

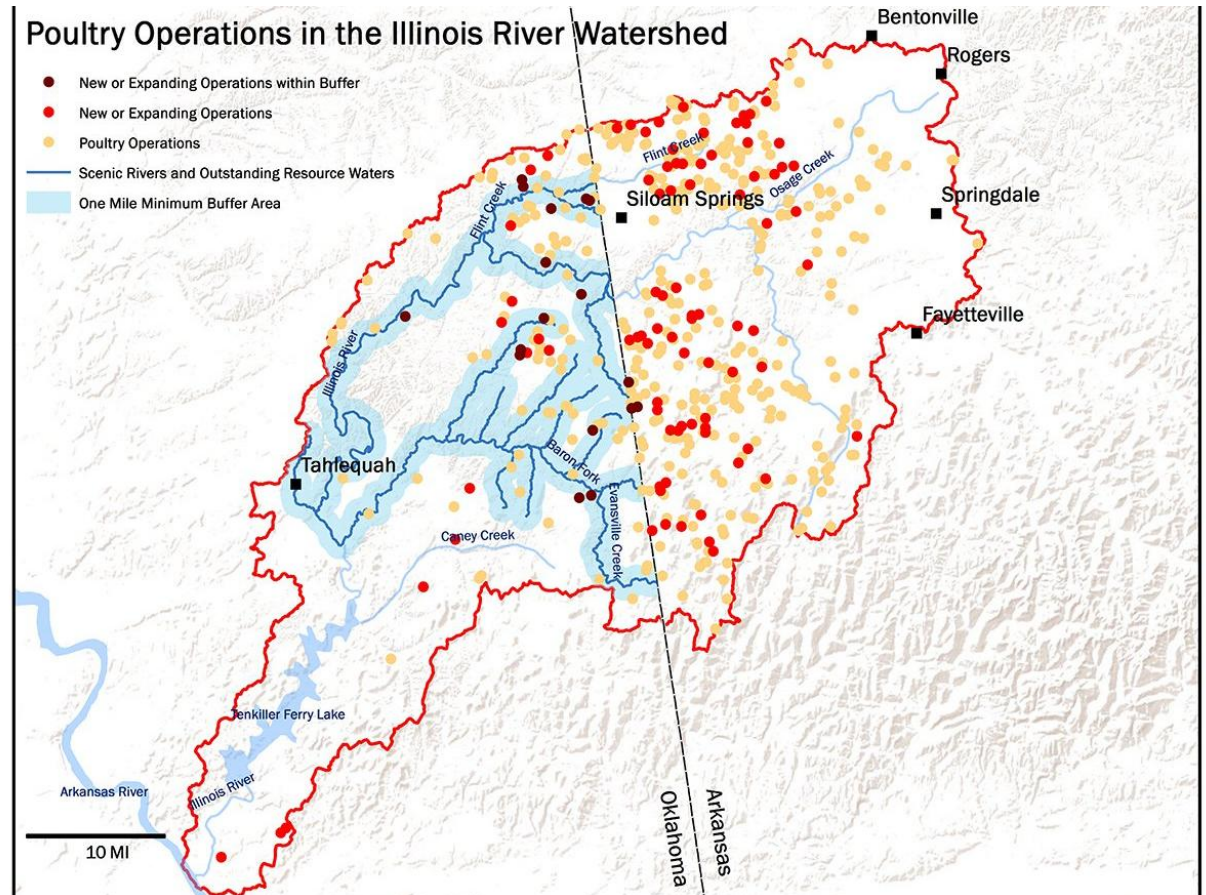
# Sign Up for our Attorney List:

- Based on an increasing number of requests from stakeholders throughout the country, the NALC is creating a contact list to connect members of the agricultural community with private practice attorneys experienced in ag-related issues.
  - Participation does not constitute endorsement or referral.
- Information requested:
  - Contact information
  - States of practice
  - Areas of practice
- Join the list at <https://rebrand.ly/aglawlist> or follow the QR code.



# Illinois River Watershed (IRW)

- Flows from NW Arkansas into NE Oklahoma
- Includes streams, tributaries, Lake Tenkiller



[https://19january2021snapshot.epa.gov/a/r/water-arkansas\\_.html](https://19january2021snapshot.epa.gov/a/r/water-arkansas_.html)



# Poultry Production in the NW AR/NE OK (2023)

- Significant poultry industry in the IRW- Northwest Arkansas and Northeast Oklahoma.
  - Millions of birds raised annually
  - Hundreds of thousands of tons of poultry litter generated each year
- Statistics pulled from 6/17/25 court order:



	Arkansas*	Oklahoma**
<b>Poultry Houses</b>	1,733	419
<b>Bird Capacity (per flock)</b>	19,086,239	8,741,500
<b>Waste Generated (tons per year)</b>	307,539	55,992

\* Due to AR privacy laws, AR numbers reflect all of Washington and Benton counties, not just those houses located in the IRW

\*\*\*\* Includes only poultry production in IRW



# “Vertically Integrated” Poultry Production

## Integrators (Tyson, Cargill, Simmons, etc.)

- Own the birds
- Own/produce feed
- Provide veterinary services
- Control processing & marketing

## Contract Growers

- Own poultry houses & equipment
- Provide labor, utilities, maintenance
- Raise birds under contract; paid by efficiency of gain (feed conversion to live weight)

## Waste Generation

- Litter produced at grower farms
- Growers typically own litter/ integrators historically disclaimed ownership

# What is Poultry Litter?

- Mixture of manure, bedding, feathers
- High in nitrogen, phosphorus and nutrients
- Used as fertilizer on agricultural lands (in OK/AR, typically land where cattle are pastured)

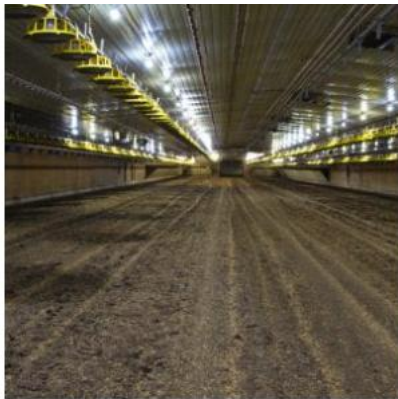


Figure 1. Broiler litter inside a poultry mega-house.



Figure 1. Caked litter stored in a dry-stack barn.

<https://www.aces.edu/blog/topics/farming/nutrient-content-and-composition-of-poultry-litter/>



<https://content.ces.ncsu.edu/guidelines-for-commercial-application-of-poultry-litter>

# Refresher: How the CWA Handles Water Pollution

## Point Source

- Pollution that comes directly from a known point source.
- Rule:
  - May not discharge pollutants to surface waters without a National Pollutant Discharge Elimination System (NPDES) permit
  - Also called a “402” permit

## Non-Point Source

- Runoff
  - Not a “discernible, confined and discrete conveyance... from which pollutants are or may be discharged”
- Rule:
  - No NPDES permit required
  - Must meet other CWA requirements set by states (§303(d))
    - Water quality standards
    - Priority rankings for impaired waterbodies
    - TMDL
  - Must meet state law requirements





## 1970: Scenic Rivers Act

Oklahoma designated the Illinois River (among others) a scenic waterway as part of the 1970 Oklahoma Scenic Rivers Act.

Effect: Allowed for additional protections of designated waterways

AKA- setting up numeric, not narrative standards

A. The Oklahoma Legislature finds that some of the free-flowing streams and rivers of Oklahoma possess such unique natural scenic beauty, water conservation, fish, wildlife and outdoor recreational values of present and future benefit to the people of the state that it is the policy of the Legislature to preserve these areas for the benefit of the people of Oklahoma. For this purpose there are hereby designated certain "scenic river areas" to be preserved as a part of Oklahoma's diminishing resource of free-flowing rivers and streams.

B. The areas of the state designated as "scenic river areas" shall include:

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

C. The term "scenic river area" as used in the Scenic Rivers Act is defined as the stream or river and the public use and access areas located within the area designated.

1988

- Environmental Protection Agency permits Fayetteville, Arkansas, to dump treated wastewater into a tributary of the Illinois River.
- Discharges violated OK WQS.

1988-  
1989

- OK brought challenge to EPA actions.
- AR won the first case (ALJ) and initial administrative appeal.

1990

- OK won the next appeal (10<sup>th</sup> Cir)
- AR appealed

- **SCOTUS:** Arkansas may dump treated sewage into the Illinois River watershed, but it must meet Oklahoma water quality standards.

- “The regulations relied upon by the EPA were a perfectly reasonable exercise of the Agency’s statutory discretion.”
- “The application of state water quality standards in the interstate context is wholly consistent with the Act’s broad purpose ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’ ... The Agency’s regulations conditioning NPDES permits are a well-tailored means of achieving this goal”



1993

- 27A Okla. Stat. § 2-3-504 becomes effective
  - “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.”

1996

- State of Oklahoma issues report detailing high levels of contaminants in Lake Tenkiller.

2002

- The Oklahoma Water Resources Board adopted a total phosphorus criterion of .037 mg/L to protect Scenic Rivers.
  - Numeric standard

2003

- Arkansas and Oklahoma agree to work together to reduce pollution in the Illinois River watershed.
  - Settlement agreement in: *City of Tulsa v. Tyson Food Inc., et. al.*, 258 F. Supp. 2d 1263 (N.D. Okla 2003).
    - CERCLA claims





## **Refresher: CERCLA**

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
  - Commonly known as “Superfund”
- Purpose:
  - Established prohibitions and requirements concerning closed and abandoned hazardous waste sites;
  - Provided for liability of persons responsible for releases of hazardous waste at these sites; and
  - Established a trust fund to provide for cleanup when no responsible party could be identified.
- In City of Tulsa, District Court ruled that phosphorous contained in the poultry litter in the form of phosphate is a hazardous substance under CERCLA.
  - Ruling vacated as result of settlement (not precedential)



## 2003 Agreement

- EPA approved phosphorus criteria of .037 mg/L.
- “Statement of Joint Principles and Actions” agreement signed by Oklahoma and Arkansas.
  - In part: *“Oklahoma periodically reevaluates all of its water quality standards. In particular, Oklahoma will reevaluate Oklahoma’s .037 mg/l criterion for total phosphorus in Oklahoma’s Scenic Rivers by 2012, based on the best scientific information available at that time, and with the full, timely inclusion of officials from the State of Arkansas representing both point and nonpoint source dischargers.”*
- Consequences:
  - Phosphorus limits for municipal discharges
  - Poultry litter application controls
  - Monitoring plan

2005

- OK AG Drew Edmondson files a federal lawsuit against 14 poultry companies

Sept.  
2009

- Trial begins

Feb.  
2010

- After 52 trial days, both parties finish their cases

- Plaintiff (OK) claims:

- Defendants disposed of hazardous substances (in the form of chicken litter) in the IRW
  - Phosphorous etc
- Integrators were vicariously liable for the grower's actions in spreading the litter
- Each defendant is a potentially responsible party
  - Joint and several responsibility

- Defendant (poultry company) claims:

- Growers are independent contractors, and contractually responsible for waste disposal
- Poultry litter is beneficial fertilizer
- Disposal is already regulated by states, their actions in AR were legal in that state
- Other sources contribute to bacteria and phosphorus
  - Karst topography (sinkholes, subsurface flow) made it difficult to link the litter to the pollution

2013

- Oklahoma and Arkansas announce a joint three-year study of water quality in the Illinois River watershed as a continuance of the 2003 agreement as a “Second Statement of Joint Principals and Actions.” The Scenic Rivers Joint Study Committee, with three members each from Arkansas and Oklahoma, is established.

2015

- U.S. Environmental Protection Agency makes available for comment a proposed Illinois River Watershed Modeling Program.

2016

- The Joint Principals agreement yields the Oklahoma-Arkansas Scenic Rivers Joint Phosphorus Study, which is adopted by the Scenic River Joint Study.



# FY 2017 Poultry Litter in Illinois River Watershed

County	# of Acres	Tons Applied	Tons sold or transferred	Number of houses	Bird Capacity
Benton (AR)	17,669	7,931	122,796	1,070	24,103,803
Crawford (AR)	6,728	4,159	2,474	47	920,200
Washington (AR)	22,389	13,236	91,711	903	17,329,002
Adair (OK)	3,771	2,679	33,227	346	7,090,000
Cherokee (OK)	1,309	1,196	2,173	38	723,200
Delaware (OK)	6,961	3,536	62,065	613	14,717,418
Mayes (OK)	375	414	4140	73	1656000
Sequoyah (OK)	5,620	2,501	4,375	56	724,300
<b>Totals</b>	<b>64,822</b>	<b>35,652</b>	<b>322,961</b>	<b>3,146</b>	<b>67,263,923</b>



## Refresher: “TMDL”

April  
2018

- EPA approves working models for the IRW based on the Oklahoma-Arkansas Scenic Rivers Joint Phosphorus Study.
- Models- summary of baseline conditions and documentation that can be used to develop TMDL/Watershed-based Plans

- **What is a TMDL?**

- Pollution “budget” established under Section 303(d) of the Clean Water Act.
- Developed for waters that fail to meet applicable water quality standards ("impaired waters").
- Calculates maximum amount of a pollutant a waterbody can receive and still attain water quality standards.

- **Process:**

- States identify impaired waters and place them on the 303(d) List.
- A TMDL is developed for the impaired waterbody.
- The TMDL allocates pollutant reductions among both point and non-point sources:
- EPA approves or disapproves the TMDL.
- Implementation occurs through permits, state programs, and voluntary measures.

# Nov. 2018 Memorandum of Agreement

---

- .037 mg/L remains as the total phosphorus criterion
- For NPDES permit applications for point-source facilities with a design flow of greater than 1 million gallons per day:
  - Current permits are grandfathered in with existing phosphorus limits of up to 1 mg/L on an averaging period
  - Applications to renew/amend/modify existing permits will be limited to not more than .5 mg/L on an averaging period
  - New applications will be limited to not more than .2 mg/L on an averaging period
- States agree to work together to develop and initiate a workgroup designed to ascertain progress toward meeting the phosphorus criterion

<https://bit.ly/2Ua7iFH>



# 2023: A Ruling

---

- Jan 2023: Ruling in favor of OK/against poultry companies (from case that ended in 2010)
  - 219 pages! / 180 pages of fact-finding
  - Recognized poultry litter as key non-point source
  - Did not specifically forbid use of litter



# Key Findings

- **Standing**

- Oklahoma had standing to sue based on its “quasi-sovereign interest” in protecting environmental resources within the state.

- **Vicarious liability**

- The court rejected arguments that poultry companies could avoid liability by characterizing growers as independent contractors.
  - Companies could be held vicariously liable for grower wrongs b/c they “knew or should have known no later than the late 1990s that their growers’ land application of litter was a primary source of the excess phosphorus in the waters of the IRW”

- **Public nuisance**

- Defendants imported phosphorus-laden feed into the watershed, even though they “have known or should reasonably have known since at least the mid-to-late 1980s” that the litter would then be used in a way that caused injury to the waters of the IRW.
- “The court concludes all defendants [the poultry companies], by their conduct, have unreasonably interfered with the public’s right to the use and enjoyment of the waters of the IRW (Illinois River watershed) in Oklahoma”



# Key Findings

- **Dormant commerce clause**

- Defendants argued Oklahoma was effectively regulating conduct occurring in Arkansas.
- The court concluded Oklahoma was not directly regulating interstate commerce; rather, it relied on a combination of:
  - Oklahoma statutory and common law; and
  - Federal common-law principles addressing harms occurring within Oklahoma.
- Any burden on interstate commerce was deemed incidental and not excessive relative to Oklahoma's environmental interests.

- **Extraterritorial effects**

- Defendants argued that OK should be prohibited from applying its law in a way that prevents legal conduct from occurring in another state.
- Ruling: states may impose liability when conduct occurring elsewhere causes harmful consequences within their borders.

- **Why the court rejected a TMDL-focused remedy**

- The court declined to rely solely on a Total Maximum Daily Load (TMDL) approach because:
  - Nonpoint-source pollution is difficult to address through TMDLs;
  - Implementation timelines were uncertain; and
  - EPA and state enforcement authority over nonpoint sources is limited.





## Consequences:

contamination are created by the poultry waste application. 2 Okla. Stat. § 10-9.7(B)(4)(a) and (B)(4)(b).<sup>52</sup>

96. This court has concluded that defendants' conduct in both Oklahoma and Arkansas constitutes a public nuisance and a trespass on the waters in the Oklahoma portion of the IRW. Although Arkansas has a regulatory scheme pertaining to the management of poultry waste, that scheme must yield to the law set forth in *Cameron* and its progeny. Moreover, it is axiomatic that Arkansas cannot "permit" nonpoint source pollution of Oklahoma's waters.

#### IV. Conclusion

For the foregoing reasons, the court finds in favor of the State and against defendants on the State's claims of statutory public nuisance, federal common law nuisance, trespass, for violation of 27A Okla. Stat. § 2-6-105, and for violation of 2 Okla. Stat. § 2-18.1.

The Court Clerk shall substitute the current relators pursuant to Fed. R. Civ. P. 25(d), as set forth in footnote 1 above.

The Environmental Protection Agency has recognized that nutrient pollution caused by phosphorus is one of America's most widespread, costly, and challenging environmental problems. The parties are hereby directed to meet and attempt to reach an agreement with regard to remedies to be imposed in this action. On or before March 17, 2023, they shall advise the court whether they have been able to do so. The agreed remedies, if any, must be approved by the court. In the event the parties are unable to reach an accord, the court shall enter judgment.

Oct 2023

- Motion to dismiss by poultry companies.
- Grounds:
  - Mootness- “you took so long to rule that there’s no longer an issue”
    - Citing a decline in pollution over the past decade
  - Due process- it’s not fair to wait this long for a ruling
  - Also said that they could not work out an agreement on implementation

June 2024

- Court denied motion to dismiss
  - Defendants didn’t meet high burden of showing mootness
  - Due process/”prudential mootness” claims weren’t enough to warrant dismissal, but instead a quick resolution

December  
2024

- Testimony by state of OK-
  - 234 million chickens raised annually in watershed
  - Illinois River shows upward trend in phosphorous loadings from 2019-2023
  - Chicken farms in IRW produce ~ 255,120 tons of poultry litter every year. Half is exported out of the region.
- Testimony by poultry companies-
  - More litter being shipped out of the region/less applied to IRW
  - Urban development (rather than litter) is a growing source of pollutants b/c of population growth



June 2025



- Question for the Court:
  - Have conditions in IRW “materially changed” enough that it is unfair to still hold the poultry companies responsible for litter application?
- Findings:
  - Phosphorus continues to injure the Illinois River and Lake Tenkiller
  - Defendant companies have continued poultry operations and generated poultry waste throughout the IRW
  - Both continued application and “legacy phosphorus” is affecting water quality
  - Phosphorus run-off from litter application continues to be a significant source of injury to the IRW
  - The continuing actual and ongoing injury to the waters of the IRW constitutes irreparable harm
  - Conditions are not “materially changed”



December  
2025

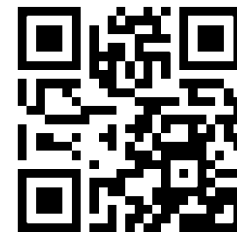


- Remedies:
  - Fines of \$10,000 per violation to the Oklahoma Department of Environmental Quality Revolving Fund
    - Not as much as OK had asked for
  - Companies are responsible for cleanup costs
    - Paid for by poultry companies with an evergreen fund, starting with a balance of 10 million
  - Court orders a special master to be appointed to oversee remediation efforts and update the court regularly.
    - Remediation will run at least 30 years
  - Companies cannot place birds with growers who are not in compliance
  - Companies are responsible for removal/storage/transport/disposal of litter
  - Injunction restricting land application of poultry waste to 2 tons of waste per acre
    - Or less, if testing shows that the phosphorus levels for that property are over an agronomically acceptable level
  - Companies are jointly and separately responsible
  - Attorney's fees



2026

- OK AG announces several settlements with integrators to resolve issues in the case
  - January 2026- Settlement with George’s
    - Amount: \$5 million payment to Oklahoma.
    - Terms: Progressively reduce the application of litter as fertilizer to 20% of the litter produced.
  - February 2026- Settlement with Tyson and Cargill
    - Amount: \$19 million from Tyson; \$6.5 million from Cargill
    - Terms:
      - Progressively reduce the application of litter as fertilizer to
      - Pay into a fund for a Special Master to monitor compliance and bear all costs associated with litter removal;
      - Pay into a fund for remediation of the Illinois River Watershed
- April 2026- Judge rejected all settlements
  - Insufficient in \$\$ and time to remedy/fix harm
  - If accepted, it would give incentives to companies to “roll the dice” and see if they get a bad verdict before negotiating





## At the Moment

- Appeals pending:
  - Appeal of foundational ruling (all companies)
  - Appeal of rejection of settlement (companies at issue joined by OK AG & OK Sec. of Energy)
- Will undoubtedly affect growers in the region as companies plan for future with limited disposal
  - Also affect others associated with local production/processing
- Bigger picture (common law)
  - TMDL process is not sufficient to protect from NPS pollution
    - Model for other challenges to land application
  - Integrators may be held responsible for actions of independent contractors/growers



**Elizabeth Rumley**

(479)387-2331

[erumley@uark.edu](mailto:erumley@uark.edu)

[nationalaglawcenter.org](http://nationalaglawcenter.org)

**UofA**  
DIVISION OF AGRICULTURE  
RESEARCH & EXTENSION  
*University of Arkansas System*



@nataglaw



Stay in Touch: Sign up for “The Feed”: