 1370 & 1365(e)); *see also Arkansas v. Oklahoma*, 112 S.Ct. 1046, 1053 (1992) ("the only state law applicable to an interstate *discharge* is 'the law of the State in which the *point source* is located'") (emphasis added) (citation omitted); Oct. 28, 2002 Order in *City of Tulsa v. Tyson*

Foods, Inc., 01-CV-0900-EA(C), N.D. Okla. (" . . . the Court expressly rejected Decatur's argument that the CWA preempted plaintiffs' Arkansas common law claims"). Indeed, the Supreme Court explained that "[b]y its terms the CWA allows States . . . to impose higher standards on their own point sources, and in *Milwaukee II* we recognized that this authority may include the right to impose higher common-law as well as higher statutory restrictions. . . ."[7] *International Paper*, 107 S.Ct. at 497-98. Accordingly, the State's claims arising out of conduct by the Poultry Integrator Defendants at point sources (i.e., CAFOs) in Arkansas that has caused injury and damages to the IRW within Oklahoma are not pre-empted; rather, simply, Arkansas nuisance, trespass and unjust enrichment law applies to such claims.[8] Similarly, the State's claims arising out of conduct by the Poultry Integrator Defendants at point sources in Oklahoma are not pre-empted, but are, rather, subject to Oklahoma law.

[7] Nor should Defendant Tyson Food be heard to argue that a party holding a permit from a regulatory authority cannot be subject to liability based upon common law claims. *See, e.g., Union Oil Company of California v. Heinsohn*, 43 F.3d 500 (10th Cir. 1994) (license or permit issued by regulator not sufficient to avoid nuisance liability).

[8] It should be noted that the fact that source-state law applies where an out-of-state point source discharge affecting interstate waters is involved does not affect venue; an action applying source-state law may be brought in the affected state. *International Paper*, 107 S.Ct. at 814-16.

2. With respect to non-point source pollution originating in Arkansas, the CWA does not pre-empt the State's claims based on Oklahoma law

The State vigorously disputes Tyson Foods' contention that the CWA pre-empts application of Oklahoma state common law to an out-of-state *non-point* source run-off affecting Oklahoma. In contrast to point sources, and as briefly discussed above, Congress has left any regulation of non-point sources up to the states. *See American Wildlands v. Browner*, 94 F.Supp.2d 1150, 1158 (D. Colo. 2000), *aff'd* 260 F.3d 1192 (10th Cir. 2001) (citing 33 U.S.C. § 1329). Indeed, controlling Tenth Circuit precedent makes clear that the CWA simply does not require states to implement nonpoint source regulatory programs. *See Defenders of Wildlife*, 415 F.3d at 1124-25 (" . . . [T]he CWA does not require states to take regulatory action to limit the amount of non-point water pollution introduced into its waterways); *American Wildlands*, 260 F.3d at 1197 ("nothing in the CWA demands that a state adopt a regulatory system for nonpoint sources") (citation and quotations omitted).

Furthermore, controlling Tenth Circuit precedent makes clear that the CWA does not authorize the EPA to promulgate a federal program in the absence of an adequate state program. *See American Wildlands*, 260 F.3d at 1197-98 ("In the Act, Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution. . . . [T]he Act nowhere gives the EPA the authority to regulate nonpoint source discharges"); *Defenders of Wildlife*, 415 F.3d at 1124 ("Congress clearly intended the EPA to have a limited, non-rulemaking role in the establishment of water

quality standards by states") (citation and quotations omitted).[9]

The limited scope of the CWA as relates to non-point sources is perhaps best summarized in the words of Senator George Mitchell, who at the time of the 1987 Amendments to the CWA served as chairman of the Senate Subcommittee on the Environment:

> There is nothing in this bill which requires any State in the country to adopt a program to deal with nonpoint source pollution. The bill provides that each State will make an assessment of the problem. If a State does not make an assessment of the problem, the EPA will make one in that State for the purpose of establishing national data on this problem. . . . After that, no State is compelled to adopt a program to control nonpoint source pollution.

133 Cong. Rec. 1568, 1571 (January 21, 1987)[10]

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[9] Defendant Tyson Foods may cite to *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140 fn. 4 (10th Cir. 2005), wherein that court stated in a footnote, without any analysis underpinning its statement, that "[t]he CWA also regulates nonpoint source discharges." The statement in this footnote should be afforded no weight inasmuch as (1) it is entirely *dicta* inasmuch it was unchallenged that the case before the court centered on a point source, (2) it is entirely inconsistent with existing, established Tenth Circuit precedent, *see American Wildlands*, 260 F.3d 1192; *Defenders of Wildlife*, 415 F.3d 1121, and (3) it is, for the reasons explained herein, simply wrong inasmuch as an examination of the CWA itself reveals that it does not regulate non-point source pollution. Underscoring the error of the *El Paso Gold Mines* footnote is that it speaks in terms of "nonpoint source *discharges*." As noted earlier, the term "discharge of pollutants" is defined in the CWA and means "any addition of any pollutant to navigable waters from any *point source*." 33 U.S.C. § 1362(12) (emphasis added).

[10] Defendant Tyson Foods' citation to various portions of the legislative record, when examined closely, does not support the

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Against this backdrop of authority, it strains credibility to argue that the CWA pre-empts the State's Oklahoma law causes of action pertaining to non-point source pollution emanating from Arkansas and causing injury and damage in Oklahoma. As noted previously, "courts should not lightly infer pre-emption," and pre-emption may only be found "when federal legislation is 'sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.'" *International Paper*, 107 S.Ct. at 811 (citation omitted). In contrast to the CWA's mandatory program for point-source pollution, the CWA's permissive program pertaining to

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proposition that Congress intended to foreclose state common law actions in the area of interstate non-point water pollution. In fact, these citations simply make the point that Congress did not intend state common law actions to supplant the *point source* regulatory program set forth in the CWA – the only type of source pollution actually regulated under the CWA. For instance, Defendant Tyson Food's citation to the remarks of Representative Hammerschmidt regarding the deletion of the proposed "savings" provision omits that portion stating that "Section 119 would have fostered State enforcement of State statutory or common law by removing impediments to Federal court jurisdiction established by *Milwaukee I, II and III.*" 133 Cong. Rec. 983, 987 (Jan. 8, 1987) (emphasis added). *Milwaukee I, II and III* are, of course, point source, not non-point source, pollution cases.

The remarks of Representative Hammerschmidt concerning the deletion of Section 119 from the conference version of the bill are similarly revealing: "I am pleased that the conferees deleted provisions in each bill related to savings clauses and other statutes. As a result, the Water Quality Act of 1987 does not in any way affect the well-established rulings of *Milwaukee I, II, and III* involving the Clean Water Act. Taken together, these decisions hold that, in interstate water pollution disputes, a downstream plaintiff State may not apply Federal common law nor the State common law or statutory law of the downstream State against an upstream State *with EPA-approved water pollution control requirements.*" 133 Cong. Rec. 983, 986-87 (Jan. 8, 1987) (emphasis added). As discussed above, the 1987 amendments did not include non-point source pollution *requirements.*

non-point source pollution in the CWA can hardly be characterized as "sufficiently comprehensive" such that pre-emption would be triggered. Likewise, because the CWA does not set forth any required standards or methods to control non-point source pollution, it can hardly be said that the imposition of Oklahoma common law standards to non-point source pollution that is running off in Arkansas and causing injury and damages in Oklahoma would "interfere[] with the methods by which the federal statute was designed to reach [the goal of eliminating water pollution]." *See International Paper*, 107 S.Ct. at 813 (noting that imposition of Vermont law against the New York-based International Paper plant "would allow respondents to circumvent the NPDES permit system").

The fact that pre-emption is not triggered by the CWA's non-point source provisions is underscored by a simple review of the factors that led the Supreme Court in *International Paper* to find pre-emption by the CWA point source provisions, and a comparison of those factors with the CWA non-point source provisions. The factors that the Supreme Court considered in finding pre-emption by the CWA point source provisions included: (1) that the CWA established "a federal permit program designed to regulate the discharge of polluting effluents," *International Paper*, 107 S.Ct. at 810; (2) that the CWA provided for "an elaborate permit system that sets clear standards," *International Paper*, 107 S.Ct. at 814; (3) that the CWA "set[] forth the procedures for obtaining a permit in great detail," *International Paper*, 107 S.Ct. at 811-12; and (4) that the CWA "provides its own remedies, including civil and criminal fines for permit violations . . . ," *International Paper*, 107 S.Ct. at 812. As the Supreme Court explained in finding pre-emption by the CWA: "It would be extraordinary for

Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure." *International Paper*, 107 S.Ct. at 814.[11]

In contrast to the point source provisions, however, (1) the CWA does not establish a permit program designed to regulate non-point source pollution, let alone an "elaborate" one with "clear standards;" (2) the CWA does not set forth procedures for obtaining a permit for non-point source pollution "in great detail" because, of course, the CWA does not establish a permit program designed to regulate non-point source pollution; and (3) the CWA does not provide any remedies for violations of non-point source pollution permits because, again, the CWA does not establish a permit program designed to regulate non-point source pollution.

There are two final points which must be kept in mind when evaluating the reach of the *International Paper* holding. The first of these points is that *International Paper* was a case addressing point source pollution. *See International Paper*, 107 S.Ct. at 808, fn. 4 ("It is not disputed that IPC is a point source within the meaning of the Act"). *International Paper* simply did not address non-point

[11] Notably, "[t]he CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act. The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." *International Paper*, 107 S.Ct. at 814 (emphasis in original). Thus, as explained above, the State's claims arising out of point source discharges in Arkansas and causing injury and damages in Oklahoma may be brought under Arkansas nuisance law.

source pollution.[12] Which leads to the second point: *International Paper* was decided before the enactment of the 1987 amendments to the CWA which added the provisions addressing non-point source pollution that Defendant Tyson Foods apparently believes triggers pre-emption of the claims at issue. Thus, any suggestion that *International Paper* holds that the CWA has any pre-emptive effect on state regulation of non-point source pollution is simply a misstatement of the law. At most, *International Paper* provides the analytical framework for determining the pre-emptive effect (or more accurately, the lack of pre-emptive effect) of the CWA. And, as shown above, using this analytical framework it is abundantly clear that the CWA's point-source pollution program is mandatory and comprehensive, while the CWA's non-point source pollution program is optional and limited. Therefore, application of affected-state law to source-state non-point sources is not pre-empted.

The conclusion that the CWA does not pre-empt counts 4, 6, 7 and 9 of the FAC as to non-point sources in Arkansas causing injury and damage to those portions of the IRW in Oklahoma of course does not in and of itself end the analysis. Rather, the next step in the analysis is a choice of law analysis. Fortunately, however, that analysis is straightforward and strongly points to the conclusion that Oklahoma law applies to each of these counts.[13]

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[12] The Supreme Court has never directly addressed the question of the pre-emptive effect (or, more appropriately, the lack thereof) of the CWA as pertains to non-point source pollution.

[13] Defendant Tyson Foods has not raised the choice of law issue. Indeed, implicit in its moving papers is the assumption that, but for its Commerce Clause and Due Process Clause arguments, Oklahoma law would properly apply to non-point source pollution emanating from Arkansas and causing injury and damages in Oklahoma. As demonstrated

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3. Applicable choice of law principles call for the application of Oklahoma law to non-point pollution emanating from Arkansas and causing injury and damage in Oklahoma

Oklahoma applies the "most significant relationship test" set forth in the *Restatement (Second) of Conflict of Laws* in determining choice of law issues. *See Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 619-620 (10th Cir. 1998) *citing Beard v. Viene*, 826 P.2d 990, 995 (Okla. 1999); *Brickner v. Gooden*, 525 P.2d 632, 637 (Okla. 1974). The Supreme Court of Oklahoma explained, "the rights and liabilities of parties with respect to a particular issue in tort shall be determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties." *Brickner*, 525 P.2d at 637. The factors to be evaluated, according to their relative importance with respect to a particular tort are: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties occurred. *See Brickner*, 525 P.2d at 637. Importantly, the Supreme Court of Oklahoma has stated that "we can think of no greater 'significant contact' than where a state or its political subdivision" is involved in a case. *Beard*, 826 P.2d at 996. For the reasons set forth below, Oklahoma courts would apply Oklahoma law to the three state common law claims

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below, however, Defendant Tyson Foods' Commerce Clause and Due Process Clause arguments both fail as a matter of law.

alleged in this case: nuisance, trespass, and unjust enrichment.

Under the most significant relationship test, Oklahoma law applies to the State's nuisance claim against Defendant Tyson Foods. *Restatement (Second) of Conflict of Laws*, § 147 provides the general rule under the most significant relationship test: "In an action for injury to land or other tangible thing, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship. . . ." *Accord Edwards v. McKee*, 76 P.3d 73, 76 (Okla. Civ. App. 2003) ("in accord with the Restatement of Conflicts analysis, the law of the place of the injury applies unless some other state has a more significant relationship to the occurrence and the parties") (*citing Brickner*) (personal injury case). Comment e to *Restatement (Second) of Conflict of Laws*, § 147 further explains that "the local law of the state where the injury occurred to the tangible thing will usually be applied to determine most issues involving the tort . . . on the rare occasions when the conduct and the resulting injury to the thing occur in different states." Such should be the case here.

As to the first factor, the place where the injury occurred, the State's nuisance claim against Defendant Tyson Foods alleges that its poultry waste practices have caused injury to the property interests of the State of Oklahoma within the State of Oklahoma by invading, interfering with and impairing the State's and the public's beneficial use and enjoyment of the IRW. *See* FAC, ¶ 99. While much of the conduct causing this injury – namely, Defendant Tyson Foods' improper poultry waste disposal practices – has admittedly occurred in Arkansas, such

conduct has also occurred in Oklahoma, thereby diminishing the weight to be given to the place-of-the-conduct factor.[14] As to the third factor, the citizenship of the parties, the plaintiff is the State of Oklahoma itself, which as previously noted is the most significant contact possible with Oklahoma. *See Beard*, 826 P.2d at 996 ("we can think of no greater 'significant contact' than where a state or its political subdivision" is involved in a case). Defendant Tyson Foods, in contrast, is a Delaware corporation with its principal place of business in Arkansas, *see* FAC, ¶ 6, and thus is a dual-citizen. *See, e.g.*, 28 U.S.C. § 1332(c)(1). Finally, as to the relationship between the State and Defendant Tyson Foods, there is none that is relevant to this claim, and as such this fourth factor is not applicable to the analysis. *See, e.g., Beard*, 826 P.2d at 996 (finding under the facts that fourth factor is "wholly irrelevant to the present inquiry").

As explained in Comment c to *Restatement (Second) of Conflict of Laws*, § 147, "[t]he likelihood that some state other than that where the injury occurred is the state of most significant relationship is greater in those relatively rare situations where, with respect to the particular issue, the state of injury bears little relation to the occurrence, the thing and the parties." The facts of this case indicate that this is plainly *not* one of those "relatively rare situations." The property interest injured is sited in Oklahoma. The injury to this Oklahoma property interest has occurred

[14] There, of course, can be no dispute that Oklahoma law would apply to Defendant Tyson Foods' improper poultry waste disposal practices occurring in Oklahoma and causing injury and damages in Oklahoma.

in Oklahoma. The State of Oklahoma is itself a party. No other state has equal or greater significant relationships to the state law nuisance claim than Oklahoma. Thus, Oklahoma law applies to all aspects of the State's nuisance claim against Defendant Tyson Foods.

The choice of law analysis under the significant relationship test as to the State's claim against Defendant Tyson Foods for trespass yields an identical conclusion: Oklahoma law applies. The State has alleged that Defendant Tyson Foods' waste disposal practices resulted in an actual and physical invasion of and interference with the State's property interests in the IRW. *See* FAC, ¶ 120. Thus, the place where the trespass injury occurred is in that portion of the IRW located in Oklahoma. The conduct at issue occurred in both Oklahoma and Arkansas. As mentioned above, the plaintiff is the State of Oklahoma itself, which is the most significant contact possible, *see Beard*, 826 P.2d at 996, while Tyson spreads its citizenship between two states, Delaware and Arkansas. FAC, ¶ 6. And, again, the factor as to where the parties' relationship occurred is wholly irrelevant to the present inquiry. Thus, no other state has equal or greater significant relationships to the state law trespass claim than Oklahoma. Oklahoma law therefore applies to all aspects of the State's trespass claim against Defendant Tyson Foods.

Finally, for similar reasons, Oklahoma law applies to the State's claim for unjust enrichment against Defendant Tyson Foods. The gravamen of this claim is that Defendant Tyson Foods has benefited, without the permission of the State, by using the lands and waters of the IRW in Oklahoma as a disposal site for its poultry waste, and Defendant Tyson Foods has thereby been unjustly enriched. *See* FAC, ¶¶ 142-46. *Restatement (Second) of*

Conflict of Laws, § 452 provides that "[t]he law of a place where a benefit is conferred determines whether the conferring of the benefit creates a right against the recipient to have compensation." Similarly, *Restatement (Second) of Conflict of Laws,* § 453 provides that "[w]hen a person is alleged to, have been unjustly enriched, the law of the place of the enrichment determines whether he is, under a duty to repay the amount by which he is enriched." The benefit has been conferred on Defendant Tyson Foods in Oklahoma and Defendant Tyson Food's has been enriched in Oklahoma. Accordingly, Oklahoma law applies to all aspects of the State's unjust enrichment claim against Defendant Tyson Foods.

4. Application of Oklahoma law to non-point pollution emanating from Arkansas and causing injury and damage in Oklahoma neither violates the Commerce Clause nor the Sovereignty of Arkansas

Where the choice of law analysis, as it does here, properly calls for the application of affected-state law to source-state polluters where non-point source pollution is at issue, the application of affected-state law does not constitute "an impermissible attempt at extraterritorial regulation."

a. Commerce Clause

Defendant Tyson Foods contends that the application in this lawsuit of Oklahoma law to non-point source pollution emanating from Arkansas and causing injury and damages in Oklahoma constitutes state regulatory

action having the practical effect of regulating interstate commerce, and thereby violates the dormant Commerce Clause. U.S. Const., art. I, § 8. Defendant Tyson Foods' contention is unsupported by the law and should be rejected.[15]

To determine whether state regulation is barred by the Commerce Clause, courts must apply the following analysis: Where state law acts "even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church Inc.*, 90 S.Ct. 844, 847 (1970).[16]

At the outset, it is important to note that the plain language of counts 8 and 9 of the FAC asserts claims' based on Oklahoma statutes and regulations – *but only* as to "those [wrongful waste disposal] practices that *occurred* in Oklahoma." *See* FAC, ¶¶ 134, 135 & 138 (emphasis added). Therefore, dormant Commerce Clause concerns are plainly not implicated by these two counts. As regards the remaining counts at issue, there are two types of claims raised. Counts 4, 6 and 10 of the FAC raise claims sounding in state common law. Count 7 of the FAC raises a

[15] The State does not dispute that hazardous and/or solid waste – which is what the State alleges poultry waste to be – is an article of commerce. *See Blue Circle Cement, Inc. v. Board of Commissioners of the County of Rogers,* 27 F.3d 1499, 1510 fn. 12 (10th Cir. 1994).

[16] The Tyson Motion curiously fails to even mention, let alone apply, the *Pike* test in its moving papers. *See Blue Circle Cement*, 27 F.3d at 1511 ("When interstate discrimination is not involved, we assess a dormant Commerce Clause challenge to a local measure under the *Pike* balancing test").

claim alleging violations of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1.[17]

As to those of the State's counts sounding in state common law, *see* FAC, Counts 4, 6 & 10, it is doubtful that a dormant Commerce Clause analysis is even appropriate. Indeed, each of the cases relied upon by Defendant Tyson Foods for support of its argument is based upon positive law – specifically, statutes or regulations. *See Healy v. Beer Institute,* 109 S.Ct. 2491 (1989) (addressing a Connecticut statute); *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 106 S.Ct. 2080 (1986) (addressing a New York statute); *Edgar v. MITE Corp.,* 102 S.Ct. 2629 (1982) (addressing an Illinois statute); *Baldwin v. Seelig,* 55 S.Ct. 497 (1935) (addressing a New York statute). *CTS Corp. v. Dynamics Corp. of America,* 107 S.Ct. 1637 (1987), however, provides that "[t]he principal objects of dormant Commerce Clause scrutiny are *statutes* that discriminate against interstate commerce." (Emphasis added.) As explained in *Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.,* 123 F.Supp.2d 245, 254 (D.N.J. 2000), "[t]he applicability of the dormant commerce clause to causes of action under state tort law is unsettled. Typically, the cases focusing on the commerce clause have considered state statutes or regulations, not lawsuits."

[17] 2 Okla. Stat. § 2-18.1, by its language, is limited in its application to only those persons subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry, and accordingly the State *is not* seeking to apply this statute to non-point pollution emanating from Arkansas and causing injury and damages in Oklahoma. In contrast, 27A Okla. Stat. § 2-6-105 contains no such restriction, and accordingly the State *is* seeking to apply this statute to non-point pollution emanating from Arkansas and causing injury and damages in Oklahoma.

Indeed, the *Camden County* Court noted that "the Third Circuit has voiced doubt that suits brought under state common law can ever be subject to dormant commerce clause analysis." 123 F.Supp.2d at 254. *See also NAACP v. Acusport, Inc.* 271 F.Supp.2d 435, 464 (E.D.N.Y. 2003) ("The Commerce Clause is not designed to prevent individual states from protecting those within the state from tortious action by those engaged in commerce whose products or activities put the state's citizens at risk"); *City of New York v. Beretta U.S.A. Corp.,* 315 F.Supp.2d 256, 285 (E.D.N.Y. 2004) (Commerce Clause "should not be used to immunize out-of-state actors from the legitimate reach of a state's tort and nuisance doctrine") (citations omitted); *Crowley v. Cybersource Corp.,* 166 F.Supp.2d 1263, 1272 (N.D. Cal. 2001) (rejecting argument that state law tort claims violated dormant Commerce Clause). Thus, it is the State's position that a dormant Commerce Clause analysis of the State's Oklahoma common law claims is not appropriate.

In any event, even were it determined that such an analysis were appropriate, it would be clear that under the *Pike* test Oklahoma state law does indeed apply even-handedly to both Oklahoma and Arkansas polluters[18] and would, "effectuate a legitimate local public interest" – namely the prevention of pollution of the waters of Oklahoma.[19] As to the third prong of the *Pike* test, Defendant

[18] A state regulation "regulates even-handedly" where it "does not distinguish between in-state and out-of-state businesses." *See American Target Advertising, Inc. v. Giani,* 199 F.3d 1241, 1254 (10th Cir. 2000). There is no assertion by Defendant Tyson Foods that Oklahoma common law does not apply even-handedly.

[19] *See Satsky v. Paramount Communications, Inc.,* 7 F.3d 1464, 1469 (10th Cir. 1993) ("[I]t is clear that a state may sue to protect its

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Tyson Foods has come forward with no evidence that any burden that might be imposed on interstate commerce "is clearly excessive in relation to the putative local benefits." *See American Target,* 199 F.3d at 1254 ("The party challenging a statute that regulates evenhandedly bears the burden of proving the statute's excess"); *see also, e.g., Acusport,* 271 F.Supp.2d at 464 ("The Commerce Clause furnishes no defense under the circumstances of the instant case to conduct occurring inside and outside the state that causes a public nuisance within the state; any burden placed on interstate commerce is far outweighed by the substantial positive effect on the New York public's health and safety that more scrupulous supervision of the sale of their handguns by gun manufacturers and distributors would have"); *Stone v. Frontier Airlines Inc.,* 256 F.Supp.2d 28, 46 (D. Mass. 2002) (rejecting argument that dormant Commerce Clause precludes state tort law from regulating any activity that, while having local effects, also effectuates some external consequence, explaining that "[t]he *reductio as absurdum* of this reasoning, however, is an evisceration of state tort law because almost every activity a state regulates has some 'extraterritorial effects' "). Accordingly, Rule 12(b)(6) dismissal is improper. *See, e.g., Camden County,* 123 F.Supp.2d at 255 (denying dismissal on dormant commerce clause grounds, holding that "[a]t the motion to dismiss stage . . . the Court cannot assess the relative burdens and benefits of the County's claims without a more fully developed record"); *City of*

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citizens against 'the pollution of the air over its territory; or of interstate waters in which the state has rights.' ") (citation omitted); *Spiva v. State of Oklahoma,* 584 P.2d 1355, 1360 (Okla. Crim. App. 1978) ("That the State has a valid interest in matters which affect the public health, safety and general welfare is undisputed . . . ").

New York, 315 F.Supp.2d at 286 ("Objections that particular provisions of the injunctive relief requested place an impermissible burden on interstate commerce can be considered on a case-by-case basis in a subsequent phase of this litigation if it becomes necessary to do so").

Applying the *Pike* test to count 7 of the FAC (wherein Oklahoma statutory claim under 27A Okla. Stat. § 2-6-105 is asserted), it is similarly clear that dormant Commerce Clause concerns are not implicated. This statute, too, applies even-handedly and effectuates a legitimate local public interest. And, as before, Defendant Tyson Foods has come forward with no evidence that any burden that might be imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *See, e.g., Aldens, Inc. v. Ryan,* 571 F.2d 1159 (10th Cir. 1978) (overruling Commerce Clause attack on Oklahoma Consumer Credit Code, explaining that "states can, of course, pass Acts which affect commerce unless the burden so imposed greatly exceeds the extent of the local benefits").

b. "Sovereignty"

Defendant Tyson Foods' argument that application of Oklahoma law to non-point pollution emanating from Arkansas and causing injury and damage in Oklahoma violates the sovereignty of Arkansas is essentially a Due Process argument.[20] However, it is a Due Process argument

[20] To the extent it is not a Due Process argument, Defendant Tyson Foods is without standing to raise alleged (and in this case illusory) violations of the sovereignty of Arkansas. As explained by the Supreme Court, " . . . this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 95 S.Ct.

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that fails because under controlling Supreme Court precedent application of Oklahoma law is constitutionally permissible.

The leading case on choice of law in this context is *Allstate Insurance Company v. Hague,* 101 S.Ct. 633 (1981) (plurality opinion), wherein the Supreme Court set forth the following test: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 101 S.Ct. at 640.[21] In fact, within these bounds, there is great Constitutional latitude. *See Shutts,* 105 S.Ct. at 2980 ("we reaffirm our observation that in many situations a state court may be free to apply one of several choices of law"). There can be no dispute that "significant relationship" choice of law analysis adopted by the Oklahoma Supreme Court in *Brickner* fully comports the, dictates of *Allstate.*

As noted in *BMW of North America, Inc. v. Gore,* 116 S.Ct. 1589, 1597-98 (1996), a state does not have the power to punish a company for conduct that was lawful where it occurred and that had *no impact* on the state or its residents. The obvious corollary to this pronouncement

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2197, 2205 (1975). In any event, "[t]he conflict with the sovereignty of the defendant's state is not a very significant factor in cases involving only U.S. citizens; conflicting policies between states are settled through choice of law analysis, not through loss of jurisdiction." *Brand v. Menlove Dodge,* 796 F.2d 1070, 1076 fn. 5 (9th Cir. 1986).

[21] As noted in *Philips Petroleum Company v. Shutts,* 105 S.Ct. 2965, 1978 (1985), even "the dissenting Justices [in *Allstate*] were in substantial agreement with this principle."

in *Gore* is that a state *does* have the power to punish a company for conduct that was lawful where it occurred but that *did have an impact* on the state or its residents. Such is precisely the case here. While not conceding that the Poultry Integrator Defendants' conduct in Arkansas was in fact lawful, the State's efforts to hold the Poultry Integrator Defendants liable under Oklahoma law for their conduct that has injured the State is fully consistent with Due Process Clause principles.[22]

B. With respect to point and non-point source pollution originating *in Oklahoma*, the CWA does not pre-empt the State's claims based on Oklahoma law

As noted in section III.A.1 above, relying upon the CWA saving clause found at 33 U.S.C. §§ 1370 & 1365(e),[23]

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[22] In fact, this is what occurs in lawsuits on a daily basis. For example, in a product liability lawsuit, irrespective of the legality of the product manufacturer's conduct in its own state, if that product, through the channels of commerce, enters Oklahoma and injures an Oklahoma citizen, the Due Process Clause fully allows the injured Oklahoman to sue the manufacturer for the manufacturing or design defect – conduct which occurred in the manufacturer's own state – pursuant to Oklahoma law.

[23] 33 U.S.C. § 1370 provides:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition,

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"nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." *International Paper,* 107 S.Ct. at 814 (emphasis in original). Thus, as pertains to point source pollution originating in Oklahoma and causing injury and damages in Oklahoma, application of Oklahoma law is not pre-empted.

Inasmuch as the discussion in section A.2 above establishes that the CWA does not in any circumstance pre-empt application of affected-state law to non-point source pollution, there is no need to even resort to the CWA saving clause. Simply put, as pertains to non-point source pollution originating in Oklahoma and causing injury and damages in Oklahoma, application of Oklahoma law is not pre-empted.

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pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1365(e) provides:

> (e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

C. With respect to non-point pollution emanating from Arkansas and causing injury and damage in Oklahoma, the CWA has not displaced the federal common law of nuisance

The State has asserted nuisance claims founded on both state and federal law. *See* FAC, Counts 4 & 5. The State acknowledges the Supreme Court's statement that "[i]f state law can be applied, there is not need for federal common law; if federal "common-law exists, it is because state law cannot be used." *Milwaukee II,* 101 S.Ct. at 1791 fn. 7.[24] Subject to this condition, the State asserts that the federal common law has not been displaced by the CWA with respect to non-point source pollution emanating from Arkansas and causing injury and damage in Oklahoma.

There can be no dispute that prior to its amendment in 1972 the CWA did not pre-empt the federal common law of nuisance. *Milwaukee I,* 92 S.Ct. at 1393 ("The application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act"). When faced with the CWA as amended by the 1972 amendments, however, the Supreme Court stated that: "We conclude that, *at least so far as concerns the claims of respondents,* Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program

[24] In any event, even where the federal common law of nuisance applies, "consideration of state standards may be relevant." *Illinois v. City of Milwaukee ("Milwaukee I")*, 92 S.Ct. 1385, 1395 (1972).

supervised by an expert administrative agency." *Milwaukee II,* 101 S.Ct. at 1972 (emphasis added). *Milwaukee II* involved solely claims pertaining to point source pollution. *See Milwaukee II*; 101 S.Ct. at 1973 fn. 11 ("There is no question that all of the discharges involved in this case are point source discharges").

In reaching its conclusion, the Supreme Court explained the analytical framework thusly: "[T]he question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." *Milwaukee II,* 101 S.Ct. at 1792, fn. 8.

The Supreme Court then proceeded to assess the scope of the 1972 amendments to the CWA, noting that "Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Milwaukee II,* 101 S.Ct. at 1793 (emphasis in original). Indeed, the Supreme Court's analysis in *Milwaukee II* was centered entirely on the point source pollution permitting program. *See generally Milwaukee II,* 101 S.Ct. at 1794-97. Concluded the Supreme Court: "There is thus no question that the problem of effluent limitations has been thoroughly addressed through the administrative scheme established by Congress, as contemplated by Congress. This being so there is no basis for a federal court to impose more stringent limitations than those imposed under the regulatory

regime by reference to federal common law. . . ." *Milwaukee II,* 101 S.Ct. at 1794.[25]

In contrast, the issue of non-point source pollution has not been "thoroughly addressed through the administrative scheme established by Congress." Accordingly, there *is* indeed a indeed [sic] for a federal court to impose limitations by reference to federal common law. Thus, the federal common law of nuisance has not been displaced by the CWA with respect to interstate non-point source pollution.

IV. Conclusion

WHEREFORE, premises considered, Defendant Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint should be denied.

Respectfully submitted,

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[25] As reflected by its definition in the CWA, the term "effluent limitations" is restricted to point sources. *See* 33 U.S.C. § 1362(11) ("The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance").

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2005, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of Court will transmit a Notice of Electronic filing to the following ECF registrants:

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Chapter 20A. Arkansas River Basin Compact Arkansas-Oklahoma, 1970

82 Okla.St.Ann. § 1421. Approval of Compact – Text

The following interstate Compact is hereby approved and ratified subject to the conditions stated in Section 2 of this act.[1]

ARKANSAS RIVER BASIN COMPACT
ARKANSAS-OKLAHOMA, 1970

The State of Arkansas and the State of Oklahoma, acting through their duly-authorized Compact representatives, S. Keith Jackson of Arkansas, and Glade R. Kirkpatrick of Oklahoma, after negotiations participated in by Trigg Twichell, appointed by the President as the representative of the United States of America, pursuant to and in accordance with the consent to such negotiations granted by an Act of Congress of the United States of America (Public Law 97, 84th Congress, 1st session), approved June 28, 1955, have agreed as follows respecting the waters of the Arkansas River and its tributaries:

ARTICLE I

The major purposes of this Compact are:

A. To promote interstate comity between the States of Arkansas and Oklahoma;

B. To provide for an equitable apportionment of the waters of the Arkansas River between the States of

[1] Title 82, § 1422.

Arkansas and Oklahoma and to promote the orderly development thereof;

C. To provide an agency for administering the water apportionment agreed to herein;

D. To encourage the maintenance of an active pollution abatement program in each of the two states and to seek the further reduction of both natural and man-made pollution in the waters of the Arkansas River Basin; and

E. To facilitate the cooperation of the water administration agencies of the States of Arkansas and Oklahoma in the total development and management of the water resources of the Arkansas River Basin.

ARTICLE II

As used in the Compact:

A. The term "state" means either state signatory hereto and shall be construed to include any person or persons, entity or agency of either state who, by reason of official responsibility or by designation of the Governor of that state, is acting as an official representative of that state.

B. The term "Arkansas-Oklahoma Arkansas River Compact Commission," or the term "Commission" means the agency created by this Compact for the administration thereof.

C. The term "Arkansas River Basin" means all of the drainage basin of the Arkansas River and its tributaries from a point immediately below the confluence of the Grand-Neosho River with the Arkansas River near Muskogee, Oklahoma, to a point immediately below the confluence of Lee Creek with the Arkansas River near Van

Buren, Arkansas, together with the drainage basin of Spavinaw Creek in Arkansas, but excluding that portion of the drainage basin of the Canadian River below Eufaula Dam.

D. The term "Spavinaw Creek Subbasin" means the drainage area of Spavinaw Creek in the State of Arkansas.

E. The term "Illinois River Subbasin" means the drainage area of Illinois River in the State of Arkansas.

F. The term "Lee Creek Subbasin" means the drainage area of Lee Creek in the State of Arkansas and the State of Oklahoma.

G. The term "Poteau River Subbasin" means the drainage area of Poteau River in the State of Arkansas.

H. The term "Arkansas River Subbasin" means all areas of the Arkansas River Basin except the four subbasins described above.

I. The term "water-year" means a twelve-month period beginning on October 1, and ending September 30.

J. The term "annual yield" means the computed annual gross runoff from any specified subbasin which would have passed any certain point on a stream and would have originated within any specified area under natural conditions, without any man-made depletion or accretion during the water year.

K. The term "pollution" means contamination or other alterations of the physical, chemical, biological or radiological properties of water or the discharge of any liquid, gaseous, or solid substances into any waters which creates, or is likely to result in a nuisance, or which renders

or is likely to render the waters into which it is discharged harmful, detrimental or injurious to public health, safety, or welfare, or which is harmful, detrimental or injurious to beneficial uses of the water.

ARTICLE III

A. The physical and other conditions peculiar to the Arkansas River Basin constitute the basis of this Compact, and neither of the states hereby, nor the Congress of the United States by its consent hereto, concedes that this Compact established any general principle with respect to any other interstate stream.

B. By this Compact, neither state signatory hereto is relinquishing any interest or right it may have with respect to any waters flowing between them which do not originate in the Arkansas River Basin as defined by this Compact.

ARTICLE IV

The States of Arkansas and Oklahoma hereby agree upon the following apportionment of the waters of the Arkansas River Basin:

A. The State of Arkansas shall have the right to develop and use the waters of the Spavinaw Creek Subbasin subject to the limitation that the annual yield shall not be depleted by more than fifty percent (50%).

B. The State of Arkansas shall have the right to develop and use the waters of the Illinois River Subbasin subject to the limitation that the annual yield shall not be depleted by more than sixty percent (60%).

C. The State of Arkansas shall have the right to develop and use all waters originating within the Lee Creek Subbasin in the state or [2] Arkansas, or the equivalent thereof.

D. The State of Oklahoma shall have the right to develop and use all waters originating within the Lee Creek Subbasin in the State of Oklahoma, or the equivalent thereof.

E. The State of Arkansas shall have the right to develop and use the waters of the Poteau River Subbasin subject to the limitation that the annual yield shall not be depleted by more than sixty percent (60%).

F. The State of Oklahoma shall have the right to develop and use the waters of the Arkansas River Subbasin subject to the limitation that the annual yield shall not be depleted by more than sixty percent (60%).

ARTICLE V

A. On or before December 31 of each year, following the effective date of this Compact, the Commission shall determine the stateline yields of the Arkansas River Basin for the previous water year.

B. Any depletion of annual yield in excess of that allowed by the provisions of this Compact shall, subject to the control of the Commission, be delivered to the downstream state, and said delivery shall consist of not less than sixty percent (60%) of the current runoff of the basin.

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[2] Probably should read "of."

C. Methods for determining the annual yield of each of the subbasins shall be those developed and approved by the Commission.

ARTICLE VI

A. Each state may construct, own and operate for its needs water storage reservoirs in the other state.

B. Depletion in annual yield of any subbasin of the Arkansas River Basin caused by the operation of any water storage reservoir either heretofore or hereafter constructed by the United States or any of its agencies, instrumentalities or wards, or by a state, political subdivision thereof, or any person or persons shall be charged against the state in which the yield therefrom is utilized.

C. Each state shall have the free and unrestricted right to utilize the natural channel of any stream within the Arkansas River Basin for conveyance through the other state of waters released from any water storage reservoir for an intended downstream point of diversion or use without loss of ownership of such waters; provided, however, that a reduction shall be made in the amount of water which can be withdrawn at point of removal, equal to the transmission losses.

ARTICLE VII

The States of Arkansas and Oklahoma mutually agree to:

A. The principle of individual state effort to abate man-made pollution within each state's respective borders, and the continuing support of both states in an active pollution abatement program;

B. The cooperation of the appropriate state agencies in the States of Arkansas and Oklahoma to investigate and abate sources of alleged interstate pollution within the Arkansas River Basin;

C. Enter into joint programs for the identification and control of sources of pollution of the waters of the Arkansas River and its tributaries which are of interstate significance;

D. The principle that neither state may require the other to provide water for the purpose of water quality control as a substitute for adequate waste treatment;

E. Utilize the provisions of all federal and state water pollution laws and to recognize such water quality standards as may be now or hereafter established under the Federal Water Pollution Control Act in the resolution of any pollution problems affecting the waters of the Arkansas River Basin.

ARTICLE VIII

A. There is hereby created an interstate administrative agency to be known as the "Arkansas-Oklahoma Arkansas River Compact Commission." The Commission shall be composed of three Commissioners representing the State of Arkansas and three Commissioners representing the State of Oklahoma, selected as provided below; and, if designated by the President or an authorized federal agency, one Commissioner representing the United States. The President, or the federal agency authorized to make such appointments, is hereby requested to designate a Commissioner and an alternate representing the United States. The Federal Commissioner, if one be designated,

shall be the Chairman and presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission.

B. One Arkansas Commissioner shall be the Director of the Arkansas Soil and Water Conservation Commission, or such other agency as may be hereafter responsible for administering water law in the state. The other two Commissioners shall reside in the Arkansas River drainage area in the State of Arkansas and shall be appointed by the Governor, by and with the advice and consent of the Senate, to four-year staggered terms with the first two Commissioners being appointed simultaneously to terms of two (2) and four (4) years, respectively.

C. One Oklahoma Commissioner shall be the Director of the Oklahoma Water Resources Board, or such other agency as may be hereafter responsible for administering water law in the state. The other two Commissioners shall reside within the Arkansas River drainage area in the State of Oklahoma and shall be appointed by the Governor, by and with the advice and consent of the Senate, to four-year staggered terms, with the first two Commissioners being appointed simultaneously to terms of two (2) and four (4) years, respectively.

D. A majority of the Commissioners of each state and the Commissioner or his alternate representing the United States, if they are so designated, must be present to constitute a quorum. In taking any Commission action, each signatory state shall have a single vote representing the majority opinion of the Commissioners of that state.

E. In the case of a tie vote on any of the Commission's determinations, order, or other actions, a majority of the Commissioners of either state may, upon written request

to the Chairman, submit the question to arbitration. Arbitration shall not be compulsory, but on the event of arbitration, there shall be three arbitrators:

(1) One named by resolution duly adopted by the Arkansas Soil and Water Conservation Commission, or such other state agency as may be hereafter responsible for administering water law in the State of Arkansas; and

(2) One named by resolution duly adopted by the Oklahoma Water Resources Board, or such other state agency as may be hereafter responsible for administering water law in the State of Oklahoma; and

(3) The third chosen by the two arbitrators who are selected as provided above.

If the arbitrators fail to select a third within sixty (60) days following their selection, then he shall be chosen by the Chairman of the Commission.

F. The salaries and personal expenses of each Commissioner shall be paid by the Government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact shall be borne equally by the two states and shall be paid by the Commission out of the "Arkansas-Oklahoma Arkansas River Compact Fund," initiated and maintained as provided in Article IX(B)(5) below. The states hereby mutually agree to appropriate sums sufficient to cover its share of the expenses incurred in the administration of this Compact, to be paid into said fund. Disbursements shall be made from said fund in such manner as may be authorized by the Commission. Such funds shall not be subject to the audit and accounting procedures of the states; however, all receipts and disbursements of funds

handled by the Commission shall be audited by a qualified independent public accountant at regular intervals, and the report of such audit shall be included in and become a part of the annual report of the Commission, provided by Article IX(B)(6) below. The Commission shall not pledge the credit of either state and shall not incur any obligations prior to the availability of funds adequate to meet the same.

ARTICLE IX

A. The Commission shall have the power to:

(1) Employ such engineering, legal, clerical and other personnel as in its judgment may be necessary for the performance of its functions under this Compact;

(2) Enter into contracts with appropriate state or federal agencies for the collection, correlation, and presentation of factual data, for the maintenance of records and for the preparation of reports;

(3) Establish and maintain an office for the conduct of its affairs;

(4) Adopt and procure a seal for its official use;

(5) Adopt rules and regulations governing its operations. The procedures employed for the administration of this Compact shall not be subject to any Administrative Procedures Act of either state, but shall be subject to the provisions hereof and to the rules and regulations of the Commission; provided, however, all rules and regulations of the Commission shall be filed with the Secretary of State of the signatory states.

(6) Cooperate with federal and state agencies and political subdivisions of the signatory states in developing principles, consistent with the provisions of this Compact and with federal and state policy, for the storage and release of water from reservoirs, both existing and future within the Arkansas River Basin, for the purpose of assuring their operation in the best interests of the states and the United States;

(7) Hold hearings and compel the attendance of witnesses for the purpose of taking testimony and receiving other appropriate and proper evidence and issuing such appropriate orders as it deems necessary for the proper administration of this Compact, which orders shall be enforceable upon the request by the Commission or any other interested party in any court of competent jurisdiction within the county wherein the subject matter to which the order relates is in existence, subject to the right of review through the appellate courts of the state of situs. Any hearing held for the promulgation and issuance of orders shall be in the county and state of the subject matter of said hearing;

(8) Make and file official certified copies of any of its findings, recommendations or reports with such officers or agencies of either state, or the United States, as may have any interest in or jurisdiction over the subject matter. Findings of fact made by the Commission shall be admissible in evidence and shall constitute prima facie evidence of such fact in any court or before any agency of competent jurisdiction. The making of findings, recommendations, or reports by the Commission shall not be a condition precedent to instituting or maintaining any action or proceeding of any kind by a signatory state in any court, or before any tribunal, agency or officer, for the protection of any right

under this Compact or for the enforcement of any of its provisions;

(9) Secure from the head of any department or agency of the federal or state government such information, suggestions, estimates and statistics as it may need or believe to be useful for carrying out its functions and as may be available to or procurable by the department or agency to which the request is addressed;

(10) Print or otherwise reproduce and distribute all of its proceedings and reports; and

(11) Accept, for the purposes of this Compact, any and all private donations and gifts and federal grants of money.

B. The Commission shall:

(1) Cause to be established, maintained and operated such stream, reservoir or other gaging stations as may be necessary for the proper administration of this Compact;

(2) Collect, analyze and report on data as to stream flows, water quality, annual yields and such other information as is necessary for the proper administration of this Compact;

(3) Continue research for developing methods of determining total basin yields;

(4) Perform all other functions required of it by the Compact and do all things necessary, proper or convenient in the performance of its duties thereunder;

(5) Establish and maintain the "Arkansas-Oklahoma Arkansas River Compact Fund," consisting of any and all funds received by the Commission under the authority of

this Compact and deposited in one or more banks qualifying for the deposit of public funds of the signatory states;

(6) Prepare and submit an annual report to the Governor of each signatory state and to the President of the United States covering the activities of the Commission for the preceding fiscal year, together with an accounting of all funds received and expended by it in the conduct of its work;

(7) Prepare and submit to the Governor of each of the States of Arkansas and Oklahoma an annual budget covering the anticipated expenses of the Commission for the following fiscal year; and

(8) Make available to the Governor of any state agency of either state or to any authorized representative of the United States, upon request, any information within its possession.

ARTICLE X

A. The provisions hereof shall remain in full force and effect until changed or amended by unanimous action of the states acting through their Commissioners and until such changes are ratified by the legislatures of the respective states and consented to by the Congress of the United States in the same manner as this Compact is required to be ratified to become effective.

B. This Compact may be terminated at any time by the appropriate action of the legislature of both signatory states.

C. In the event of amendment or termination of the Compact, all rights established under the Compact shall continue unimpaired.

ARTICLE XI

Nothing in this Compact shall be deemed:

A. To impair or affect the powers, rights or obligations of the United States, or those claiming under its authority in, over and to the waters of the Arkansas River Basin;

B. To interfere with or impair the right or power of either signatory state to regulate within its boundaries of appropriation, use and control of waters within that state not inconsistent with its obligations under this Compact.

ARTICLE XII

If any part or application of this Compact should be declared invalid by a court of competent jurisdiction, all other provisions and application of this Compact shall remain in full force and effect.

ARTICLE XIII

A. This Compact shall become binding and obligatory when it shall have been ratified by the legislature of each state and consented to by the Congress of the United States, and when the Congressional Act consenting to this Compact includes the consent of Congress to name and join the United States as a party in any litigation in the United States Supreme Court, if the United States is an indispensable party, and if the litigation arises out of this

Compact or its application, and if a signatory state is a party thereto.

B. The States of Arkansas and Oklahoma mutually agree and consent to be sued in the United States District Court under the provisions of Public Law 87-830 as enacted October 15, 1962, or as may be thereafter amended.

C. Notice of ratification by the legislature of each state shall be given by the Governor of that state to the Governor of the other state, and to the President of the United States, and the President is hereby requested to give notice to the Governor of each state of consent by the Congress of the United States.

ARKANSAS RIVER BASIN COMPACT ARKANSAS-OKLAHOMA, 1970 MEMORANDUM OF CORRECTION

The State of Arkansas and Oklahoma, further acting through their duly-authorized compact representatives, S. Keith Jackson of Arkansas, and Glade R. Kirkpatrick of Oklahoma, hereby execute this memorandum of correction to the Arkansas River Basin Compact Arkansas-Oklahoma, 1970, executed at the City of Little Rock, State of Arkansas, on the 16th day of March, 1970, as follows:

1. By striking the word "below" as it appears in the last line of Article II(C) and inserting in lieu thereof the word "above."

2. By striking the word "of" as it appears in the first line of Article IX, (B)(8) and inserting in lieu thereof the word "or."

IN WITNESS WHEREOF, the authorized representatives have executed three counterparts hereof each of which

shall be and constitute an original, one of which shall be deposited with the Administrator of General Services of the United States, and affixed to the original Arkansas River Basin Compact Arkansas-Oklahoma, 1970, there on file, and one of which shall be forwarded to the Governor of each state and likewise affixed to said Compact there on file.

IN THE UNITED STATE [sic] DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.	)	
Plaintiff	)	Case No. 4:05-cv-00329-JOE-SAJ
v.	)	
TYSON FOODS, INC., et al	)	
Defendants.	)	

TYSON FOODS, INC.'S MOTION TO DISMISS COUNTS 4-10 OF THE FIRST AMENDED COMPLAINT AND INTEGRATED OPENING BRIEF IN SUPPORT

* * *

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule of Civil Procedure 7.1, Defendant Tyson Foods, Inc., joined by Tyson Poultry, Inc, Tyson Chicken, Inc., and Cobb-Vantress, Inc. (collectively "Defendants"), hereby move this Court for an order completely or partially dismissing claims four, five, six, seven, eight, nine, and ten of the First Amended Complaint ("Complaint") for failure to state a claim upon which relief can be granted.

The State of Oklahoma and Oklahoma's Secretary of the Environment (collectively the "Oklahoma Plaintiffs" or "Plaintiffs") brought suit in this Court against fourteen out-of-state poultry companies. The lawsuit alleges that the independent farmers or "growers" who raise poultry for defendants, pursuant to contracts, are violating Oklahoma common law and statutes by engaging in the longstanding

agricultural practice of using poultry litter as fertilizer.[1] Specifically, the Oklahoma Plaintiffs claim that water running off fertilized fields pollutes the Illinois River Watershed ("IRW"), which crosses from Arkansas into Oklahoma (and eventually flows back into Arkansas after joining the Arkansas river).

Among other theories, the Oklahoma Plaintiffs allege that the use of poultry fertilizer in both Oklahoma and Arkansas creates a nuisance *per se* under Oklahoma law (count 4); creates a nuisance under federal common law (count 5) ; constitutes a trespass upon Oklahoma's property interests under Oklahoma law (count 6); violates Oklahoma statutory prohibitions on waste disposal (count 7); violates Oklahoma's Animal Waste Management Plans (count 8); violates Oklahoma statutes and regulations barring waste discharges to surface and ground waters (count 9); and unjustly enriches the Defendants under Oklahoma law (count 10). For convenience, Counts 4 and 6-10, which seek to apply Oklahoma common law, statutes, and regulations will be referred to collectively as the "Oklahoma Law Claims."

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[1] Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., George's, Inc., George's Farms, Inc., Peterson Farms, Inc., and Simmons Food, Inc. all have their principal place of business in the State of Arkansas. First Amended Complaint at ¶¶ 6-10, 15-18. Defendant Aviagen, Inc. has its principal place of business in Alabama. *Id.* at 10. Defendants Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc. have their principal places of business in Mississippi. *Id.* at ¶¶ 11-12. Defendants Cargill, Inc. and Cargill Turkey Production, LLC have their principal places of business in Minnesota. *Id.* at ¶¶ 13-14. Defendant Willow Brook Foods, Inc. has its principal place of business in Missouri. *Id.* at 19.

To the extent that the Oklahoma Law Claims pertain to activities occurring in Arkansas or pollution allegedly emanating from Arkansas, those claims should be dismissed. *First,* the Oklahoma Law Claims are preempted by the Clean Water Act, 33 U.S.C. §§ 1251-1387, which exclusively governs matters involving interstate water pollution. *Second,* to the extent the Oklahoma Law Claims seek to apply Oklahoma law to activities in the State of Arkansas (thereby displacing Arkansas statutes, regulations, and common law), these claims constitute an impermissible attempt at extraterritorial regulation in violation of the Commerce and Due Process Clauses of the United States Constitution. *Third,* the Oklahoma Plaintiffs' claim for relief under the federal common law of nuisance (Count 5) must be dismissed as no such federal common law of nuisance exists to govern claims of interstate water pollution.

II. BACKGROUND

The Clean Water Act ("CWA"), the common name for the 1972 Amendments to the Federal Water Pollution Control Act, is a far-reaching and complex statutory scheme "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a), CWA § 101(a). The CWA is implemented through a balanced Federal-State partnership that finely allocates responsibilities among varying levels of government.

Disputes concerning control over interstate waters and interstate water pollution are not novel. *See, e.g., Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824); *Missouri v. Illinois,* 200 U.S. 496 (1906). In fact, the States of Arkansas and Oklahoma have recently litigated over pollution

levels in the Illinois River. *See Arkansas v. Oklahoma,* 503 U.S. 91 (1992) (upholding EPA's issuance of a CWA permit to City of Fayetteville, Arkansas on the grounds that it would not violate Oklahoma's water quality standards). Here, the State of Oklahoma alleges that Defendants' independent contractors are causing pollution throughout the entire 1,069,530 acre IRW, which is bisected by the Arkansas-Oklahoma border. Complaint ¶ 22; Complaint, Exh. 1 (map). The Oklahoma Plaintiffs admit that approximately half of the IRW lies outside of Oklahoma's boundaries. *See id.* And, Plaintiffs do not limit their claims to activities occurring within the state of Oklahoma; to the contrary, the claims are based upon the assertion that farmers throughout the IRW are "routinely and repeatedly applying" poultry litter to lands within the entire IRW. Complaint at ¶ 49. *See also id.* at ¶¶ 22-31, 54, 58-64.

The Plaintiffs further admit that, by invoking Oklahoma law, their goal is to change the agricultural methods and practices of persons residing throughout the region, including in Arkansas. *See* Complaint at ¶¶ 1, 69, IV.3 (requesting a permanent injunction requiring Defendants "to immediately abate" the use of poultry fertilizer throughout the IRW). In short, Plaintiffs admit that they are attempting to use the Oklahoma Law Claims to impose the standards of Oklahoma state law outside the borders of the State.

III. LEGAL STANDARD

"The court's function on a Rule 12(b)(6) motion is . . . to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Yanaki v. Iomed, Inc.,* 415 F.3d 1204, 1211 (10th Cir. 2005)

(quoting *Sutton v. Utah State Sch. for Deaf & Blind,* 173 F.3d 1226, 1236 (10th Cir. 1999) (quotations omitted)). In considering the motion, the court must accept all well-pleaded factual allegations in the complaint as true and view them in the light most favorable to the nonmoving party. *GFF Corp. v. Associated Wholesale Grocers, Inc.,* 130 F.3d 1381, 1384 (10th Cir. 1997). In spite of the deference afforded to the Plaintiffs factual allegations, it is not proper for the court to assume that the plaintiff can prove facts not alleged in the complaint "or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,* 459 U.S. 519, 526 (1983). Moreover, the court does not give any deference to "unsupported conclusions or interpretations of law." *Wash. Legal Found. v. Mass. Bar Found.,* 993 F.2d 962, 971 (1st Cir. 1993). Dismissal is appropriate if it "'appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief.'" *Murrell v. Sch. Dist. No. 1,* 186 F.3d 1238, 1244 (10th Cir. 1999) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)).

IV. ARGUMENT

The Oklahoma Plaintiffs seek to apply federal common law and Oklahoma state law to practices in, and water pollution allegedly emanating from, another State. These claims should be dismissed as a matter of law.

A. THE CLEAN WATER ACT PREEMPTS OKLAHOMA STATE LAW ON CLAIMS OF INTERSTATE WATER POLLUTION

Although the Complaint only addresses the issue in a generalized fashion, *see* Complaint at ¶ 55, under the CWA the sources of alleged pollution in the IRW must fit within one of two classifications: either a "point source" or a "nonpoint source." *See Pronsolino v. Nostri,* 291 F.3d 1123, 1125-26 (9th Cir. 2001). "Point source" water pollution comes from a single, identifiable source or "point" such as a factory or a sewage plant. *See International Paper Co. v. Oullette,* 479 U.S. 481, 485 n.4 (1987). For example, certain concentrated animal feeding operations (called "CAFOs"), are defined as point sources under the CWA. *See* 33 U.S.C. § 1362(14), CWA § 502(14). All other generalized sources of alleged pollution are considered to be "nonpoint" sources of pollution. *Pronsolino,* 291 F.3d at 1126. Regardless of which form of water pollution is at issue here, the CWA's pervasive federal regulation of *both* point and nonpoint sources preempts the Oklahoma Law Claims. The Oklahoma Plaintiffs' state law claims must therefore be dismissed to the extent they are asserted against alleged activities in or pollution stemming from the State of Arkansas.

In analyzing whether state law has been preempted by federal regulation, the first question is whether the federal law preempts the entire "field" or of law and regulation. Congress may elect to occupy an entire field of regulation – thereby barring *any* state regulation on that topic. *See Ouellette,* 479 U.S. at 491 (noting that field preemption occurs where "federal legislation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation")

(quotations omitted); *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners,* 199 F.3d 1185, 1190 (10th Cir. 1999) ("state or local law may be preempted if it attempts to regulate conduct in a field that Congress, by its legislation, intended to be occupied exclusively by the federal government.") (quotation omitted). Even where Congress does not occupy an entire field of regulation, state law is preempted to the extent it conflicts with federal law. *See Ouellette,* 479 U.S. at 494.

The CWA Occupies the Field of Point Source Water Pollution: In the area of water pollution from "point sources," the Supreme Court already has ruled, in *International Paper v. Ouellette,* 479 U.S. 481, that State law actions to remedy such pollution are preempted by the CWA.

In *Ouellette,* a group of Vermont property owners filed a nuisance suit under Vermont's common law against a New York pulp and paper mill operated by International Paper Company. 479 U.S. at 484. The property owners alleged that International Paper discharged pollutants into Lake Champlain, which forms part of the border between Vermont and New York. *Id.* at 483-484. These discharges, according to the suit, created a continuing nuisance under Vermont law, as the water was rendered "foul, unhealthy, smelly, and . . . unfit for recreational use." *Id.* at 484 (alteration in original) (quotations omitted). The property owners demanded compensatory and punitive damages as well as an injunction requiring International Paper to change its water treatment system. *Id.*

The Supreme Court dismissed the suit because it concluded that Congress intended for the CWA to "dominate the field of [interstate water] pollution regulation."

Id. at 492. Because Congress has occupied the field of interstate water pollution, the Court held that "an affected State only has an advisory role in regulating pollution that originates beyond its borders." *Id.* at 490. This holding was mandated by the Supreme Court's prior ruling in *Milwaukee v. Illinois ("Milwaukee I"),* 451 U.S. 304 (1981), in which the Court held that the CWA is "an all-encompassing program of water pollution regulation" that "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Id.* at 317-318. The Supreme Court emphasized that the CWA "applies to all point sources and virtually all bodies of water . . . " *Ouellette,* 479 U.S. at 492; *see also Milwaukee II,* 451 U.S. at 318 ("*Every* point source discharge is prohibited unless covered by a permit which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals.") (footnote omitted).

While resting its holding on the doctrine of field preemption, the Supreme Court in *Ouellette* also noted that State causes of action would impermissibly conflict with federal regulation. "[W]e are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" *Ouellette,* 479 U.S. at 493 (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 713 (1985)). Among other harms, allowing State law causes of action for interstate water pollution would impede regulatory certainty for citizens and regulators in interstate watersheds and would frustrate Congress' intent to avoid interstate conflict over the application of state nuisance

laws. *See Ouellette,* 479 U.S. at 496 ("The application of numerous States' laws would only exacerbate the vagueness and resulting uncertainty."); *id.* n.17 ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'") (quoting Prosser & Keen on Torts 616 (5th ed. 1984)); *id.* at 496-497 ("For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states.") (quoting *Milwaukee v. Illinois ("Milwaukee III"),* 731 F.2d 403, 414 (7th Cir. 1984)).

In this case, the effort to apply the Oklahoma Law Claims against Arkansas point sources is preempted by the CWA. As the Supreme Court cautioned, any attempt to apply Oklahoma state law to point source discharges occurring in Arkansas "could effectively override both the [CWA's] permit requirements and the policy choices made by the source State." *Id.* at 495. In asking this Court to declare Defendants liable for damages based on conduct in Arkansas and in seeking an injunction that would apply in Arkansas, *see* Complaint IV.1-8, the Oklahoma Plaintiffs seek to "do indirectly what they could they could not do directly – regulate the conduct of out-of-state sources." *Id.* at 495. Accordingly, inasmuch as the Oklahoma Plaintiffs seek to impose legal obligations and liabilities on Arkansas point sources, this Court must dismiss the Oklahoma law claims.[2]

[2] Nor is the Oklahoma Plaintiffs' effort at interstate water regulation permitted by the CWA' s savings clause. The CWA preserves "the right of any State or political subdivision . . . to adopt or enforce" more stringent effluent standards than provided by federal law, so long as they do not "impair[] or in any manner affect[] any right or jurisdiction of

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The CWA Occupies the Field of Non-Point Source Water Pollution: The same preemption analysis applies to any attempt on the part of the Oklahoma Plaintiffs to impose Oklahoma law on Arkansas *nonpoint sources.* Federal regulation of nonpoint sources under the CWA is equally comprehensive and therefore preempts the Oklahoma Law Claims through both field and conflict preemption.

The CWA imposes a pervasive and intricate system of obligations in order to reduce nonpoint source pollution. Nonpoint source pollution includes all discharges to waters of the United States that fall outside the definition of a point source discharge, such as "rainfall or snowmelt moving over and through the ground and carrying natural and human-made pollutants" into surface or groundwater. 68 Fed. Reg. 60,653, 60,655 (Oct. 23, 2003). Given their nature, nonpoint source discharges are difficult to regulate and Congress therefore constructed a complex regulatory structure under CWA §§ 303 and 319 that imposes responsibility on each State to make its own policy choices and impose its own regulations on conduct occurring within its borders. *See Pronsolino,* 291 F.3d at 1126 (control of nonpoint sources are "distinctly different" than control of point sources) (citation omitted). The congressional decision to

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the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. As both the Supreme Court and the lower federal courts have held, this language means only that the CWA does not preempt a state from regulating activity that occurs within the state's own boundaries. *See Ouellette,* 479 U.S. at 494, 498-99; *Milwaukee III,* 731 F.2d at 405, 413 (holding that the CWA's savings clause did "no more than to *save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters*") (emphasis added).

use a different approach does not make control of nonpoint source pollution any less comprehensive. *Cf. Milwaukee II,* 451 U.S. at 323 ("The difference in treatment between overflows and treated effluent by the agencies is due to differences in the *nature* of the problems, *not* the extent to which the problems have been addressed").

Federal involvement in managing nonpoint sources begins with each State's development of Water Quality Standards. These standards require States to specify (1) a designated use for each individual water body (such as recreation or a source of drinking water); (2) the maximum amount of pollutants that the water body can tolerate while serving this desired use; and (3) an antidegradation review policy. *See, e.g.,* 33 U.S.C. § 1313(c)(2)(A), CWA § 303(c)(2)(A); 40 C.F.R. § 131; *American Wildlands v. Browner*, 260 F.3d 1192, 1194 (10th Cir. 2001). These standards, along with a Water Management Plan, are submitted to EPA for approval or rejection with required changes, 33 U.S.C. § 1313(c)(2)-(3), CWA § 303(c)(2)-(3).[3] "The EPA provides states with substantial guidance in drafting water quality standards," *City of Albuquerque v. Browner,* 97 F.3d 415, 419 n.4 (10th Cir. 1996) (citing 40 C.F.R. § 131.11), and the entire process requires public notice and a public hearing. 33 U.S.C. § 1313(c)(1), CWA § 303(c)(1); 40 C.F.R. § 131.10(e). Where these Water Quality Standards are not met, each State is obligated to list and prioritize substandard water bodies, called "impaired

[3] Water Quality Standards were to be adopted sometime shortly after 1972 with a State review every three years. The results of these reviews are to be submitted to EPA. 33 U.S.C. § 1313(c)(2), CWA § 303(c)(2). States are obligated to maintain a "continuing planning process" under CWA § 303(e)(3)(A) which must be approved by an EPA official. 40 C.F.R. §§ 130.5(a), (c).

waters." 33 U.S.C. § 1313(d)(1)(A) & (B), CWA § 303(d)(1)(A) & (B). For each impaired water, the State must calculate the Total Maximum Daily Load ("TMDL") of pollutants that the water body can receive without exceeding Water Quality Standards. 33 U.S.C. § 1313(d)(1)(C), CWA § 303(d)(1)(C); 40 C.F.R. § 130.7. Both mechanisms aid in determining the contribution of nonpoint sources to impaired waters and how best to control them on a watershed-by-watershed basis. The Ninth Circuit's description of the TMDL program shows how this "intricate scheme" is interconnected: "TMDLs serve as a link in an implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution reduction, and assessment of the impact of such measures on water quality, all to the end of attaining water quality goals." *Pronsolino*, 291 F.3d at 1128-1129.

The Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 42 (1987), amended the CWA and tasked States with both detailed reporting and planning requirements for nonpoint sources. CWA § 319 requires each State to submit a State Assessment Report to EPA, after holding a State-level notice and comment rulemaking, identifying (1) impaired waters "which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to maintain applicable water quality standards . . . "; (2) categories and subcategories of nonpoint sources and "particular nonpoint sources which add significant pollution" to impaired waters; (3) a process that uses "intergovernmental coordination and public participation" to develop best management practices ("BMPs") for controlling each category and subcategory of nonpoint source "to the maximum extent practicable"; and (4) programs to control nonpoint source pollution. 33 U.S.C. § 1329(a)(1),

CWA § 319(a)(1). The EPA Administrator may reject the plan as inadequate, mandate resubmission with modifications by the State, 33 U.S.C. § 1329(d)(2), CWA § 319(d)(2), or prepare its own report if the State refuses to comply. 33 U.S.C. § 1329(d)(3), CWA § 319(d)(3). *See also Pronsolino,* 291 F.3d at 1138-1139 (describing regulation under CWA § 319).

States also must provide EPA, after public notice and a hearing, a management program containing the following: (1) identification of BMPs and measures to reduce nonpoint source pollution from each category and subcategory; (2) identification of all programs that can aid in implementing the BMPs; (3) a schedule of "annual milestones" for implementation of the BMPs; (4) the State Attorney General's certification that State laws provide adequate authority to impose the BMPs on nonpoint sources; and (5) a list of federal grant programs that will aid the program. 33 U.S.C. § 1329(b)(2), CWA § 319(b)(2). Each management plan must be developed on a watershed-by-watershed basis with the help of technical experts, 33 U.S.C. § 1329(b)(3), (4), (e), CWA § 319(b)(3), (4), (e), and submitted to EPA for approval. 33 U.S.C. § 1329(d), CWA § 319(d). The Administrator may reject the plan as inadequate and mandate resubmission with modifications by the State. 33 U.S.C. § 1329(d)(2), CWA § 319(d)(2). "Under section 319(b), all States have . . . adopted management programs to control nonpoint source pollution." 68 Fed. Reg. at 60,655. Together with CWA §303, § 319 "is one of numerous interwoven components that together make up an intricate statutory scheme addressing technically complex environmental issues." *Pronsolino,* 291 F.3d at 1133.

Congress also created a mechanism for settling multi-state disputes regarding interstate waters, such as the IRW. CWA § 319(g) allows any state to petition the Administrator for an Interstate Management Conference when the water body fails to meet its water quality standards "in whole, or in part [due to] pollution from nonpoint sources in another State. . . ." The Administrator has no discretion to deny this conference – and "*shall* convene[] a management conference of all States which contribute significant pollution resulting from nonpoint sources. . . ." *Id.* (emphasis added). The Administrator will then coordinate "an agreement among such States to reduce the level of pollution in such portion resulting from nonpoint sources. . . ." *Id.*

Given the intricacies of federal regulation of interstate nonpoint source pollution, there should be no question that it is "sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." *Ouellette,* 479 U.S. at 491 (quotations omitted). Additionally, allowing Oklahoma to sue under its own common law of nuisance and other state laws for transboundary pollution would conflict with Congress' intent (including Congress' instruction for the EPA Administrator to mediate interstate disputes under CWA § 319(g)).[4]

[4] The current CWA and its regulation of nonpoint sources bears no resemblance to *Illinois v. Milwaukee ("Milwaukee I"),* 406 U.S. 91 (1972), where the Supreme Court allowed a federal common law nuisance claim to proceed at a time when federal regulation of water pollution was minimal. The universe of federal water protections at the time included only (1) "some surveillance by the Army Corps of Engineers over industrial pollution, not including sewage" under the Rivers and Harbors Act; (2) the consideration of the environment in

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The legislative history of the CWA also supports the conclusion that Congress intended to preempt State and federal common law claims in this area. For example, Representative Hammerschmidt, a House conferee on the 1987 amendments to the CWA, declared that allowing States to "impose [their] own statutory or common law upon residents of other States . . . would have been contrary to a rational, orderly, and consistent regulatory scheme . . . [i]nterstate water pollution should be – and

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federal decisionmaking under the National Environmental Policy Act; (3) an expression of "increasing concern with the quality of the aquatic environment" through the passage of the Fish and Wildlife Act of 1956 and its amendments; (4) an Army Corps of Engineers rule expressing "new and expanding policies" requiring permits for discharges into navigable waters; and (5) the Water Quality Standards under the Federal Water Pollution Control Act. *Milwaukee I,* 406 U.S. 91, 101-102 (1972). Few regulations existed as the nascent EPA was only two years old at the time. *See* Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970) (creating the EPA from portions of the Department of the Interior, Department of Health, Education, and Welfare and Department of Agriculture). Even with this barren regulatory backdrop, however, the Supreme Court relied on a savings clause in the CWA which expressly preserved "state and interstate action[s] to abate pollution of interstate or navigable waters. . . ." *Milwaukee I,* 406 U.S. at 104. Five months after the Court released its decision in *Milwaukee I,* Congress passed the CWA. Pub. L. No. 92-500, 86 Stat. 816 (Oct. 18, 1972). These amendments have "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Milwaukee II,* 451 U.S. at 317. That Congress has since passed additional measures specifically addressing nonpoint sources only augments the completeness of the CWA. Most importantly, the savings clause which served as the fulcrum of *Milwaukee I's* decision to allow a federal common law action was subsequently deleted from the Federal Water Pollution Control Act. *See* H.R. Rep. No. 92-911 at 173 (1972) (listing § 10(b) among the "Existing Law" supplanted by the CWA). Today, both the deletion of the savings clause and the major subsequent revisions work to prevent State common law or statutory claims to intrude on such a pervasive federal scheme.

will remain – the subject of uniform Federal law and not the conflicting laws of various states." 133 Cong. Rec. 986-987 (1987). Similarly, in the debate of the 1985 amendments the EPA emphasized that application of state law to claims of interstate water pollution would only interfere with the implementation of the CWA:

> [P]ermitting states to apply state law to abate out-of-state discharges will significantly impair the federal government's ability to carry out a national pollution control policy. The Act creates a federal-state partnership in the area of interstate water quality . . . Under this partnership, the states must defer to the federal government's choice of minimum national requirements . . . If one state may impose its limitations beyond its borders, this balance of federal and state roles is destroyed.

Amending the Clean Water Act: Hearings Before the Subcommittee on the Environmental Pollution of the Senate Environment and Public Works Committee, 99th Cong. 25-26 (1985) (EPA Response to Congressman Moody).

In keeping with Congress' intent to exclude state law from the regulation of interstate water pollution, the final version of the Water Quality Act of 1987 explicitly stripped authorization for State common law actions from a Senate version of the bill. *See* 133 Cong. Rec. at 987 (praising the demise of § 119 of the Senate bill).[5] This is strong evidence

[5] The deleted § 119 read: "This section preserves State common law, permitting a person in a downstream State who is injured or aggrieved by pollution from an upstream State to seek relief in the courts of the injured party's State or in the courts of the neighboring State through State common or statutory law." 131 Cong. Rec. 15317

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that Congress did not intend to endorse State common law actions in the area of interstate water quality so soon after they were condemned by the Seventh Circuit and the U.S. Supreme Court.[6] *See Thompson v. Kennickell,* 797 F.2d 1015, 1024-1025 (D.C. Cir. 1986) (deletion of provision in earlier bill is evidence of congressional intent). *Cf. Rusello v. United States,* 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *Lorillard v. Pons,* 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Congress was undoubtedly aware of the issues raised in both *Ouellette* and *Milwaukee III.*[7] Allowing the Oklahoma Law Claims to proceed now

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(1985). States would have been able to "bring actions involving State law, in cases involving water pollution arising in another State, in Federal district court" had this savings clause not be [sic] excised from the Bill. S. Rep. No. 99-50 at 50 (1985).

[6] *Milwaukee III* was decided by the Seventh Circuit in 1984. *Ouellette* was decided by the U.S. Supreme Court on January 21, 1987; the Water Quality Act of 1987 was enacted on February 4, 1987. Pub. L. No. 100-4, 101 Stat. 42 (1987).

[7] *See, e.g., Amending the Clean Water Act: Hearings Before the Subcommittee on the Environmental Pollution of the Senate Environment and Public Works Committee,* 99th Cong. 25-26 (1985) (EPA Response to Congressman Moody) (discussing *Milwaukee III*); 133 Cong. Rec. at 1591 (1987) (Statement of Rep. Simpson) ("There are a number of delicate yet critical questions concerning intergovernmental relations in water quality regulation, and I am pleased that the U.S. Supreme Court will take the opportunity this term to wrestle with conflicting circuit court opinions concerning the laws applicable in cases where affected parties in downstream states allege harm from permitted discharges in upstream states. Along with other members of the Environment and Public Works Committee, I will carefully examine the

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would effectively countermand Congress' rejection of state law regulation of interstate water quality and undermine "the clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

The fact that Oklahoma, or its Attorney General, would prefer different or more stringent regulation of nonpoint sources is not a defense to preemption.[8] Congress has recognized the challenges presented by nonpoint source pollution, and has chosen not to impose the type of particularized and discriminatory effluent limitations that Oklahoma is advocating here. *See* 68 Fed. Reg. 60,653, 60,654 (Oct. 23, 2003) (EPA places "emphases on watershed-based planning and on restoring impaired waters through developing and implementing TMDLs, represent the current state of the art in fashioning watershed-based

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court's ultimate holding in *International Paper v. Ouellette,* which is anticipated early this year.").

[8] *Dicta* in some cases suggests that nonpoint sources are unregulated. *See American Wildlands v. Browner,* 260 F.3d 1192, 1197-98 (10th Cir. 2001) ("Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution"); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("Congress would have regulated so-called nonpoint sources if a workable method could have been derived; it instructed the EPA to study the problem and come up with a solution"); *Appalachian Power Co. v. Train,* 545 F.2d 1351, 1373 (4th Cir. 1976) ("Congress consciously . . . [gave] EPA authority under the Act to regulate only" point sources). Two of these cases were decided before the Water Quality Act of 1987 added § 319, and amended CWA § 303 and are thus inapposite in addition to being *dicta. American Wildlands,* the only recent case, concerned whether EPA properly approved Montana's antidegradation and mixing zone policies under the Administrative Procedure Act. 260 F.3d at 1196. No question of preemption was ever presented to that court. Considering the comprehensive requirements of CWA §§ 303 and 319, detailed above, claims that nonpoint source discharges are free of federal oversight are incorrect and should be afforded no precedential weight.

solutions to prevent and remedy water quality problems."). The existing regulatory scheme is not a consequence of neglect, but of a deliberate congressional decision to regulate nonpoint sources differently than point sources. While Congress has continued to afford States "a strong voice in regulating their own pollution," *Ouellette*, 479 U.S. at 490, they must proceed against nonpoint source pollution from other States in accordance with the CWA; not through *ad hoc* state law lawsuits against persons or industries they deem to be disfavored.

In sum, because Congress has "eliminat[ed] dual regulation and substitut[ed] regulation by one agency," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947), the Oklahoma law claims against Arkansas point sources and nonpoint sources must be dismissed as preempted by the CWA.[9]

B. OKLAHOMA'S CLAIMS VIOLATE THE COMMERCE CLAUSE AND THE SOVEREIGNTY OF ARKANSAS

The Oklahoma Plaintiffs seek to extend Oklahoma law beyond the State's borders into Arkansas. To the extent that the Oklahoma Law Claims concern commercial activities conducted in, and pollution allegedly emanating from, Arkansas, they run afoul of the dormant Commerce Clause, U.S. Const., Art. I, § 8, and the constitutional

[9] In noting that the CWA occupies the field of both point and non-point pollution in claims of interstate water pollution, Defendants take no position on whether the conduct alleged in the Complaint would properly be classified as point or non-point discharges under the CWA.

principles of federalism and due process that afford each State sovereignty within its own borders.

1. Regulation of Commerce In Another State Violates the Commerce Clause

The dormant Commerce Clause prohibits States from regulating "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst.,* 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982) (plurality opinion)). Put another way, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* Thus, Plaintiffs, through this litigation, cannot impose Oklahoma's commercial and environmental standards upon citizens of Arkansas conducting business within Arkansas.

Indeed, the Supreme Court has expressed little hesitation in prohibiting State regulatory action that has the practical effect of directly regulating interstate commerce. *See, e.g., Healy,* 491 U.S. at 324 (striking down a liquor price affirmation statute); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 585 (1986) (striking down New York liquor regulations where they would "force those other States to alter their own regulatory schemes"); *Edgar,* 457 U.S. at 624 (striking down Illinois law which imposed regulations upon corporate takeovers of companies with certain minimum contacts with Illinois); *Baldwin v. Seelig,* 294 U.S. 511 (1935) (striking down minimum price requirements for milk). In all of these cases, the regulating State had an interest in protecting its citizens from certain harms – such as higher

prices or potentially deceptive or harmful investment practices – but, due to the direct regulatory effect upon interstate commerce, the Supreme Court has "struck down the [State action] without further inquiry." *Brown-Forman,* 476 U.S. at 579.

Here, by attempting to impose Oklahoma standards upon Arkansas citizens, the Oklahoma Plaintiffs seek to do that which was prohibited in *Healy, Brown-Forman, Edgar,* and *Baldwin.* The Oklahoma Plaintiffs undeniably endeavor to impose additional obligations on commerce occurring wholly within Arkansas, *see id.* at VI.3 (seeking a permanent injunction to abate Tyson's alleged "pollution-causing" business practices). The complaint plainly sets forth purported violations of Oklahoma's statutory regulatory scheme governing waste discharges and Oklahoma's Animal Waste Management Plans for use of poultry litter as a natural fertilizer (counts 7-10) and seeks to enjoin that practice, *even against* that activity which occurs within Arkansas.

Moreover, the Oklahoma Plaintiffs' action, by attempting to enforce Oklahoma law within the territorial borders of Arkansas, will plainly displace Arkansas's statutes, regulations, and common law, or it will require Defendants to conform to two potentially incompatible sets of standards. *Healy*, 491 U.S. at 337 (noting that the "practical effect" of competing state legislation "is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was mean [sic] to preclude"). Thus, the Oklahoma Plaintiffs' lawsuit "must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but

many or every, State adopted similar legislation." *Id.*; *Edgar,* 457 U.S. at 642 ("[I]f Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled."). Should Defendants be found liable under the Oklahoma Law Claims, they may be required to change their commercial practices to avoid future violations of Oklahoma law even though these practices are currently lawful in Arkansas. The Commerce Clause precludes Plaintiffs from requiring Arkansas citizens "to seek regulatory approval in [Oklahoma] before undertaking" commercial activity in Arkansas. *Brown-Forman,* 476 U.S. at 337.

Nor can Plaintiffs contend that the Defendants' business practices – be it the more general raising of poultry or the more specific use of chicken litter as natural fertilizer – is not commerce. Control of a company's societal obligations, such as the management of pollution, enforcement of labor laws, and restrictions on anti-competitive activities have historically been viewed as the regulation of interstate commerce. *See, e.g., Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (federal regulation of water pollution is premised on Congress' power to regulate interstate commerce).

It is clear that the Oklahoma legislature never intended to apply its laws in other states, but even if the legislature had such an intent, the enforcement of the law "is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy,* 491 U.S. at 336.

In short, suing to compel the businesses of other States to comply with the Oklahoma Plaintiffs' state laws constitutes the direct regulation of interstate commerce. *See Healy v. Beer Institute,* 491 U.S. at 332. This Court should dismiss the Oklahoma law claims as a violation of the Commerce Clause.

2. Extraterritorial Application of Oklahoma Law Violates the Sovereignty of Arkansas

Similarly, it is axiomatic that each State is a sovereign entity unto itself. "[T]he attributes of sovereignty [are] enjoyed by the government of every State in the Union." *Hans v. Louisiana,* 134 U.S. 1, 13 (1890). *See Blatchford v. Native Village of Noatak,* 501 U.S. 775, 779 (1991) ("the States entered the federal system with their sovereignty intact"). So, while the Plaintiffs proclaim their "complete dominion" regarding "the interest of the State of Oklahoma," Complaint ¶ 5, they have no dominion, control, influence, or authority over Arkansas' agricultural, environmental or commercial laws. *See Bonaparte v. Tax Court,* 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction . . . Each State is independent of all the others in this particular"). Plaintiffs endeavor to project their own policy choices into Arkansas, a sovereign State entitled to make differing policy choices regarding agricultural practices. Such an attempt violates the fundamental principal that a State "cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states." *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.,* 292 U.S. 143, 149 (1934).

The Constitution protects the citizens of all States from interstate encroachments of State power; the Supreme Court has emphasized "the due process principle that a state is without power to exercise 'extraterritorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries." *Watson v. Employers Liability Assurance Corp.,* 348 U.S. 66, 70 (1954). Accordingly, in a wide range of contexts, the Court has crafted remedies under the Due Process Clause of the Fourteenth Amendment to preclude the extraterritorial application of one State's laws into another State's jurisdiction. *See, e.g., State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408 (2003) (due process clause limitations on punitive damages); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985) (due process clause limitations on class certification); *Bigelow v. Virginia,* 421 U.S. 809 (1975) (due process clause limitation of proscribing advertising). As a common thread in each of these decisions, the Supreme Court has prohibited the enforcement of State laws that would make unlawful conduct that is otherwise lawful in the State where the activity occurred. *See State Farm,* 538 U.S. at 421 ("A State cannot punish a defendant for conduct that may have been lawful where it occurred."); *Shutts,* 472 U.S. at 822 (holding that Kansas cannot abrogate other inconsistent State laws for activities occurring within those States); *Bigelow,* 421 U.S. at 824 ("Virginia possessed no authority to regulate the services provided in New York. . . .").

Here, the Oklahoma Plaintiffs' attempt to enforce Oklahoma law within Arkansas plainly violates this due process principle, which finds support in the most fundamental tenets of federalism. *See State Farm,* 538 U.S. at 422 ("A basic principle of federalism is that each State may

make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."). Arkansas has an extensive set of statutes and regulations that would be displaced if the Oklahoma Plaintiffs were successful in projecting Oklahoma law into Arkansas. Arkansas regulates the land application of poultry litter within Arkansas in accordance with its own legislative judgments.[10] *See* Ark. Code Ann. §§ 15-20-901, *et seq.* (Arkansas Poultry Feeding Operations Registration Act); 15-20-1101, *et seq.* (Arkansas Soil Nutrient Application and Poultry Litter Utilization Act); 15-20-1114 (governing potential conflicts between land application of poultry litter and Arkansas water and air pollution control laws). Oklahoma has not alleged that land application of poultry litter in Arkansas violates any of these Arkansas laws. In pursuit of their own goals, the Oklahoma Plaintiffs would rob Arkansas of the "police power [which] is an attribute of sovereignty inherent in every sovereign state. . . ." *Oliver v. Oklahoma ABC Bd.*, 359 P.2d 183, 189 (Okla. 1961).

In sum, entertaining the Oklahoma law claims would violate basic "principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States" *BMW of North America v.*

[10] Oklahoma also regulates the land application of poultry litter, a lawful act in Oklahoma that is protected from the very nuisance action that Plaintiff brings against Tyson's Arkansas facilities. *See* Okla. Stat. tit. 27A § 10.9 *et seq.* (Oklahoma Registered Poultry Feeding Operations Act); Okla. Stat. tit. 50 § 4 ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance").

Gore, 517 U.S. 559, 573 (1996). As this Court is asked by Oklahoma to enjoin that which is lawful in Arkansas, the Oklahoma law claims must be dismissed.

C. THE OKLAHOMA PLAINTIFFS' FEDERAL COMMON LAW NUISANCE CLAIM HAS BEEN DISPLACED BY THE CLEAN WATER ACT

Oklahoma's federal common law claim must also fail because there is no federal common law of nuisance applicable to its claim of interstate water pollution. Although such a body of federal common law existed at one time, it has been displaced by Acts of Congress.

Since *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), the United States Supreme Court has recognized federal common law only in limited areas that are notably few and restricted. The Supreme Court has also made clear that even if a federal common law cause of action is recognized, it may be displaced at any time by an Act of Congress. In the case of federal common law nuisance claims based on interstate water pollution, the principles expressed by the Court in *Milwaukee II,* 451 U.S. 304, make clear that Congress' passage of the CWA and its subsequent amendments displaced the federal common law regarding both point source and nonpoint source pollution. Accordingly, Oklahoma's federal common law nuisance claim should be dismissed for failure to state a claim upon which relief can be granted.

1. "There is no general federal common law"

Prior to the Supreme Court's decision in *Erie,* 304 U.S. 64, the federal courts had developed a body of federal common law to govern interstate environmental nuisance claims brought by States. *See, e.g., New Jersey v. New York,* 283 U.S. 336 (1931) (addressing controversies between States that are fed by the same river basin); *New York v. New Jersey,* 256 U.S. 296 (1921) (addressing controversies between States that border the same body of water); *Missouri,* 200 U.S. 496 (addressing controversies between a State that introduces pollutants into a waterway and a downstream State that objects). In *Erie,* however, the Supreme Court held that "[t]here is no federal general common law." *Erie,* 304 U.S. at 78. The Court thereby eviscerated the foundation upon which prior common law interstate environmental nuisance precedents rested. In short, "*Erie* recognized . . . that a federal court could not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress." *Milwaukee II,* 451 U.S. at 313.

2. Federal Common Law Only Exists In Limited Areas And May Be Displaced At Any Time By Congress

Since *Erie,* the Supreme Court has held that when Congress has not spoken to a particular issue, and when there exists a "significant conflict between some federal policy or interest and the use of state law," *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63, 68 (1966), the federal courts may formulate federal common law only in "limited" areas that are notably "few and restricted." *Texas Indus., Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 640

(1981) (internal citations omitted); *see also Milwaukee II,* 451 U.S. at 313. Always recognizing that federal common law is "subject to the paramount authority of Congress," *Milwaukee II,* 451 U.S. at 313-314 (quoting *New Jersey,* 283 U.S. at 348), the Supreme Court has consistently applied these separation-of-powers principles to refuse to create federal common law in cases that involve "a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot," *Texas Indus.,* 451 U.S. at 647 (quoting *Diamond v. Chakrabarty,* 447 U.S. 303, 317 (1980)).

3. The Clean Water Act And Its Subsequent Amendments Displaced Federal Common Law On Issues of Interstate Water Quality

In Count Five of the complaint, the Oklahoma Plaintiffs invoke federal common law. However, any federal common law that existed in the area of interstate water quality has been displaced by Acts of Congress. As discussed in detail above, in *Milwaukee I,* 406 U.S. 91, the Supreme Court recognized the existence of a federal common law claim for an abatement of a nuisance caused by interstate water pollution, but stated that the federal common law cause of action ceases to exist if Congress displaces it through legislation or regulation. *Id.* at 107 n.9. Following the passage of the CWA, the Court held in *Milwaukee II* that the federal government's comprehensive regulatory scheme created by the 1972 amendments displaced the plaintiff State's federal common law nuisance claims. 451 U.S. at 307-08. The Court thereby resolved any

doubt that Congress had displaced all interstate environmental nuisance claims based on federal common law. *Id.* at 325 ("The invocation of federal common law . . . in the face of congressional legislation supplanting it is peculiarly inappropriate in areas as complex as water pollution control."); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 99 (1992) (stating that *Milwaukee II* held that federal law displaced the federal common law tort of nuisance with respect to transboundary water pollution claims). As discussed above, subsequent to *Milwaukee II,* which specifically addressed federal legislation governing point source transboundary water pollution, Congress expanded its regulation of transboundary water pollution to include nonpoint source pollution thought [sic] its enactment of Sections 303 and 319 of the Clean Water Act.[11] Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 42 (1987). Congressional action has thus displaced federal common law of nuisance claims for interstate water pollution disputes in both point source and nonpoint source disputes.[12]

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[11] As discussed in detail above, Section 303 of the Clean Water Act governs federal oversight of the States' development of Water Quality Standards, and Section 319 of the Clean Water Act requires States to comply with detailed federal reporting and planning requirements for nonpoint sources. See supra at 4-15.

[12] The Act's legislative history supports the conclusion that Congress' enactment of Sections 303 and 319 of the Clean Water Act did not alter the principles of the *Milwaukee II* decision:

> I am pleased that the conferees deleted provisions in each bill related to savings clauses and other statutes. As a result, the Water Quality Act of 1987 does not in any way affect the well-established rulings of Milwaukee I, II, and III involving the Clean Water Act. Taken together, these decisions hold that, in interstate water pollution disputes, a downstream plaintiff State may not apply Federal common law nor the State common or statutory law

(Continued on following page)

Plaintiffs cannot escape the holding of *Milwaukee II* by complaining that Congress did not address these particular facts or that the CWA does not provide an adequate remedy. The standard for determining when Congress has displaced federal common law is different from – and far less demanding than – the standards that govern preemption of state law. Because "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law," courts should approach the question of displacement with a "willingness to find congressional displacement of federal common law." *Milwaukee II,* 451 U.S. at 317 & n.9 (emphasis deleted). As long as "the scheme established by Congress addresses the problem formerly governed by federal common law," *id.* at 315 n.8 – i.e., if Congress has "spoken to [the] particular issue," *id.* at 313 – federal common law is displaced. *See also United States v. Oswego Barge Corp. (In re Oswego Barge Corp.),* 664 F.2d 327, 335 (2d Cir. 1981) (federal common law displaced "as to every question to which the legislative scheme 'spoke directly,' and every problem that Congress has 'addressed'. . . . [and] separation of powers concerns create a presumption in favor of [displacement] of federal common law *whenever it can be said that Congress has legislated on the subject*")

---

of the downstream State against an upstream State with EPA-approved water pollution control requirements.

. . .

Today, Congress leaves this comprehensive regulatory mechanism intact and does not in any way imply that Federal common law remedies are available to supplant or supplement remedies already available under the Clean Water Act.

133 Cong. Rec. 986-987 (statement of Rep. Hammerschmidt) (emphasis added).

(emphasis added) (quoting *Milwaukee II,* 451 U.S. at 315). Congress need not create an alternative remedy to displace federal common law: "The lesson of *Milwaukee II* is that once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution" or "holding that the solution Congress chose is not adequate." *Illinois v. Outboard Marine Corp.,* 680 F.2d 473, 478 (7th Cir. 1982).

There can be no doubt that Congress has "addressed" and "spoken to" the issue of interstate water pollution in the CWA. Although the Plaintiffs may not approve of Congress' policy choices, Oklahoma's federal common law claim should be dismissed because it, and all other interstate water pollution claims based on federal common law, have been displaced by Acts of Congress. Oklahoma cannot avoid the fate of the plaintiff in *Milwaukee II* by merely electing not to bring a statutory claim against the defendants under the CWA, or by asserting claims under other federal statutes. The law is clear: all federal common law causes of action for nuisance based on interstate water pollution no longer exist, irrespective of whether the claim is based on allegations of point source or nonpoint source pollution. Accordingly, Count Five of the complaint should be dismissed for failure to state a claim upon which relief can be granted.

VI. CONCLUSION

For the foregoing reasons counts four, five, six, seven, eight, nine, and ten of the Complaint should be dismissed.

Dated: October 3, 2005 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2005, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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STEPHEN L. JANTZEN

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

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity of ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiffs,	)	
vs.	)	
1 TYSON FOODS, INC., 2. TYSON POULTRY, INC., 3. TYSON CHICKEN, INC., 4. COBB-VANTRESS, INC., 5. AVAIGEN, INC., 6. CAL-MAINE FOODS, INC., 7. CAL-MAINE FARMS, INC., 8. CARGILL, INC., 9. CARGILL TURKEY PRODUCTION, LLC, 10. GEORGE'S, INC., 11. GEORGE'S FARMS, INC., 12. PETERSON FARMS, INC., 13. SIMMONS FOODS, INC., and 14. WILLOW BROOK FOODS, INC.,	)	Case No. 05-CV-0329-JOE-SAJ
Defendants.	)	

PETERSON FARMS, INC.'S MOTION TO DISMISS AND, OR IN THE ALTERNATIVE, MOTION TO STAY PROCEEDINGS PENDING APPROPRIATE REGULATORY AGENCY ACTION, AND BRIEF IN SUPPORT

* * *

Defendant Peterson Farms, Inc. ("Peterson"), submits this Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) for the Court's lack of subject matter jurisdiction over the claims made in this lawsuit and for the State of Oklahoma's, through its Attorney General and Secretary of the Environment (hereinafter "Plaintiffs), failure to state a claim for which the Court can grant relief, respectively, in any of the Counts 1 through 10 in the First Amended Complaint (the "Complaint") for the reasons that:

(1) Plaintiffs' attempt to impose liability on Peterson for its operations and those of the independent contract growers conducted within Arkansas violates the sovereignty of the State of Arkansas and the Due Process and Commerce Clause protections set forth in the United States Constitution. Further, by virtue of being predicated on allegations of interstate water pollution, Plaintiffs' claims are preempted by federal law, namely the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Arkansas River Basin Compact, OKLA. STAT. tit. 82, § 142; ARK. CODE ANN. § 15-23-401;

(2) Plaintiffs cannot maintain their SWDA Citizen Suit because they have failed to comply with the applicable notice requirements prior to commencing the action and the State of Oklahoma is not a proper party to such an action;

(3) Plaintiffs cannot maintain a nuisance *per se* cause of action because the alleged tortious acts alleged in the Complaint have a beneficial purpose as a matter of law;

(4) Plaintiffs have failed to exhaust the administrative remedies required before the Court can exercise subject matter jurisdiction over the claims in this lawsuit; and

(5) Plaintiffs cannot maintain their common law claims because the Court lacks jurisdiction to consider these claims under the Political Question Doctrine.

In the alternative, or in addition to any relief granted pursuant to its Motion to Dismiss, Peterson moves the Court to stay the proceedings in this action, pending appropriate action by the Oklahoma Department of Agriculture, Food & Forestry ("ODAFF") and the other Oklahoma "environmental" administrative agencies, to whom the Oklahoma Legislature delegated jurisdiction over the subject matter underlying the claims asserted by Plaintiffs in this lawsuit.

I. INTRODUCTION

In their Complaint, Plaintiffs paint a curious paradox of the Illinois River Watershed ("IRW"), which is the subject of this action. On one hand, Plaintiffs describe the Illinois River as an outstanding water resource with significant fish, wildlife and aesthetic values, and further characterize Tenkiller Ferry Lake as "the emerald jewel in Oklahoma's crown of lakes." Yet, on the other hand, Plaintiffs paint a contrived and dire image of the IRW as a 1,069,530-acre *hazardous waste site,* which they assert is contaminated by various substances, the bulk of which are

nutrients – ubiquitous in nature and necessary for and a natural byproduct of nearly all living organisms. Plaintiffs remarkably assert that this "outstanding resource" and "crown jewel" now pose an "imminent and substantial endangerment to the health and environment" of the people and property within the watershed. (Complaint at ¶ 95).

The second view of the IRW is solely the creation of Oklahoma's Attorney General as the self-described possessor of "complete dominion" over litigation he elects to pursue in the name of the State of Oklahoma and its citizens, regardless of the litigation's lack of foundation in either law or fact. On this point, the fictional depiction of the IRW as a massive hazardous waste site gains no support from any of the many, responsible state and federal environmental regulatory agencies who, under color of law, closely monitor the conditions and activities within the IRW. Unlike the Attorney General, however, these regulatory agencies have not designated or otherwise labeled the IRW a hazardous waste disposal site; have not determined that animal manure is a "hazardous" or "solid waste"; and have not found that the operations of the Defendants or the independent poultry growers are threatening or harming the State of Oklahoma's natural resources.

The divergent viewpoints of the partisan Attorney General and the various regulatory agencies is of considerable legal significance, insofar as the conduct and alleged consequences set forth in Plaintiffs' Complaint are governed by a well-defined and comprehensive scheme of state and federal statutes and regulations enacted by the Oklahoma Legislature, the Arkansas Legislature, and the United States Congress, respectively. These allegations

have been addressed by the respective legislative bodies with those bodies delegating responsibilities for the subject matter of this lawsuit to the regulatory agencies to the exclusion of the Attorney General.

Nevertheless, for purposes of this lawsuit, Plaintiffs, through exercise of the Attorney General's purported "complete dominion," have chosen to wholly ignore the laws enacted by the respective legislative bodies, undermining each sovereigns' manifested public policy in favor of a single official's political will. In doing so, Plaintiffs effectively seek to render an entire body of state and federal law a nullity on which no party to this lawsuit, persons potentially affected by this lawsuit, nor the citizenry of Oklahoma and Arkansas can either rely or reasonably order their affairs. Moreover, as discussed below, Plaintiffs' claims in this lawsuit affront the fundamental protections of the United States Constitution and the supremacy of federal law by seeking to extend the reach of Oklahoma law across the border to regulate commerce and the citizens of a neighboring sovereign.

Based on the allegations in the Complaint, Plaintiffs cannot maintain their various common-law and Oklahoma statutory and regulatory claims against the Defendants for alleged pollution arising from the activities of both Oklahoma and Arkansas farmers within the borders of each state, regardless of whether Plaintiffs establish a requisite relationship between the Defendants and the independent farmers. Quite simply, notwithstanding the Oklahoma Attorney General's proclamation of "complete dominion over every litigation in which he properly appears" (Complaint at ¶ 5), this purported dominion does not permit the State of Oklahoma or its representatives to impose its laws, public policy, or political will on a

neighboring sovereign and its citizens, such as Plaintiffs are attempting to do in this lawsuit. Moreover, certain of Plaintiffs' claims are preempted by federal law as contained in the Clean Water Act and the Arkansas River Basin Compact. In addition, Plaintiffs cannot maintain their SWDA claim because they have failed to comply with the notice requirements contained in that statutory regime. Thus, Plaintiffs have failed to state claims for which this Court can grant relief, entitling Peterson to relief in accordance with Federal Rule of Civil Procedure 12(b)(6).

Furthermore, Plaintiffs cannot maintain their claims in this lawsuit because they have failed to exhaust the administrative remedies required under Oklahoma law as a prerequisite to the Court's exercise of subject matter jurisdiction over the [sic] their claims. As a matter of long-established law, all administrative remedies must be exhausted before a party may seek judicial relief, as Plaintiffs are doing in this matter. In this action, Plaintiffs have asserted claims that explicitly require administrative action; yet, they have not sought any relief through the responsible regulatory agencies. (*See, e.g.,* Complaint at Counts 4, 7, 8 and 9). Accordingly, without having first sought relief through the appropriate administrative bodies, Plaintiffs have denied this Court the subject matter jurisdiction to consider their claims in this lawsuit. Likewise, Plaintiffs' common-law claims are precluded by the Political Question Doctrine. Thus, these claims should be dismissed in accordance with Federal Rule of Civil Procedure 12(b)(1).

Finally, even if Plaintiffs were able to maintain their claims against Peterson for the actions of Oklahoma and Arkansas farmers undertaken within the borders of each state, ODAFF has primary jurisdiction over the subject matter of the claims alleged in the Complaint, *i.e.*, alleged nonpoint source discharges related to agriculture. Similarly, other Oklahoma administrative agencies have been delegated duties by the Oklahoma Legislature under the scheme imposed on the states under the Clean Water Act. These agencies have begun, and continue their efforts to improve the quality of Oklahoma waters, including those within the IRW. Plaintiffs' lawsuit, however, disrupts and delays these efforts to the detriment of the public and the subject waters. The primary jurisdiction of these regulatory bodies compels the conclusion that this action be stayed until such time as these agencies satisfy their legislatively mandated responsibilities.

Accordingly, the claims brought by Plaintiffs should be dismissed under Federal Rules of Civil Procedure 12(b)(1) and (6), and/or this lawsuit should be stayed until such time as the appropriate administrative agencies have undertaken the factual findings and remedial actions delegated to them by the Oklahoma Legislature.

II. ARGUMENT AND AUTHORITY

A. COUNTS 4 THROUGH 10 OF THE COMPLAINT SHOULD BE DISMISSED BECAUSE THEY INVADE ARKANSAS'S SOVEREIGNTY, VIOLATE THE UNITED STATES CONSTITUTION AND ARE PREEMPTED BY FEDERAL LAW.[1]

Because Plaintiffs' claims contained in Counts 4 through 10 of the Complaint are based on the alleged conduct of Peterson and the farmers with whom it contracts within and *outside* the borders of Oklahoma, Plaintiffs have failed to state a claim for which this Court can grant relief.[2] As discussed below, Plaintiffs cannot maintain these claims based on the conduct of Peterson, as a citizen of Arkansas, or the Arkansas farmers with whom it contracts, because (1) the statutory and regulatory claims, inclusive of Plaintiffs' common-law theories, are precluded by elementary concepts of sovereignty and constitutional principles; and (2) Plaintiffs' Oklahoma and federal common-law claims are preempted by the Clean Water Act.

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[1] The Complaint contains the following ten counts: (1) cost recovery action under CERCLA; (2) natural resource damage claim under CERCLA; (3) SWDA citizen suit; (4) state law nuisance claim; (5) federal common law nuisance claim; (6) common law trespass claim; (7) alleged violation of OKLA. STAT. tit. 27A, § 2-6-105 and OKLA. STAT. tit. 2, § 2-18.1; (8) alleged violation of OKLA. STAT. tit. 2, § 10-9.7 and OAC § 35:17-5-5; (9) alleged violation of OAC § 35:17-3-14; and (10) unjust enrichment, disgorgement and restitution.

[2] In addition to the arguments set forth herein at length, Peterson adopts and joins in the arguments set forth in "Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint and Integrated Opening Brief in Support," regarding dismissal of Plaintiffs' Counts 4 through 10.

1. *Plaintiffs' common-law claims should be dismissed as precluded by Oklahoma's statutory and regulatory program governing the conduct at issue.*

As an initial matter, all of Plaintiffs' claims, whether pleaded as statutory or common-law claims, arise from the alleged presence of excess nutrients and other constituents in the waters of the IRW, which Plaintiffs attribute to the land application of poultry litter. However, the land application of poultry litter is legal in the State of Oklahoma; authorized by the Oklahoma Legislature and ODAFF; and, indeed, the practice is heavily regulated to ensure that the practice does not cause harm to the environment or the waters of the State. *See, e.g.,* OKLA. STAT. tit. 2, §§ 10.9-10.9-25 (comprising the Oklahoma Registered Poultry Feeding Operations Act, the Oklahoma Poultry Waste Transfer Act, the Oklahoma Poultry Waste Applicators Certification Act, and Educational Programs on Poultry Waste Management); OAC §§ 35:17-5 – 1 35:17-7-11 (comprising regulations for Registered Poultry Feeding Operations and Poultry Waste Applicators Certification).[3]

For example, the Oklahoma Registered Poultry Feeding Operations Act requires all owners or operators of poultry operations in Oklahoma to register with the State Board of Agriculture before constructing or operating a new facility and, thereafter, must register annually to continue operating. *See* OKLA. STAT. tit. 2, §§ 10-9.3, 10-9.4. Moreover,

[3] Arkansas also regulates poultry operations and the land application of poultry litter. *See, e.g.,* ARK. CODE ANN. §§ 15-20-901 – 15-20-906 (Arkansas Poultry Registration Act); *id.* §§ 15-20-1101 – 15-20-1114 (Arkansas Soil Nutrient Application and Poultry Litter Utilization Act).

the Act prohibits the registered poultry operation from contaminating the waters of the State, and authorizes extensive regulation by ODAFF to accomplish this mandate. *See id.* § 10-9.7. Similarly, the poultry farmers' management of litter is closely controlled. The Oklahoma Poultry Waste Applicators Certification Act and the regulations authorized thereunder specify when, or if, poultry litter can be spread in a nutrient-sensitive watershed, such as the IRW. *See id.* §§ 10-9.19, 10-9.19a. Notably, the regulations promulgated by ODAFF under these statutory schemes state the purpose of the poultry-related statutes and regulations, to wit:

> These rules shall serve to control nonpoint source runoff and discharges from poultry waste application of poultry operations. The rules allow for the monitoring of poultry waste application to land or removal from these operations and assist in *ensuring beneficial use of poultry waste while preventing adverse effects to the waters of the state of Oklahoma*. . . .

OAC § 35:17-5-1 (emphasis added).

Significantly, as a general proposition, activities sanctioned by the Oklahoma Legislature – such as those authorized by the aforementioned Acts – cannot amount to actionable, tortious conduct. *See, e.g., Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270, 1274 n.4 (Okla. 1991) (noting that an activity undertaken under the express authority of a statute is a "legalized nuisance" which may not be enjoined), *overruled on other grounds*; *see* OKLA. STAT. tit. 50, § 4 ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance"). This has long been the law of Oklahoma, as recognized by the Supreme Court of Oklahoma as early as 1915:

> It seems to be well settled that, where one has the sanction of the state for what he does, unless he commits a fault in the manner of doing it, he is completely justified. . . . This upon the principle that, when the Legislature allows or directs that to be done which would otherwise be a nuisance, it must be presumed that the Legislature is the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law.

E.I. du Ponte Nemours Powder Co. v. Dodson, 150 P. 1085, 1087 (Okla. 1915) (citations omitted).

The activities which Plaintiffs claim have resulted in the injuries alleged in the IRW are sanctioned by the Oklahoma and Arkansas Legislatures, thus sheltering these activities from State common-law tort liability, *unless* Plaintiffs provide specific proof that the independent farmers have not complied with applicable statutory provisions and related regulations. As such, potential liability under Plaintiffs' common-law claims must necessarily be measured by, and are dependent on, these statutory and regulatory provisions, effectively transforming Plaintiffs' common-law claims into claims under the various statutory and regulatory provisions relied upon by Plaintiffs.

2. ***Counts 4, 6, 7, 8, 9, and 10 seek to regulate the conduct of Arkansas citizens within the borders of Arkansas, and therefore, they should be dismissed.***

a. Plaintiffs' claims violate the sovereignty of Arkansas.

Assuming, for purposes of this Motion only, that the statutory and regulatory provisions relied upon by Plaintiffs have been violated, Plaintiffs nevertheless cannot maintain these claims against Peterson, as a citizen of Arkansas, as these claims are predicated on the conduct of the independent Arkansas farmers with whom Peterson contracts to grow poultry within the separate, sovereign State of Arkansas.

As a matter of law, Plaintiffs simply cannot encroach upon the sovereignty of Arkansas by subjecting its citizens to the statutory and regulatory requirements of Oklahoma law. *Cf. Oliver v. Oklahoma Alcoholic Beverage Control Bd.*, 359 P.2d 183, 189 (Okla. 1961) (commenting that "[t]he police power is an attribute of sovereignty inherent in every sovereign state . . . "); *Smith v. State ex rel. Hepburn,* 113 P. 932, 937 (Okla. 1911) (noting a state can "[n]either surrender [n]or stipulate away any of its sovereignty or render herself less sovereign than other states"); *Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co.,* 131 P. 43, 61 (Wyo. 1913) ("It is one of the plainest elementary rules that no Legislature can extend its laws to territory beyond the borders of its own state"). Furthermore, "it is fundamental that the sovereignty of any government is limited to persons and property *within the territory it controls.*" *Id.* at 59; *see id.* at 61 ("It is a familiar elementary principle that the laws of a state have no extraterritorial effect"). As such, the above-referenced

claims should be dismissed insofar as Plaintiffs' efforts in this lawsuit to govern Arkansas citizens invade the sovereignty of Arkansas.

b. Plaintiffs' claims violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Any attempt by Plaintiffs to subject Arkansas citizens to Oklahoma law also violates well-established principles of due process set forth in the Fourteenth Amendment to the United States Constitution. These due process safeguards apply both to individuals and corporations. *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408 (1984); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 285 (1989). By filing the instant lawsuit, Plaintiffs are attempting to extraterritorially impose Oklahoma laws, rules, and regulations on law-abiding citizens of Arkansas, including Peterson and the independent Arkansas farmers with whom it contracts. Specifically, Plaintiffs' Counts 4 and 6 through 10 seek to bring these Arkansas entities within the reach and jurisdiction of Oklahoma law.

The Due Process Clause of Fourteenth Amendment dictates that Plaintiffs lack both the power and authority to exercise extraterritorial jurisdiction over another state by imposing regulations that control activities wholly beyond the boundaries of Oklahoma. *See Watson v. Employer Liab. Assur. Co.,* 348 U.S. 66 (1954).

> It is fundamental that jurisdiction of all governments is geographical or territorial. Any attempt at extra-territorial jurisdiction constitutes an

> invasion of another sovereignty. . . . The jurisdiction of a state, acting either through its executive, legislative, or judicial department, or by a combined action of one or more of such departments must confine itself to persons and property and activities within it boundaries, and *any attempt to control persons or things beyond such boundaries is ineffective and void for want of power and violates the due process clause of the* XIVth *Amendment to the Constitution of the United States.* [The Constitution] did not extend the power of the states. On the contrary, it restricted their power.

Minnesota v. Karp, 84 N.E.2d 76, 79 (Ohio App. 1948) (emphasis added); *see Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934) (concluding that an attempt by the State of Mississippi to alter terms of an insurance contract made in Tennessee was a due process violation); *New York, Lake Erie & W. R.R. Co. v. Pennsylvania,* 153 U.S. 628 (1894) (concluding that an attempt by Pennsylvania to regulate conduct of a New York railroad was a violation of the company's due process even though the company conducted operations in Pennsylvania). Again, Plaintiffs' claims in Counts 4, 6, 7, 8, 9, and 10 should be dismissed since these claims offend the Due Process Clause of the Fourteenth Amendment.

c. Plaintiffs' claims violate the Commerce Clause of the United States Constitution.

In addition to encroaching upon a sovereign neighbor and violating Arkansans' due process rights, Plaintiffs will likewise be in violation of the Commerce Clause of the United States Constitution if they are allowed to subject

the commercial activities of Arkansas citizens to Oklahoma statutory and regulatory requirements, insofar as such conduct would run afoul of dormant Commerce Clause jurisprudence.[4] In this regard, "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." *Healy v. Beer Inst.,* 491 U.S. 324, 332 (1989). Moreover, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* at 336. Significantly, where a state seeks to project its legislation into another state, the former state's action is, in effect, a direct regulation of commerce in the latter state. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 583-84 (1986).

Thus, while a state may enact standards within its borders stricter than those required by the federal environmental legislation, *see International Paper Co. v. Oullette,* 479 U.S. 481, 490 (1987), a state may not seek to impose its standards on another sovereign state, whether directly or indirectly, without violating the Commerce Clause. *See Edgar v. MITE Corp.,* 457 U.S. 624, 643 (1982) (prohibiting state regulation of interstate commerce by "any attempt 'directly' to assert extraterritorial jurisdiction over person or property"); *American Civil Liberties*

[4] Of note, the federal environmental statutes were enacted under Congress's Commerce Clause powers. *See United States v. Deaton,* 332 F.3d 698, 706 (4th Cir. 2003) (noting that the Clean Water Act was enacted under power to regulate interstate commerce); *Burnette v. Carothers,* 192 F.3d 52, 59 (2d Cir. 1999) (commenting that CERCLA was enacted pursuant to Commerce Clause authority).

Union v. Johnson, 194 F.3d 1149, 1161-62 (10th Cir. 1999) (prohibiting indirect regulation of interstate commerce); *Childs v. State ex rel. Okla. State Univ.,* 848 P.2d 571, 577 (Okla. 1993) ("Another critical inquiry under the Commerce Clause is whether the practical effect of the state law is to control conduct beyond the boundaries of Oklahoma").

In the instant action, Plaintiffs seek to impose liability on Peterson for "acts or omissions within and outside of Oklahoma that have injured the IRW." (Complaint at ¶ 4). Plaintiffs' theory of liability against Peterson for these alleged acts and omissions outside the borders of Oklahoma is based in significant part upon the alleged violation of various Oklahoma statutory and regulatory provisions and several common-law claims, which as discussed above, have no efficacy in the absence of a violation of the aforementioned codifications, since the Oklahoma Legislature (and, indeed, Arkansas Legislature) has sanctioned the alleged acts and omissions at the center of Plaintiffs' claims. Plaintiffs are simply without the power and authority to extend Oklahoma law across the border in order to regulate Peterson's conduct or that of the independent contract growers occurring in Arkansas. Yet, this is precisely what Plaintiffs propose to do on the face of their Complaint.

If Plaintiffs are permitted to project these Oklahoma codifications and common-law principles across the border into Arkansas in order to regulate the poultry industry in that state, the action amounts to a direct regulation of commerce in Arkansas. Any action of this nature is a *per se* violation of the Constitution's Commerce Clause and, thus, cannot be allowed. Plaintiffs are limited, among other things, by the Constitution to governance within the

borders of Oklahoma. As such, based on the State of Oklahoma's limited sovereignty and the further limits imposed by the Commerce Clause, Plaintiffs cannot maintain these aforementioned claims against Peterson, or the independent contract farmers in Arkansas, for their Arkansas operations. For purposes of the instant motion, Plaintiffs cannot possibly prove any set of facts on which Peterson can be found liable under the Oklahoma statutory claims asserted in the Complaint, inclusive of the common law theories, for the acts of Arkansas farmers conducted within the borders of Arkansas. Thus, Counts 4, 6, 7, 8, 9, and 10 should be dismissed for failure to state a claim on which this Court can grant relief.

3. *Counts 4, 5, 6, goad 10 are preempted by the Clean Water Act.*

Plaintiffs likewise cannot maintain their common-law claims for alleged acts and omissions occurring within Arkansas, whether based in Oklahoma or federal common-law, against Peterson for the additional reason that those claims are preempted by federal law. *See Arkansas v. Oklahoma*, 503 U.S. 91, 99-101 (1992); *International Paper Co. v. Oullette*, 479 U.S. 481, 485-87 (1987); *see also City of Milwaukee v. Illinois,* 451 U.S. 304, 312-17 (1981). "[T]he regulation of interstate water pollution is a matter of federal, not state, law." *International Paper*, 479 U.S. at 488 (dicta). Moreover, the United States Supreme Court has held that, with regard to interstate water pollution, federal common-law and the common-law of an affected state are both preempted by federal statutory law, namely the Clean Water Act. *International Paper Co.*, 479 U.S. at 487; *see also Arkansas*, 503 U.S. at 99-100 (1992).

In *International Paper,* the United States Supreme Court reaffirmed its holding in *City of Milwaukee* that, in cases involving alleged interstate water pollution, federal common-law of nuisance is preempted by the CWA. *See International Paper*, 479 U.S. at 489; *see also City of Milwaukee,* 451 U.S. at 332. The *International Paper* Court also examined the relationship between state common-law and the CWA, concluding that, where alleged interstate pollution is concerned, the common-law of an affected state is likewise preempted. *See International Paper*, 479 U.S. at 493-94 (holding "that the CWA precludes a court from applying the law of an affected State against an out-of-state source"). The Court noted that permitting the affected state to bring an action under its common-law would "disrupt the balance of interests" sought through enactment of the CWA and further create a menagerie of "vague" and "indeterminate" standards. *Id.* at 495-96. The Court commented, as such, regarding the uncertainty and irrational regulations that would follow were an affected state's common-law allowed efficacy:

> "For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water."

Id. at 496-97 (quoting *Illinois v. City of Milwaukee,* 731 F.2d 403, 414 (7th Cir. 1984)). On this point, it is entirely conceivable that there are poultry farmers in Arkansas

who own and land apply poultry litter on lands in adjacent watersheds, for example, one that drains into Oklahoma, and another that drains into Texas. If the states of Oklahoma and Texas were permitted to prosecute the instant type of claims against those farmers, the farmers would have to anticipate these actions in operating their farms so as to comply with Arkansas, Oklahoma and Texas laws – an impossible task. Thus, logic supports the legal precedent by holding that an affected state cannot seek to extend its common-law to an alleged source of pollution beyond its borders. *See id.* at 500.

Similarly, in *Arkansas v. Oklahoma,* the Supreme Court was faced with an issue somewhat similar to the one in this lawsuit. In that case, Oklahoma, the affected state, effectively sought to impose its water quality standards on Arkansas, the source state. *Arkansas,* 503 U.S. at 95-98. The *Arkansas* Court noted that the affected state had a subordinate position under the CWA regime. *Id.* at 100. It further noted that the affected state could, under its own laws, govern conduct within its borders. *See id.* at 99-100. However, the affected state cannot extend its common-law to the source state. *Id.* at 100. Like the *International Paper Court,* the *Arkansas* Court concluded that the affected state's subordinate position limited its potential common-law claims against another state to the tort law of the source state. *Id.*

In this action, Plaintiffs impermissibly seek to impose liability on Peterson under Oklahoma common-law and the federal common-law of nuisance for alleged pollution originating within the borders of Arkansas. In the Complaint, Plaintiffs go to great lengths to paint the State of Oklahoma as the victim of alleged pollution originating in Arkansas

from the operations of Peterson and the independent farmers with whom it contracts. Taken as true for purposes of this Motion, Plaintiffs effectively concede that, under the applicable precedent, Oklahoma is the affected state and that Peterson is a purported Arkansas source of its alleged injury. *The International Paper* and *Arkansas* opinions clearly denote that the CWA preempted the federal common-law of nuisance and any common-law claim based on the law of an affected state. Accordingly, because Plaintiffs' claims in this lawsuit are based on alleged interstate water pollution, Counts 4, 5, 6, and 10, all of which are based on Oklahoma and federal common-law, should be dismissed in accordance with Rule 12(b)(6) for failure to state a claim for which this Court can grant relief.

B. ALL OF PLAINTIFFS' CLAIMS ARE PREEMPTED BY THE ARKANSAS RIVER BASIN COMPACT.

Plaintiffs' claims are preempted by the Arkansas River Basin Compact ("ARBC") and constitute a breach of the compact on the part of the State of Oklahoma. Oklahoma and Arkansas have entered into the ARBC, *see* OKLA. STAT. tit. 82, § 1421 and ARK. CODE ANN. § 15-23-401, with the consent and approval of the United States Congress. The ARBC, by its plain terms, governs the dispute now before the Court, precluding Plaintiffs from maintaining any claim based on conduct occurring in Arkansas, regardless of whether the claims are made pursuant to Oklahoma, Arkansas or other federal law.

Congressional approval of the ARBC transformed the compact between Oklahoma and Arkansas into the law of the United States. *See Texas v. New Mexico I,* 462 U.S. 554, 564 (1983); *Nebraska v. Central Interstate Low-Level*

Radioactive Waste Comm'n, 207 F.3d 1021, 1023 (8th Cir. 2000) ("When approved by Congress, a compact becomes a statute of the United States and must be construed and applied according to its terms"). "[B]y vesting in Congress the power to grant or withhold consent, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative State action that might otherwise interfere with the full and free exercise of federal authority." *Cuyler v. Adams,* 449 U.S. 433, 439-40 (1981). As federal law, the ARBC has the same preemptive effect over inconsistent state law that any other federal law, such as the CWA, CERCLA and SWDA, would have over an inconsistent state law. *See Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg. Planning Agency,* 24 F. Supp. 2d 1062, 1069 (E.D. Cal. 1998); *accord Nebraska,* 207 F.3d at 1023 ("When the statutory language provides a clear answer, the analysis ends").[5]

The ARBC is also a binding contract between the States of Arkansas and Oklahoma. *See Texas v. New Mexico II,* 482 U.S. 124 (1987). The expansive scope and effect of a compact, such as the ARBC, has been characterized as follows:

> Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the

[5] Like the CWA, control of interstate water pollution is one of the driving forces underlying the extensive use of interstate compacts. *See State ex rel. Dyer v. Sims,* 341 U.S. 22, 27 (1951). Indeed, the *Dyer* Court commented that interstate compacts are the preferred way of handling "the delicacy of interstate relationships" as opposed to the "awkward and unsatisfactory . . . litigious solution" available to the states to resolve localized interstate issues. *Id.*

> agreement and is superior to both prior and subsequent law. Further, when enacted, a *compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties.*

C.T. Hellmuth & Assoc. v. Washington Metro. Area Transit Auth., 414 F. Supp. 408, 409 (D. Md. 1976) (emphasis added). Indeed, as implied by the *C.T. Hellmuth* court, where the language of a compact conflicts with other federal law, the compact controls because it is more specific and limited in geographic scope. *See Texas v. New Mexico I,* 462 U.S. 554, 564 (1983) ("[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its expressed terms"); *Lake Tahoe,* 24 F. Supp.2d at 1073. An interstate compact, such as the ARBC, necessitates this result, because, since the agreements are freely negotiated between the states, they serve as the final statement on issues falling within the purpose and scope of the compact. *See* Matthew S. Tripolitsiotis, *Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities,* 23 YALE L. & POL'Y REV. 163, 181 (2005).

By virtue of the ARBC, the States of Oklahoma and Arkansas surrendered a portion of their sovereignty over the IRW to the ARBC itself and to the ARBC Commission created to enforce it. Article XIII(A) of the ARBC makes cooperative and coordinated effort to abate interstate pollution "binding and obligatory" upon both Arkansas and Oklahoma. As such, interstate pollution within the IRW falls under the jurisdiction of the ARBC, *see* OKLA. STAT. tit. 82, § 1421, art. II(E) and art. IV(B), and relief must be consistent with its terms. *See Texaco v. New Mexico I,* 462 U.S. 554, 564 (1983).

The ARBC is more than an advisory compact and the ARBC Commission holds more than just advisory powers. The ARBC clearly contains measures for enforcement.[6] Under the terms of the Compact, the ARBC Commission has the authority to issue appropriate pollution abatement orders necessary for the proper administration of the Compact. *See* OKLA. STAT. tit. 82, § 1421, art. IX. These others are enforceable by any court of competent jurisdiction and subject to appellate review, just as any other court order would be. *See id.* The ARBC also contemplates that the ARBC Commission could issue injunctive orders as part of its enforcement arsenal. *See* Arkansas River Compact (Working Draft), art. X(A)(7) (April 14, 1969) (attached hereto as Exhibit "2").

As agreed between Oklahoma and Arkansas, and approved by Congress, a major purpose of the ARBC is, *inter alia*, "[t]o encourage the maintenance of an active pollution abatement program in each of the two states and to seek the further reduction of both natural and man-made pollution in the waters of the Arkansas River Basin." OKLA. STAT. tit. 82, § 1421, art. I(D). Regarding the pollution abatement programs contained in the ARBC, Oklahoma and Arkansas agreed to the following:

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[6] In the early stages of negotiation and drafting the ARBC, Arkansas-Oklahoma Arkansas River Compact Committee members specifically addressed the issue of whether the commission should be given only advisory powers or enforcement power. As indicated by subsequent drafts of the Compact itself, the members voted to give the ARBC Commission enforcement powers. *See* Minutes of the Fourth Meeting of the Arkansas-Oklahoma Arkansas River Compact Committee, at 4-5 (Dec. 13, 1956) (attached hereto as Exhibit "1").

A. The *principle of individual state effort to abate man-made pollution within each state's respective borders,* and the continuing support of both states in an active pollution abatement program;

B. The *cooperation of the appropriate state agencies in the States of Arkansas and Oklahoma to investigate and abate sources of alleged interstate pollution within the Arkansas River Basin;* [and]

C. Enter into joint programs for the identification and control of sources of pollution of the waters of the Arkansas River and its tributaries which are of interstate significance . . . .

Id. § 1421, art. VII (emphasis added).

Therefore, since the subject matter of this lawsuit falls within the scope of the ARBC, Plaintiffs cannot maintain their claims against Peterson because those claims are directed to alleged polluting sources outside of Oklahoma's "respective border." *Id.* Under the ARBC, the State of Oklahoma is free to pursue abatement of pollution within its borders to the extent permitted under Oklahoma law. However, this authority does not permit the State, or any of its representatives, including Plaintiffs, to attempt to govern or abate alleged pollution within the borders of Arkansas, regardless of the source of law, without violating the terms of the ARBC. Rather, in the event of alleged interstate pollution, Oklahoma and Arkansas have agreed, and are otherwise required by force of federal law, to undertake cooperative efforts to resolve the pollution through legislation and employment of their

respective state agencies' expertise and enforcement authority.

Moreover, because the ARBC has the effect of federal law, and Plaintiffs' claims based on other federal law and Oklahoma common-law, as well as those based on Oklahoma statutory and regulatory provisions, conflict with the plain language of the ARBC, Plaintiffs cannot maintain any of these claims against Peterson as they rely upon the alleged conduct of Peterson or independent Arkansas farmers within the borders of that state. The same is true regarding any claim that Plaintiffs may bring or otherwise assert under Arkansas law, since it too is preempted by the ARBC. Any unilateral attempt by Plaintiffs to circumvent the ARBC by filing a lawsuit addressing alleged pollution in the Arkansas portion of the IRW is in breach of the Compact. "Once enacted, compacts may not be unilaterally renounced by a member state, except as provided by the compacts themselves." COUNCIL OF STATE GOVERNMENTS, 1998 INTERSTATE COMPACTS AND AGENCIES REPORT 7 (1999) (attached hereto as Exhibit "3"); *see Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n,* 207 F.3d 1021, 1026 (8th Cir.2000).

Clearly, in this regard, Plaintiffs' attempt to regulate Arkansas conduct through litigation, even if based on Arkansas law, goes beyond the language of Article VII(A) of the ARBC, and it cannot be said under any circumstances that the instant litigation is a cooperative effort to abate alleged interstate pollution. In short, Plaintiffs' claims in this lawsuit conflict with federal law as contained in the ARBC, regardless if those claims are based on Oklahoma, Arkansas or other federal law, and constitute a breach of the ARBC itself. As such, the language of the ARBC compels the conclusion that Plaintiffs' claims

should be dismissed for failure to state a claim on which this Court can grant relief.

C. COUNT 3 SHOULD BE DISMISSED BECAUSE PLAINTIFFS FAILED TO COMPLY WITH THE NOTICE REQUIREMENTS OF SWDA BEFORE COMMENCING THEIR CITIZEN SUIT.

Plaintiffs' SWDA Citizen Suit, brought pursuant to 42 U.S.C. § 6901 *et seq.,* should be dismissed in accordance with Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs have failed to comply with the applicable notice requirements prior to commencing their action against Peterson and the other Defendants, and because the State of Oklahoma is not a proper party to bring a citizen suit under 42 U.S.C. § 6972(a)(1)(B). In support of this contention, Peterson hereby adopts and incorporates by reference the arguments and authorities contained in "Tyson Poultry, Inc.'s Motion to Dismiss Count 3 of Plaintiffs' First Amended Complaint and Integrated Opening Brief in Support," filed contemporaneously herein with the Court by counsel for said Defendant.

D. COUNT 7 SHOULD BE DISMISSED AS THE LAND APPLICATION OF POULTRY LITTER CANNOT CONSTITUTE A NUISANCE *PER SE.*

In the Complaint, Plaintiffs have alleged that violation of Oklahoma Statutes, Title 27A Sections 2-6-105 and 2-18.1 amounts to a public nuisance *per se.* (Complaint at ¶¶ 103-104). Plaintiffs cannot maintain this claim against Peterson for any of its or the contract growers' operations, whether in Arkansas or Oklahoma.

Under Oklahoma law, a nuisance *per se* is an activity which under all circumstances amounts to a nuisance. *See Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270, 1276 n.6 (Okla. 1991) (defining a nuisance *per se* as "an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings"). The land application of poultry litter does not fit within this definition. In fact, use of poultry litter as fertilizer is recognized as a beneficial use of the substance, *see* OAC § 35:17-5-1.[6] The recognition by the Oklahoma Legislature and ODAFF of the benefits derived from the land application of poultry litter clearly precludes this conduct from being a nuisance *per se*. As such, Peterson cannot possibly be found liable under nuisance *per se* claim based on the acts and omissions arising from its operations in Oklahoma, Arkansas or those of the independent farmers with whom it contracts. Thus, Peterson is entitled to dismissal of Plaintiffs' nuisance *per se* claims since they cannot possibly establish that land application or use of poultry litter is nuisance under *all* circumstances, regardless of surroundings.

[6] *See also* OKLA. STAT. tit. 50, § 1.1 (providing for the nuisance exemption for agricultural activities); and ARK. STAT. ANN. § 2-4-101 (limiting the circumstances under which agricultural operations may be deemed a nuisance).

E. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED FOR THEIR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, PRECLUDING THE COURT FROM HAVING SUBJECT MATTER JURISDICTION OF THIS ACTION.

In addition to those reasons previously discussed, all claims in the instant action should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for Plaintiffs' failure to exhaust administrative remedies required by Oklahoma law, thereby precluding the Court from exercising subject matter jurisdiction over this lawsuit. For purposes of brevity on this issue, Peterson fully adopts and incorporates herein the exhaustion of remedies argument and analysis on this proposition set forth at length in "Cobb-Vantress, Inc.'s Motion to Dismiss Counts Four, Six, Seven, Eight, Nine and Ten of the First Amended Complaint or, Alternatively, to Stay the Action and Integrated Opening Brief in Support," filed herein by counsel for said Defendant.

F. COUNT 4, 5, 6 AND 10 SHOULD BE DISMISSED UNDER THE POLITICAL QUESTION DOCTRINE.

In addition to the other reasons stated above, Plaintiffs' claims contained in Counts 4, 5, 6 and 10 of the Complaint should be dismissed in accordance with Federal Rule of Civil Procedure 12(b)(6) because said claims violate the Political Question Doctrine. In support of this position, Peterson hereby adopts and incorporates by reference the arguments and authorities set forth at length in "Tyson Chicken, Inc.'s Motion to Dismiss Counts 4, 5, 6 and 10 of the First Amended Complaint Under the

Political Question Doctrine and Integrated Opening Brief in Support," filed contemporaneously herein with the Court by counsel for said Defendant.

G. THIS ACTION SHOULD BE STAYED PURSUANT TO THE DOCTRINE OF PRIMARY JURISDICTION.[7]

In the alternative to the other relief requested herein, or in addition to any partial relief granted it by the Court, Peterson requests the Court to stay this action based on the doctrine of primary jurisdiction so that the various agencies tasked with addressing the alleged acts and omissions in Plaintiffs' Complaint may undertake the determinations delegated to them by the Oklahoma Legislature and/or the United States Congress as discussed below.

1. *This case satisfies the standards for applying the primary jurisdiction doctrine.*

As noted above, Plaintiffs have ignored the authority delegated by the Oklahoma Legislature to the various Oklahoma environmental agencies. In doing so, Plaintiffs have proposed a scenario in their Complaint where a party in full compliance with the applicable state and federal environmental laws can, nevertheless, potentially be found

[7] In addition to the positions briefed herein, Peterson joins the primary jurisdiction arguments contained in the "Cobb-Vantress, Inc.'s Motion to Dismiss or, Alternatively to Stay, State Law Claims and Integrated Brief in Support," to the extent that those arguments support Peterson's contention that ODAFF and the other Oklahoma environmental agencies have primary jurisdiction over the subject matter of this lawsuit.

liable under on their claims in complete derogation of the public policy embodied in the Legislature's enactments, thereby rendering them unconstitutionally vague. *See American Communications Ass'n v. United Steel Workers of Am.,* 339 U.S. 382, 412 (1950). However, this incongruous and, indeed, impermissible circumstance is avoided if the agencies responsible for implementing and enforcing these laws are permitted to perform the duties delegated to them by the respective legislative bodies.

As previously stated, several of the claims in this action are based upon alleged violations of Oklahoma statutory and regulatory provisions. For operations within Oklahoma, the codifications at issue delegate certain duties to various Oklahoma administrative agencies or bodies within those agencies, namely ODAFF and, in part, through the State Board of Agriculture. *See, e.g.,* OKLA. STAT. tit. 2, §§ 2-18.1, 10-9.7.[8] Moreover, the regulations at issue in this lawsuit were promulgated by ODAFF under the authority of the Oklahoma Legislature. *See id.* § 10-9.7. In addition, Congress has commanded the various states through various provisions of the Clean Water Act to formulate and implement water quality standards and to further develop comprehensive plans for nonconforming waters to meet those standards. Oklahoma has delegated these responsibilities to its several environmental agencies. In any event, in accordance with the doctrine of

[8] Of note, the State Board of Agriculture is an entity within ODAFF, *see* OKLA. STAT. tit. 2, § 1-2, and is also an entity mandated by the Oklahoma Constitution. *See* OKLA. CONST. art. VI, § 31 ("Said Board shall be maintained as part of the State government, and shall have jurisdiction over all matters affecting animal industry . . . regulation . . . "). For the convenience of the Court, both entities will be referred to hereinafter simply as ODAFF.

primary jurisdiction, this lawsuit should be stayed pending resolution of the issues delegated to ODAFF and these other environmental agencies as discussed hereafter.

"The doctrine of primary jurisdiction provides that where the law vests in an administrative agency the power to decide a controversy or treat an issue, the courts will refrain from entertaining the case until the agency has fulfilled its statutory obligation." *Marshall v. El Paso Natural Gas Co.,* 874 F.2d 1373, 1376-77 (10th Cir. 1989). The doctrine holds that, before a judicial body may examine the merits of an action, "the case will require resolution of issues which, under a regulatory scheme, have been placed in the hands of the administrative body." *Id.* at 1376. As such, when the doctrine of primary jurisdiction applies to a particular controversy, the judicial proceeding is suspended until the administrative body has considered the factual issues. *Id.* at 1377. In determining whether the doctrine applies in a given case, there are three primary considerations: "[1] whether the issues of fact raised in the case are not within the conventional experience of judges; or [2] *whether the issues of fact require the exercise of administrative discretion,* or [3] *require uniformity and consistency in the regulation of the business entrusted to a particular agency." Id.* at 1377 (emphasis added).

Notably, the *Marshall* court also identified two additional considerations that fall under these primary considerations: (1) "Exercise of primary jurisdiction may be based on preventing the disruption of state efforts to establish a *coherent policy* with respect to a matter of substantial public concern . . . ," *id.* at 1379 (citing *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943)); and (2) exercise of the doctrine is generally limited to a dispute that involves public rights. *See id.* The United States District Court for

the District of Wyoming has identified yet other factors that should be examined in determining whether the doctrine is applicable: "[1] *whether the Defendants could be subjected to conflicting orders of both the Court and the administrative agency*; [2] whether relevant agency proceedings have actually been initiated; . . . and [3] *whether the Court can fashion the type of relief requested by the plaintiff.*" *Wilson v. Amoco Corp.,* 989 F. Supp. 1159, 1169 (D. Wyo. 1998) (citing *Friends of Sante Fe County v. LAC Minerals, Inc.,* 892 F. Supp. 1333, 1349-50 (D. N.M. 1995)) (emphasis added).

While, generally, determinations with regard to alleged pollution are within the conventional knowledge of a judge and jury, *see Marshall,* 874 F.2d at 1378, the determinations to be made in this lawsuit with regard to the operations within Oklahoma should nevertheless be made by ODAFF, because it has been charged by the Oklahoma Legislature with the exercise of administrative discretion and uniformity in regulation over the poultry industry in environmental matters. *See id.* at 1377. In this regard, Oklahoma law requires that, once the Legislature has delegated a responsibility to an administrative body, such as it has in the statutes at issue in this action, it cannot be further delegated:

> "It is a general principle of law, expressed in the maxim '*delegatus non potest delegare*',[9] that a

[9] *Black's Law Dictionary* defines the phrase "*delegates non potent delegare*" as follows: "A delegate cannot delegate; an agent cannot delegate his functions to a subagent without the knowledge or consent of the principal; the person to whom an office or duty is delegated cannot lawfully devolve the duty on another, unless he expressly authorized so to do." BLACK'S LAW DICTIONARY 426 (6th ed. 1990).

> delegated power may not be further delegated by the person to whom such power is delegated and that in all cases of delegated authority, where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another. . . ."

Anderson v. Grand River Dam Auth., 446 P.2d 814, 818 (Okla. 1968) (quoting 2 AM. JUR. *Administrative Law* § 222). Furthermore, consistent with the factors outlined in *Marshall,* the Oklahoma Supreme Court noted in *Anderson* that, where the powers at issue are discretionary powers of the administrative body, such powers cannot be properly delegated to another. *See id.* (noting that the administrative body "cannot delegate powers and functions which are discretionary or quasi-judicial in character"); *see also* Atty. Gen. Op., 2001 OK AG 15, ¶ 6 (same). Hence, it is unlawful for the Oklahoma Attorney General or the Secretary of Environment to self-delegate the authority granted to the State of Oklahoma's regulatory agencies to themselves.

Like the instant case, the *Anderson* case was before the court on a demurrer, the state procedural equivalent of a Rule 12(b)(6) Motion to Dismiss. *See Anderson,* 446 P.2d at 816-17. The *Anderson* case addressed the improper redelegation of authority granted by the Oklahoma Legislature to the Grand River Dam Authority ("GRDA"). *See id.* at 817. Under the statutes promulgated by the Legislature, *see* OKLA. STAT. tit. 82, § 875, the GRDA was authorized to make discretionary determinations as to whether certain recreational use of lands and lakes under its jurisdiction were dangerous or otherwise interfered with the GRDA's business. *Anderson,* 446 P.2d at 817. The

statute also authorized the GRDA to promulgate regulations in furtherance of the duty delegated to it by the Legislature. *See id.* In accordance with this grant of rule-making authority, the GRDA promulgated a regulation which required private landowners' written consent before issuing permits for anchorage of certain houseboats. *Id.* at 816.

This GRDA regulation, it was argued, delegated the GRDA's discretionary authority to private landowners. In effect, the GRDA left it to the private landowner to exercise discretion in evaluating the use of lands and lakes under the GRDA's jurisdiction, to wit:

> Assuming that this proviso [being the Oklahoma Legislature's grant of rule-making authority in the 1961 version of OKLA. STAT. tit. 82, § 862(p) in effect at the time] be construed as giving GRDA an unconditional discretion prescribing the location of the houseboat anchorage, such discretion must be exercised by GRDA, and not redelegated by it to the abutting landowner. A rule requiring an 'abutting landowner' to give its written consent before the anchorage location could be maintained under the circumstances here presented would be a substitution of the abutting landowner's judgment for GRDA.

Id. at 817-18. This re-delegation of the GRDA's authority allowed the private landowner to make the discretionary land and lake use determinations delegated to the GRDA by the Legislature. The Oklahoma Supreme Court held that such a re-delegation of authority was illegal and void. *See id.* at 819. Similarly, if the instant action is not stayed until such time as ODAFF makes the determinations required of it under the discretionary authority granted by the Oklahoma Legislature, this authority will effectively

be re-delegated to entities not designated by the Legislature, such as the Attorney General of Oklahoma, this Court, or a jury.

2. *ODAFF has primary jurisdiction over Plaintiffs' claims.*

In the instant case, ODAFF has primary jurisdiction and discretionary authority over the claims and issues now before the Court that derive from conduct within Oklahoma. Foremost, ODAFF has been given broad, discretionary authority over all matters "affecting agriculture," including environmental matters. *See* OKLA. STAT. tit, 2, § 2-4. In fact, the Oklahoma Legislature has designated ODAFF as an "official environmental regulatory agency for agricultural point source and nonpoint source pollution within its jurisdiction." OKLA. STAT. tit. 2, § 2-18.2. As the Oklahoma Attorney General has determined,

> The State Board of Agriculture has jurisdiction over all aspects of the management and disposal of waste from animal industry including the environmental and aesthetic impacts of such waste on the air, land, or waters of the State.

1997 OK AG 95, ¶ 16.

Under this grant of authority, ODAFF has jurisdiction over agriculturally related nonpoint source discharges to the exclusion of other state environmental agencies. *See* OKLA. STAT. tit. 27A, § 1-3-101(D)(1); *compare* OKLA. STAT. tit. 2, § 8-41.16, *with* OKLA. STAT. tit. 17, § 52 (granting ODAFF jurisdiction over agricultural nonpoint sources to the exclusion of the Oklahoma Department of Environmental Quality); *see also* OAC § 35:45-1-5(a) ("ODAFF has environmental responsibility for . . . point source discharges

and nonpoint source runoff from . . . animal waste"). In addition, the Legislature has also delegated to ODAFF the authority to determine whether pollution has resulted from an alleged violation of the Oklahoma Agricultural Code. *See* OKLA. STAT. tit. 2, § 2-18.1(B).

In addition to these delegated powers, ODAFF is authorized by the Legislature to promulgate rules and regulations governing the management, use, and application of poultry litter. *See id.* §§ 2-4, 10-9.7(A)-(B).[10] The regulations that Plaintiffs allege that Peterson has violated are among those promulgated by ODAFF. *See* OAC §§ 35:17-3-14, 35:17-5-5. Indeed, Sections 35:17-3-14 and 35:17-5-5 of ODAFF regulations govern how, when, and where poultry litter will be handled. *See id.* As noted above, the purpose of ODAFF's rules and regulations governing poultry litter is to "control nonpoint source runoff and discharges from poultry waste application," while "ensuring beneficial use of poultry waste." *Id.* § 35:17-5-1.

Undoubtedly, the Oklahoma Legislature delegated this rule-making authority to ODAFF to ensure uniform and consistent regulation of the poultry industry. Under ODAFF regulations, the agency is responsible for licensing and/or registering all poultry operations. *Id.* § 35:45-1-7(a)(1). Likewise, ODAFF is responsible for investigating any complaint received regarding animal waste management. *Id.* § 35:45-1-7(c)(1). Furthermore, ODAFF is also

[10] Plaintiffs have also alleged that the Defendants have violated Section 10-9.7. However, Peterson maintains that this determination, like those under Sections 2-6-105 and 2-18.1, are to be made by the administrative body to whom the Oklahoma Legislature has delegated the duty, *i.e.*, in this case, ODAFF.

responsible for initiating enforcement actions in the event that any poultry operation violates the standards set by the Legislature in the Oklahoma Agricultural Code, *see* OKLA. STAT. tit. 2, § 10-9.7(B), to wit:

> These [enforcement] actions integrate corrective or remedial activities that can include clean up activities and restoration activities. Remediation requirements are determined on a case-by-case basis. The Department shall assess and review all approved remediation requirements to provide technical standards for future remediations.

Id. § 35:45-1-7(a)(3). As such, these various determinations outlined in the Oklahoma Statutes and the applicable regulations must be made by ODAFF, as delegated by the Oklahoma Legislature. *Id.*

In addition to this general authority, ODAFF's discretionary authority extends to specific claims made in this action by Plaintiffs. Of particular note, in this action, Plaintiffs allege that Peterson has violated OKLA. STAT. tit. 2, § 2-18.1. Section 2-18.1 states, in pertinent part, as follows:

> A. It shall be unlawful and a violation of the Oklahoma Agricultural Code for any person to cause pollution of any air, land or waters of the state by persons which are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act.
>
> B. If the *State Board of Agriculture finds that any of the air, land, or waters of the state* which are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act

> *have been or are being polluted,* the *Board shall make an order* requiring that the pollution cease within a time period determined by the Department. . . . In addition, the *Board may assess an administrative penalty* pursuant to Section 2-18 of Title 2 of the Oklahoma Statutes. . . .

OKLA. STAT. tit. 2, § 2-18.1 (emphasis added). Notably, the plain language of Section 2-18.1 grants ODAFF the authority to administer the Oklahoma Environmental Code within areas covered by the agency's jurisdiction.

In addition, Plaintiffs have alleged that Peterson has violated OKLA. STAT. tit. 27A, § 2-6-105, which states, in pertinent part, as follows:

> A. It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance.
>
> B. If the *Executive Director* [of ODEQ] *finds that any of the air, land or waters of the state have been, or are being, polluted, the Executive Director shall make an order requiring such pollution to cease* within a reasonable time, or requiring such manner of treatment or of disposition of the sewage or other pollution materials as may in his judgment be necessary to prevent further pollution. . . .

OKLA. STAT. tit. 27A, § 2-6-105 (emphasis added).

Comparing the structure of Section 2-18.1 with Section 2-6-105, it is evident that these statutory provisions have parallel construction, which necessitates the conclusion that the legislative intent of these statutes is

the same. *See City of Hugo v. State ex rel. Public Employees Relations Bd.,* 886 P.2d 485, 493 (Okla. 1994) (interpreting legislative intent based on parallel provisions). Under either statutory provision, subparagraph A must be read in conjunction with subparagraph B. *See id.* at 8 n.5; *cf. Cox v. State ex rel. Okla. Dep't of Human Servs.,* 87 P.3d 607, 614-15 (Okla. 2004) (commenting, "[i]ntent is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each").

Notably, this Court has previously interpreted Section 2-6-105 to require a factual finding by the Executive Director of the ODEQ under subparagraph B of Section 2-6-105 before liability may attach under subparagraph A of the statute. *See Burlington & Santa Fe R.R. Co. v. Spin-Galv,* No. 03-CV-162-P(J), at 7-8 (N.D. Okla. Oct. 5, 2004) (unpublished), *appeal docketed,* No. 04-5182 (10th Cir. Nov. 26, 2004) (attached hereto as Exhibit "4"). As such, as a matter of simple statutory interpretation, Section 2-18.1 likewise requires an administrative finding under its subparagraph B by ODAFF before liability can potentially attach under subparagraph A. *Cf.* OKLA. STAT. tit. 2, § 2-16 ("*When requested by the State Board of Agriculture* it shall be the duty of the district attorney or Attorney General to institute appropriate proceedings in the proper courts . . . " (emphasis added)). Under either section, the requisite factual finding is a discretionary duty delegated to ODAFF or another environmental agency by the Oklahoma Legislature. Thus, under the law of Oklahoma, these duties cannot be further delegated to another state agency, another executive officer, or a judicial body. Under the doctrine of primary jurisdiction, these issues should be

resolved by the assigned agency, which in this case is ODAFF.

Moreover, if ODAFF is not given the opportunity to make the requisite findings required by the aforementioned statutory and regulatory provisions, Peterson will potentially be subjected to conflicting orders of the agency and this Court. For example, were ODAFF to make the factual determination required by Section 2-18.1 and determine that Peterson has not polluted the waters of the IRW, it could nevertheless be subjected to claims of liability in this Court for pollution of the waters of the IRW.

The potential for inconsistent orders is further exacerbated by Plaintiffs' contention that Peterson has allegedly polluted the IRW through the acts of the independent farmers with whom it contracts. As a matter of law, these farmers are required to obtain an Animal Waste Management Plan ("AWMP") which must include a host of requirements for the handling and land application of poultry litter, including nutrient analysis for the litter, descriptions of the land where it will be applied, application rates, and other related information. *See* OKLA. STAT. tit. 2, § 10-9.7(C) (containing list of requirements that must be contained in the AWMP); *see* OAC § 35:17-5-5 (describing information required in the AWMPs); *see also* OAC § 35:17-3-14 (containing additional requirements for AWMPs). Thus, while the independent farmers obtain and comply the requirements of their AWMPs, if Plaintiffs have their way, Peterson could nonetheless be subjected to claims of liability in this Court for this *lawful* conduct.

Similarly, with regard to inconsistent orders, Plaintiffs seek as a remedy in this action the termination or modification of the litter utilization practices employed by

the farmers in the IRW, while at the same time, these land application practices are specifically prescribed by regulations promulgated by ODAFF in the Oklahoma portion of the IRW, and the Arkansas Natural Resources Commission on its side of the state line. Thus, if Plaintiffs are allowed to simply ignore this substantial body of law, Defendants and the independent contract farmers who grow poultry will be subjected to an uncertain and ambiguous regulatory environment where they can potentially be found liable for conduct authorized by the Oklahoma and Arkansas Legislatures. *But cf.* OKLA. STAT. tit. 50, § 4 ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance").

A dramatic illustration of the necessity for allowing the regulatory agencies to perform their delegated function arises from Plaintiffs' claims based upon CERCLA, 42 U.S.C. § 9601 *et seq.*, and SWDA, 42 U.S.C. § 6901 *et seq.* (Complaint Counts 1, 2 and 3.) A finding of liability under these federal acts will require the Court to find that poultry litter is a "hazardous substance" under CERCLA, and a "solid" or "hazardous waste" under SWDA. 42 U.S.C. §§ 6972 and 9607. Such findings would be entirely inconsistent with the animal waste management scheme set forth in the laws and regulations of both Arkansas and Oklahoma (and for that matter, the federal regulations for Confined Animal Feeding Operations), and would have the practical effect of nullifying both states' agricultural nonpoint source management programs. Accordingly, if ODAFF is not permitted to carry out its legislatively delegated duties, Plaintiffs, through the Attorney General, will be permitted to effectively undermine or effectively invalidate these statutory and regulatory provisions,

thereby creating an intolerable predicament for Defendants and the thousands of farmers who must discern which standard must apply.

Furthermore, this Court cannot fashion the type of relief requested by Plaintiffs on their Oklahoma statutory and regulatory claims. In this regard, Plaintiffs seek administrative penalties for each of these statutory and regulatory claims. (Complaint at ¶¶ 132, 136, 139). However, by operation of law, the authority to assess such civil penalties has been delegated to ODAFF, who may seek to assess the penalties in either an administrative proceeding or in a court. *See* OKLA. STAT. tit. 2, § 2-18. In this regard, Section 2-18 limits the assessment of administrative penalty to ODAFF after "notice and opportunity for a hearing." *Id.* § 2-18(A), (D). Under this statutory scheme, Plaintiffs, through the Attorney General, is *only* authorized to enforce an administrative penalty assessed by ODAFF in the manner provided by statute for the enforcement of a civil judgment. *See id.* §§ 2-7(B), 2-16(B). Nothing in these statutes permits or otherwise authorizes Plaintiffs, through the Attorney General or otherwise, to seek assessment of such a penalty *sua sponte.*

As discussed in *Marshall,* a dispute involving public rights warrants turning the matter over to the agency responsible for resolving the issues addressed in the dispute. In addition to the other factors addressed above, this factor, too, further compels the position that this action be stayed until such time as ODAFF performs the duties delegated to it by the Oklahoma Legislature. Likewise, as discussed in greater detail in the following section, if Plaintiffs are permitted to continue this litigation against Peterson and the other Defendants, notwithstanding the Legislature's delegation of authority

elsewhere, the lawsuit would surely disrupt Oklahoma's efforts to establish a "coherent policy with respect to a matter of substantial public concern." *Marshall,* 874 F.2d at 1379. At minimum, the lawsuit would render the Oklahoma Agricultural Code, the related regulations, and much of the Oklahoma Environmental Code mere surplusage, having little or no practical application to the issues for which the Legislature sought to remedy. As such, this action should be stayed until such time as the various agencies perform their legislatively delegated duties.

3. *The Clean Water Act also dictates that the Court should defer to the primary jurisdiction of the regulatory agencies.*

As noted above, Plaintiffs' attempt to regulate through litigation undermines, and effectively supercedes, the efforts by the Oklahoma Legislature and environmental agencies to formulate and implement a coherent water policy as required by the Clean Water Act.[11] *See, e.g.,* 33 U.S.C. § 1313(d)(1)(C) (requiring development of total maximum daily loads for "impaired" waterways listed on a state's 303(d) list). These CWA requirements further compel the conclusion that this action should be stayed until the various environmental regulatory agencies have

[11] In addition to the Clean Water Act, the ARBC requires "Wile cooperation of the appropriate state agencies in the State of Arkansas and Oklahoma to investigate and abate sources of alleged interstate pollution within the Arkansas River Basin." OKLA. STAT. tit. 82, § 1421, art. VII(B). Thus, under the doctrine of primary jurisdiction, the agencies designated by the States under the ARBC must likewise be permitted to fulfill these congressionally delegated duties before Plaintiffs are permitted to pursue the instant litigation against Peterson.

complied with their delegated duties in order to avoid "the disruption of state efforts to establish a coherent policy with respect to a matter of substantial concern." *Marshall,* 874 F.2d at 1379. Indeed, ODAFF's efforts at regulating agriculturally related nonpoint source pollution fall within this broader scheme mandated by Congress.[12]

In this regard, the CWA mandates that Oklahoma adopt a comprehensive and coherent policy with regard to its waters. As part of a larger water quality management program, Section 303 of the CWA requires Oklahoma to adopt water quality standards ("WQS") for its *intrastate* waters and submit the WQSs to the EPA for its approval. 33 U.S.C. § 1313(a)(3)(A).[13] The WQSs "are the State's goals for individual water bodies and provide the legal basis for control decisions under the [Clean Water] Act." 40 C.F.R. § 130.0(b). The Oklahoma Water Resources Board ("OWRB") is charged with developing, and has developed, Oklahoma's WQSs. *See* OKLA. STAT. tit. 82, § 1085.30; OKLA. ADMIN. CODE §§ 35:45-1-4(a) and 785:45-1-1.[14] After

[12] As the Oklahoma Attorney General has recognized, ODAFF plays a key role in this ongoing process to meet the WQS by determining Best Management Practices and adjusting the standards for Animal Waste Management Plans to minimize the "contamination of waters of the state." 1997 OK AG 95, ¶ 11.

[13] "A water quality standard (WQS) defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary protect the uses." 40 C.F.R. § 130.3. These WQSs "serve the dual purposes of establishing the water quality goals for a specific water body and serving as the regulatory basis for establishment of water quality-based treatment controls and strategies beyond the technology-based level of treatment required by . . . the [Clean Water] Act." *Id.*

[14] Each of the State of Oklahoma's "environmental agencies" is responsible for utilizing and enforcing the WQSs. *See* Okla. Stat. tit. 27A, § 1-1-202(a)(2). These environmental agencies are the OWRB, the

(Continued on following page)

WQSs have been adopted, the State is required to publicly review them at least once every three (3) years and may be required to submit them to the EPA for further review. 33 U.S.C. § 1313(c)(1)-(4); *see* 40 C.F.R. Pt. 131 (containing the procedures for developing, reviewing, and revising the WQSs).

Oklahoma is required to, and does, continuously monitor the navigable waters within its borders and to report their condition in conjunction with the approved WQSs. *See* 33 U.S.C. § 1315(b)(1); 40 C.F.R. § 130.0(b). To further this objective, Oklahoma must also establish monitoring methods and procedures to compile data needed to analyze water quality. 40 C.F.R. § 130.4(a). The federal regulations state that the monitoring data will be used in "determining abatement and control priorities; developing and reviewing water quality standards, total maximum daily loads, wasteload allocations and load allocations; assessing compliance with National Pollutant Discharge Elimination System ("NPDES") permits by dischargers; reporting information to the public through the section 305(b) report and reviewing site-specific monitoring efforts." *Id.* § 130.4(b).

In addition to the development of WQSs, Section 303 of the CWA requires Oklahoma to identify "those waters within [its] boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters." 33

Oklahoma Corporation Commission, ODAFF, the Oklahoma Conservation Commission, the Oklahoma Department of Wildlife Conservation, the Oklahoma Department of Mines, and the ODEQ. *See id.* § 1-1-102(13).

U.S.C. § 1313(d)(1)(A). Oklahoma is required to identify those waters which will not meet the established WQSs and to list them on its "303(d) list". *See* 40 C.F.R. § 130.7(b)(1). Oklahoma is then required to provide documentation to the EPA for each of its listed water bodies, justifying its place on the list. *Id.* § 1307.(b)(6). Significantly, for purposes of this action, Oklahoma has listed waters within the IRW on its 303(d) list, including Tenkiller Ferry Lake, the Illinois River, Flint Creek, and Baron Fork, among others. *See* OKLA. DEP'T ENV. QUALITY, WATER QUALITY ASSESSMENT INTEGRATED REPORT: PREPARED PURSUANT TO SECTION 303(D) AND SECTION 305(B) OF THE CLEAN WATER ACT, app. C, at 8-9 (2004) (attached hereto as Exhibit "5").

For each of the waters identified, including those within the IRW, Oklahoma is required to establish a Total Maximum Daily Load ("TMDL") for the applicable pollutants. 33 U.S.C. § 1313(d)(1)(C).[15] The EPA regulations describe the purpose and goal of the TMDLs as follows: "TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQLS [water quality limited segments] with seasonal variations and a margin of safety which takes into account the relationship between effluent limitations and water quality." 40 C.F.R. § 130.7(c)(1); *see* OAC § 35:45-1-2 (stating a TMDL is "a written, pollutant-specific and water body-specific plan establishing pollutant loads for point

[15] "TMDLs are a device to assure attainment of water quality goals by calculating the amount of allowable pollutants that may be discharged into a water body and allocating these loads among pollutant sources." Jeffrey M. Gaba, *New Sources, New Growth and the Clean Water Act*, 55 ALA. L. REV. 651, 652 (2004).

and nonpoint sources, incorporating safety reserves, to ensure that a specific water body will attain and maintain the water quality necessary to support existing and designated beneficial uses"); *see also* Cynthia D. Norgart, *Florida's Impaired Waters Rule: Is There a "Method" to the Madness?,* 19 J. LAND USE & ENVTL. L. 347, 348 (2004) (noting that the TMDL establishes the maximum level of pollutants that an impaired water body can take without exceeding the established WQS for the water body).

In Oklahoma, the Oklahoma Department of Environmental Quality ("ODEQ") is charged with establishing, implementing, and enforcing the TMDLs. OKLA. STAT. tit. 27A, § 2-6-103(A)(6). The ODEQ regulations state that it "will establish TMDLs for impaired water bodies, including wasteload allocations for point sources and load allocations for nonpoint sources, in accordance with the procedures described in the [Continuing Planning Process]." OAC § 252:690-1-7. The ODEQ has also been given the discretionary authority to coordinate with the other environmental agencies in preparing the TMDLs. *See id.;* OKLA. STAT. tit. 27A, § 2-6-103(A)(8).

The general process described in Oklahoma's most recent Continuing Planning Process document for developing a TMDL for an impaired water body is as follows:

> The first step in developing a TMDL involves establishing a goal, or target, which is usually related to achieving a particular numerical or narrative water quality criterion. Because of the complexity of the WQS, this goal may be specific to a particular pollutant or may involve a number of pollutants. In addition, this goal may be set differently depending on the type of water body. Multiple targets are appropriate in cases

> where different requirements must be applied to different points in the water body or where differing requirements are associated with multiple uses. A phased approach can be appropriate in some cases.

OKLA. DEP'T ENV. QUALITY, CONTINUING PLANNING PROCESS 156 (2002) [hereinafter "2002 CPP"] (attached hereto as Exhibit "6"). Oklahoma is required to have the CPP document under the auspices of the CWA. 33 U.S.C. § 1313(e). The document is Oklahoma's plan for the waters within its borders and must contain detailed plans for, among other things, procedures for establishing TMDLs for waters listed on Oklahoma's 303(d) list. *Id.* § 1313(e)(3)(C). The 2002 CPP, as it must, further describes the steps in developing a TMDL: (1) assessing existing conditions of the water body; (2) identifying and analyzing all pollutant sources; and (3) allocating loadings among pollutant sources. 2002 CPP at 157-58.

This extensive and comprehensive process culminates with the TMDL loading allocation which distributes "pollutant loads among various point, nonpoint, natural background sources, and margin of safety." *Id.* at 160. The TMDL promulgation process is designed to be an exhaustive and comprehensive approach to remedying purportedly impaired water bodies contained on the 303(d) list, bringing them within the established WQSs. In other words, the TMDL process focuses on all sources of purported pollution within a 303(d) listed water body in an concerted effort to bring it with the established WQSs. Notably, ODEQ scheduled the completion of TMDLs for waters within the IRW (including Tenkiller Ferry Lake, the Illinois River, Flint Creek, and Baron Fork) for 2004 and has begun work on these. *See* OKLA. CONSERVATION

COMM'N, WATERSHED RESTORATION ACTION STRATEGY FOR THE ILLINOIS RIVER/BARON FORK WATERSHED 5 (1999) (noting that ODEQ has begun TMDLs "to protect the Illinois River and Lake Tenkiller"). Thus, the doctrine of primary jurisdiction requires that this process be completed before this litigation is permitted to move forward.

In any event, this Court should not grant the relief requested by Plaintiffs absent the factual determinations required under Oklahoma and federal law by ODAFF, OWRB, ODEQ, and the other Oklahoma environmental agencies to the extent that they have jurisdiction over the issues raised in Plaintiffs' Complaint. Any other result permits Plaintiffs to ignore, undermine, or sidestep the public policy present in the Oklahoma and federal statutes and regulations and to further disrupt the continuing, comprehensive efforts of the various Oklahoma environmental agencies to formulate and implement a coherent policy with regard to the water quality within the IRW. To avoid this result, this action should, if not dismissed, be stayed until such time as the designated agencies fulfill the duties and responsibilities mandated by Oklahoma and federal law.

III. CONCLUSION

Plaintiffs' allegations in their Complaint are insufficient to establish that they have stated a claim in each of the ten counts against Peterson for which this Court can grant relief, even when those allegations are viewed with a favorable bias toward Plaintiffs. First, Plaintiffs have failed to state an actionable claim in this lawsuit to the extent is seeks to impose liability on Peterson for the alleged acts of omissions of the Arkansas farmers with

whom it contracts to raise poultry within the borders of Arkansas. The various claims in the Complaint are precluded because the claims encroach upon Arkansas's sovereignty, violate constitutional principles or are otherwise preempted by federal law, including but not necessarily limited to the Clean Water Act and the Arkansas River Basin Compact. Second, because land application of poultry litter has a recognized beneficial use, Plaintiffs cannot maintain a nuisance *per se* claim under the circumstances of this lawsuit. Third, Plaintiffs have not complied with the applicable notice requirements prior to commencing their SWDA claim and are not proper parties for such an action. Fourth, the Court lacks subject matter jurisdiction over the claims in this lawsuit because Plaintiffs have failed to exhaust the administrative remedies required under Oklahoma law and because the common-law claims are precluded under the Political Question Doctrine. All of these reasons compel the conclusion that this action must be dismissed in accordance with Federal Rules of Civil Procedure 12(b)(1) and (6).

In the alternative, or in addition to partial dismissal, this action should be stayed until such time as ODAFF makes the various determinations delegated to it by the Oklahoma Legislature as the administrative agency with jurisdiction over alleged agricultural nonpoint pollution in Oklahoma. This lawsuit is within the jurisdiction of ODAFF, and it is the only entity authorized by the Oklahoma Legislature to determine whether the acts and omissions in Oklahoma alleged in the Complaint have caused the pollution alleged therein. Furthermore, the TMDL promulgation scheme mandated by the Clean Water Act compels the conclusion that the subject matter of this lawsuit must first be addressed by the Oklahoma

environmental agencies responsible for implementation of this process before Plaintiffs can seek to hold Peterson liable for the alleged acts and omissions contained in the Complaint. This conclusion is based on the doctrine of primary jurisdiction and analogous Oklahoma law which prohibits another entity, whether the Attorney General of Oklahoma, this Court, or a jury, from performing legislatively delegated duties.

Respectfully submitted,

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[Exhibits Omitted In Printing]