

Expansion of Integrator Environmental Liability in Recent Lawsuits
Rural Advancement Foundation International

A carefully watched lawsuit, *State of Oklahoma v. Tyson Foods*¹ is unfolding federal district court, and it may have serious implications regarding poultry integrator liability for soil and water pollution from contained animal feeding operations (CAFOs). On June 13, 2005, the Attorney General of Oklahoma filed a complaint against fourteen poultry operations for water and soil pollution. The Attorney General stated, “run off from the improper dumping and storage of poultry waste has contaminated Oklahoma’s rivers and streams particularly in the Illinois River watershed where phosphorus from the poultry waste is estimated to be equivalent to the waste generated by 10.7 million people.”² The suit alleges violations of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), federal and state nuisance laws, and state environmental and administrative laws.

The Oklahoma lawsuit is progeny of the landmark decision in *Sierra Club v. Tyson Foods*³ which held Tyson Chicken not the poultry growers were responsible for reporting toxic levels of ammonia emissions from their operations. In a summary judgment hearing, the Kentucky Court found Tyson Chicken was the “operator” and “person in charge” at the CAFOs and thus they were responsible for reporting emissions under CERCLA and EPCRA. The lawsuit ended with a consent decree whereby Tyson Foods agreed to invest half a millions dollars to study and report emissions from its poultry operations.⁴

¹ No. 05-0329, N.D. Okla.

² 18-10 Measley’s Oil. Liab. Report 11 (2005).

³ 299 F. Supp. 2d 693 (W.D.K.Y. 2003).

⁴ Tyson Forced to Clean Up Its Act., <http://www.sierraclub.org/environmental/lawsuits/viewCase.asp?id=160>

Sierra Club v. Tyson Foods⁵

In the Kentucky case, the Sierra Club and neighboring residents brought a suit in federal court against four poultry producers alleging violations in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Emergency Planning and Community Right to Know Act (EPCRA). Specifically, the Sierra Club asserted Tyson Foods failed to report emissions of ammonia from several chicken operations.

Ammonia is a colorless, irritant gas produced by decomposing animal waste. The standard procedure is to cover the floor of the chicken house with a layer of wood shavings or rice hulls. There the ammonia builds up from the collected animal waste. Exhaust fans and vents provide necessary ventilation to protect the animals from the ammonia. The poultry grower controls which vents are open and adjust the fans; however, most of the ventilation tasks along with feed, water and heating and cooling are automated.

When ammonia or other named hazardous substances are released into the air in a certain quantity, both CERCLA and EPCRA require notification to the appropriate governmental agency. Specifically, section 103 of CERCLA requires “any person in charge of facilities” to notify authorities when there is a reportable release of hazardous substance. Likewise, EPCRA requires “owner or operator” of facilities to provide immediate notice of a release of hazardous substance to the state authorities. In both statutes, ammonia is a hazardous substance. Further, CERCLA and EPCRA authorize citizen’s suits permitting citizens to file suit to enforce its provisions.

At the summary judgment hearing, one of the main issues at contention was the meaning of “facility” in both CERCLA and EPCRA. Tyson Foods argued each chicken house constituted a facility whereas Sierra Club maintained the whole farm site consisting of multiple chicken

⁵ 299 F. Supp. 2d 693 (W.D.K.Y. 2003).

houses on a contiguous site is a “facility”. Sierra Club presented evidence the Tyson Facility, constituting of many chicken houses, as a whole released approximately 235 pounds of ammonia daily, far more than CERCLA’s reportable minimum of 100 pounds. Comparatively, a single chicken house releases approximately 10 pounds of ammonia daily and would be exempt from reporting requirements under CERCLA and EPCRA. The Court felt section 103 of CERCLA is best served by a broad definition. The Court defined facility as “encompassing the entire chicken operation [and it] was the only interpretation of the statute that meets CERCLA’s basic purpose: to protect and preserve public health and the environment.” The Court extended this interpretation of “facility” to the EPCRA.

The Court made a significant decision regarding the role and responsibilities of integrators under CERCLA and EPCRA. Tyson Foods argued it was neither a “person in charge” under CERCLA or an “operator” under EPCRA. Sierra Club maintained an owner or operator of facility is “person in charge” under CERCLA and the “operator” under EPCRA. Looking at precedent decisions, the Court formulated the following queries to determine the “person in charge” under CERCLA and EPCRA: whether the defendant’s occupy positions of responsibility and power and whether the defendant is in an position to make timely discovery of a release, direct activities that result in the pollution, and have the capacity to prevent and abate the environmental damage.

Applying its formula, the Court found Tyson Chicken, subsidiary of Tyson Foods, was “the person in charge” and “operator” on both its own facilities and significantly on the facilities owned by independent contracted farmers. Tyson Chicken argued it was not the “person in charge” on facilities owned by contracted farmers because it merely provided the chicks, feed, veterinary services and medication, and technical advice to the poultry growers. The court

denied Tyson Chicken defense it was not in the “best” position to detect, prevent or abate a release of a hazardous substance. The Court emphasized it was not necessarily the “best person” rather it’s “any person who is in a position” and there may be several persons in charge.

The Court looked to Alabama Supreme Court’s decision in *Tyson Foods v. Stevens*⁶ which found Tyson’s control of poultry growers was so pervasive that it held the poultry grower was an “agent” of Tyson and upheld a punitive verdict against Tyson. In this case, the Court applied the *Stevens* holding and felt the agency relationship best described Tyson Chicken’s relationship with the poultry growers. Consequently, the Court found Tyson Chicken was “clearly in a position of responsibility and power with respect to each facility.” The Court emphasized Tyson Chicken was in “a position to make timely discovery of the release, direct the activities resulting in the ammonia release, and it has the capacity to prevent and abate the alleged environmental damage.”

At the summary judgment motion hearing, the Court made influential findings regarding CERCLA and EPCRA regulations and their application to CAFOs. Since there was no trial, the issue of liability was not found. Tyson Foods did not make an admission of liability in the Consent Decree, but they paid a half a million dollars to conduct an ammonia monitoring project on several of its chicken production facilities.

Oklahoma v. Tysons Foods⁷

Following the decision in Kentucky, the Attorney General of Oklahoma has brought suit against fourteen poultry operations for pollution in the Oklahoma’s rivers and streams. The Attorney General alleges the defendant’s poultry operations have released phosphorus and other

⁶ 738 So. 2d 804 (Ala. 2000).

⁷ No. 05-0329, N.D. Okla.

containments including nitrogen, arsenic, copper, zinc, hormones and microbial pathogens such as E.coli and fecal coliform into the Illinois River Watershed. The state seeks to recover CERCLA past and present response costs to monitor, assess and evaluate water quality and wildlife in the watershed, and it demands a permanent injunction requiring immediate abatement of the pollution producing practices.

The effect of the Kentucky decision is evident in the complaint which clearly asserts integrators not the poultry growers are liable for the pollution in the watershed. The complaint states: “each of the poultry integrator defendants so dominates and controls the actions and activities of its respective poultry growers that the relations is not one of independent contractor, but rather one of employer and employees or one of principal and agent and one of owner, operator or arranger of poultry waste under CERCLA.” Significantly, the complaint cites the agreements between integrators and poultry growers are contracts of adhesion, and the integrators are clearly the dominant party while poultry growers have little bargaining power. The complaint indicates the Attorney General seeks to avoid placing liability on the poultry grower.

The Defendants responded by saying they are not the only parties to blame for the pollution. At a news conference, a spokesperson for the poultry integrators released legal documents citing 160 private and public entities contributing to the pollution in the watershed. Currently, the Defendants seek a dismissal on the grounds they have adhered to the law and have not been cited by any state regulatory agencies for infractions. Alternatively, the Defendants may add other parties to the suit.⁸

The Kentucky case did not make trial, and it is very possible this Oklahoma case may settle. The Attorney General indicated the filing of the lawsuit does not preclude mediation and

⁸ <http://www.meatingplace.com>

negotiation with the companies.⁹ Though the Kentucky decision established some precedent in the issues of environmental liability between integrators and contract poultry growers, there are still unanswered questions that will be watched closely by integrators and poultry growers alike.

The growing issue of integrator liability may encourage discussions to improve contracts between poultry growers and integrators. Currently, contracting in the poultry industry minimizes the autonomy of the poultry grower and his role as the primary decisionmaker. As a result, the courts are finding the contracts between the integrators and the poultry growers define the grower as an agent or employee. This has shifted environmental liability to the integrator. This may support changing current contracting practices and encourage better contracts giving the poultry grower a greater role in production decisions. Then, the grower can make the best choices regarding production for his or her farm and the surrounding community. The result may satisfy the concerns of environmentalists as well as strengthen the role of the poultry grower.

The next article in this series will explore relationship between expanding integrator liability and the pursuit for better contracts for growers.

⁹ 18-10 Measley's Oll. Liab. Report 11 (2005).