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City of Tulsa v. Tyson Foods: CERCLA Comes to the Farm—But Did Arranger Liability Come with it?

by

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City of Tulsa v. Tyson Foods: CERCLA Comes to the Farm—But Did Arranger Liability Come with It?*

I. INTRODUCTION

Environmental regulation in the United States is a "highly developed body of law."[1] Moreover, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[2] is "the principal federal statute addressing the cleanup of improperly discharged hazardous substances in the United States."[3] Specifically, CERCLA "provides for strict liability for any person found responsible for depositing

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1. J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 265 (2000) [hereinafter Ruhl, *Farms*].

2. 42 U.S.C. §§ 9601-9675 (2000). CERCLA is commonly referred to as "Superfund." 47 AM. JUR. *Trials* § 1 (1993). "It is a federal trust fund that is funded [through] federal appropriations and a tax on petrochemicals, and is replenished by" CERCLA cost recovery actions. *Id.* at § 3.

3. Sachiko Morita, Note, United States v. Shell Oil Company: *Is the Decision Too Lenient on the United States Government?*, 30 ECOLOGY L.Q. 569, 570 (2003). The four basic elements of liability for monetary damages under CERCLA are:

> (1) The site qualifies as a "facility" as defined in the statute
> (2) There is a "release" or "threatened release" of a "hazardous substance" into the environment as defined in the statute and
> (3) The plaintiff has incurred costs of "response" as defined in the statute[.]
> The fourth basic element, which in most cases is less clear, is the requirement that the defendant fall within one of the four defined classes of persons that are held responsible under the statute for such costs.

47 AM. JUR. *Trials* § 4. The four defined classes of persons who may be held responsible under the statute include:

> (1) The present owner or operator of the facility
> (2) Any person who owned or operated the facility at the time hazardous substances were disposed of
> (3) Any person who owned or possessed hazardous substances and *arranged for* disposal or treatment of them (commonly known as a "generator")
> (4) Any person who transported the hazardous substances to the facility (commonly known as a "transporter")[.]

Id. at § 5 (emphasis added).

hazardous substances in such a way as to endanger human health or safety."[4] This strict liability is "one of the most frightening things that can happen to a business today."[5] Under CERCLA, businesses can be held liable for the cleanup of substances deposited years ago if the waste is found "to have created an environmental hazard . . . ."[6]

Traditionally, farms have not been subjected to CERCLA liability, as they have benefited from a federal "hands-off" approach to agricultural environmental regulation.[7] The basis for such an approach can be found in the ideology that the American farmer is a steward of the land, consciously promoting conservation.[8] However, on March 14, 2003, in *City of Tulsa v. Tyson Foods, Inc.*, the United States District Court for the Northern District of Oklahoma refuted the traditional federal hands-off approach by potentially subjecting poultry operations to CERCLA.[9] While those adhering to the stewardship ideal of agriculture may find this decision overly regulatory, the fact remains that the poultry industry of Arkansas may now be subjected to a heightened standard of environmental liability through certain provisions of CERCLA. Yet the *Tyson* court, unwilling to take such a bold leap, or perhaps influenced by traditional ideology favoring agriculture, refrained from holding poultry companies liable as CERCLA "arrangers" as a matter of

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4. *Id.* at § 1.

5. *Id.*

6. *Id.*

7. *See* Ruhl, *Farms*, *supra* note 1, at 293-316 (illustrating the safe harbors that farms enjoy under federal regulation). *But see id.* at 316-27 (stating that there are three notable exceptions to the general rule of safe harbor enjoyed by farms, including: regulation of concentrated animal feeding operations ("CAFOs"), regulations under the Endangered Species Act, and regulations through subsidy-based conservation programs).

8. *See* Douglas R. Williams, *When Voluntary, Incentive-Based Controls Fail: Structuring a Regulatory Response to Agricultural Nonpoint Source Water Pollution*, 9 WASH. U. J.L. & POL'Y 21, 22-23 (2002). This myth has been criticized in depth. *See* Jim Chen, *Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation*, 48 OKLA. L. REV. 333 (1995).

9. 258 F. Supp. 2d 1263, 1276-88 (N.D. Okla. 2003), *vacated*, No. 01 CV 0900EA(C), 2003 U.S. Dist. LEXIS 23416 (N.D. Okla. July 16, 2003). The decision in this case was subsequently withdrawn by the court pursuant to the terms of a settlement between the respective parties. *See Tyson*, 2003 U.S. Dist. LEXIS 23416, at *2-3, *8. In its decision, the court considered several motions for summary judgment. *Tyson*, 258 F. Supp. 2d at 1311-12. The bulk of this note discusses the court's denial of the plaintiffs' summary judgment motion regarding CERCLA arranger liability.

law.[10] Before addressing the court's interpretation of CERCLA arranger liability, it is critical for attorneys throughout Arkansas and the surrounding areas to understand the additional ramifications of this landmark decision in the area of CERCLA liability.

First, the *Tyson* court held that a watershed could be considered a "facility"[11] under CERCLA because the definition of facility is "broad enough to include both the initial site where a hazardous substance is disposed of and additional sites to which the substances have migrated following the initial disposal."[12] Such a broad definition of a facility provides a means for large areas of land to be subjected to CERCLA liability. Second, poultry litter is considered a CERCLA "hazardous substance"[13] because one of its components, phosphate, is a compound that contains phosphorus, a listed hazardous substance.[14] In effect, this means poultry litter, as well as all animal waste, can now serve as a source for CERCLA liability.

Third, the court denied the summary judgment motions of both plaintiffs and defendants on the issue of whether the land application of poultry litter fell under the "normal application of fertilizer" exception[15] to the definition of a "release"[16] under CERCLA.[17] The court required the defendants to make a stronger showing of evidence that their practices were "normal" under CERCLA and refused to provide poultry businesses and agricultural operations a safe harbor[18] traditionally afforded to

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10. *Tyson*, 258 F. Supp. 2d at 1182-83. A CERCLA "arranger" is a potentially responsible party that "arranged for" the disposal of hazardous substances. 47 AM. JUR. *Trials* § 5.

11. A CERCLA "facility" is defined as essentially "any type of structure, vehicle or place that contains a hazardous substance." 47 AM. JUR. *Trials* § 4.

12. *Tyson*, 258 F. Supp. 2d at 1279 (citing NutraSweet Co. v. X-L Eng'g Corp., 933 F. Supp. 1409, 1418 (N.D. Ill. 1996)).

13. A CERCLA "hazardous substance" is defined "by means of reference to other federal laws and regulations that list substances as hazardous." 47 AM. JUR. *Trials* § 4.

14. *Tyson*, 258 F. Supp. 2d at 1285.

15. 42 U.S.C. § 9601(22). Although the "normal application of fertilizer" is excepted from the definition of "release," CERCLA fails to define what the term "normal" means. *See Tyson*, 258 F. Supp. 2d at 1287; *see also infra* notes 64-67.

16. A CERCLA "release" is defined "to include a variety of means by which the substance enters the environment . . . ." 47 AM. JUR. *Trials* § 4.

17. *Tyson*, 258 F. Supp. 2d at 1287-88.

18. *Id.*

the industry of agriculture.[19] The court noted that to effect the "goals of environmental protection and remediation, the definition of 'release' ha[d] been broadly construed by courts," and "exceptions from liability under CERCLA [had been] narrowly construed."[20] This language leaves open the possibility that the land application of poultry litter may be subjected to the broader definition of CERCLA "release."

The court's bold implementation of CERCLA application to the poultry industry ended here, as the court failed to hold that poultry companies had arranged for the disposal of poultry waste.[21] Admittedly, however, the court did not directly hold that poultry businesses could not ultimately be subject to arranger liability under CERCLA,[22] but rather adopted a middle-ground approach to CERCLA arranger liability that analyzes liability on a "case-by-case" basis.[23] Though these conclusions by the district court do not have the immediate nationwide implications of a United States Supreme Court opinion, the fact remains that this decision will substantially affect the poultry industry, not only in northeast Oklahoma, but also throughout the entire State of Arkansas.[24] In light of this decision, Arkansas attorneys must prepare for a new wave of environmental litigation targeted at the agricultural industries as CERCLA has finally come to the farm.

Recognizing these facts and the importance of the poultry industry to the State of Arkansas, but also the spatial constraints within which to address this case, this note will focus specifically on the arranger liability analysis adopted by the district court in *Tyson*. Specifically, this note will provide a brief overview of the *Tyson* decision as well as a general historical background that addresses: (1) an overview of the American farm, (2) contract poultry operations, and (3) the

19. *See* Ruhl, *Farms*, *supra* note 1, at 293.

20. *Tyson*, 258 F. Supp. 2d at 1287.

21. *Id.* at 1283.

22. *See id.* at 1282-83.

23. *Id.* at 1282; *see also infra* notes 139-49.

24. The poultry industry is a vital part of Arkansas's economy, as evidenced by the fact that Arkansas is the nation's second largest producer of poultry and eggs. UNITED STATES DEP'T OF AGRIC., 2002 CENSUS OF AGRIC., STATE PROFILE: ARKANSAS (2004), http://www.nass.usda.gov/census/census02/profiles/ar/cp99005.PDF. Applying potential environmental liability to poultry businesses based in Arkansas will drastically affect the viability of an essential part of Arkansas's agriculture-based economy.

creation of CERCLA and judicial approaches to analyzing arranger liability. Finally, this note analyzes the *Tyson* court's totality of the circumstances approach to arranger liability and argues that the district court ruled counter to the remedial purpose of CERCLA by drawing an artificially lenient line of liability—seemingly absolving poultry companies of responsibility for waste over which they had significant control.

II. STATEMENT OF FACTS

During the years preceding the commencement of legal action against Tyson, the City of Tulsa had seen an increase in the amount of nutrients found in its water supply.[25] Specifically, Tulsa had noticed an increase in the amount of phosphorus, which contributed to excessive algae growth within the water supply.[26] As a result, Tulsa's water quality was affected by both taste and odor problems.[27] Responding to these problems, Tulsa's Mohawk Water Treatment Plant, operated by the Tulsa Metropolitan Utility Authority ("TMUA"), incurred substantial treatment costs and damages.[28]

Efforts to ascertain the source of these excess nutrients led to the examination of Spavinaw Creek, the tributary forming Tulsa's water supply.[29] Also examined was the 415-square-mile Eucha/Spavinaw watershed, located in northeastern Oklahoma and northwestern Arkansas, which contributes all of the water to Spavinaw Creek.[30] Here, Tulsa discovered two separate sources of phosphates, including numerous poultry operations and a publicly-owned wastewater treatment plant operated by the City of Decatur, Arkansas.[31]

25. City of Tulsa v. Tyson Foods, Inc., 258 F. Supp. 2d 1263, 1271 (N.D. Okla. 2003). For purposes of this case, Tulsa's water supply collectively includes Lake Spavinaw, Lake Eucha, Lake Yahola, and the City of Tulsa Mohawk Water Treatment Plant. *Id.* at 1270.

26. *Id.* at 1271.

27. *Id.*

28. *Id.* at 1270-71. TMUA "is an Oklahoma public trust established . . . for the purpose of operating the water supply system for the express benefit of the City of Tulsa . . . ." *Tyson*, 258 F. Supp. 2d at 1270.

29. *See id.* at 1270-71.

30. *Id.* at 1270; OKLA. WATER RES. BD., WATER QUALITY EVALUATION OF THE EUCHA/SPAVINAW LAKE SYS. 1 (2002), http://www.owrb.state.ok.us/studies/reports/eucha-spav/pdf/exec_summary.pdf.

31. *Tyson*, 258 F. Supp. 2d at 1271.

The poultry operations within the watershed consisted of independent poultry growers who, through contracts, raised poultry that was at all times the property of the poultry businesses.[32] As a direct result of this contractual relationship, poultry growers throughout the watershed were left with large amounts of poultry manure after shipping the live poultry to local processing plants.[33] This manure, mixed with bedding material consisting of wood shavings or rice hulls, is commonly referred to in the industry as "poultry litter."[34]

"Poultry litter is rich in phosphorus and nitrogen," and it was the custom among poultry growers in the watershed to spread the poultry litter on fields and pastures as fertilizer.[35] In an effort to determine the amount of poultry litter being introduced within the watershed, George's, Inc. ("George's"), a Northwest Arkansas poultry company, estimated that its contract growers generated approximately 6700 tons of poultry litter inside the watershed between 1998 and 2002.[36] A second poultry company based in Northwest Arkansas, Peterson Farms, Inc. ("Peterson"), admitted that as of September 1, 2002, its contract growers had produced approximately 39,859 tons of litter within the watershed.[37] In addition to poultry litter spreading, Tulsa also found that Decatur's wastewater treatment plant contributed excess amounts of phosphates to the watershed.[38] Moreover, Tulsa directly linked the source of these phosphates to Peterson's poultry processing plant, which accounted for approximately 90% of the total volume of waste processed by Decatur.[39]

Decatur's wastewater treatment plant is a "point source," defined under the Clean Water Act ("CWA") as "'any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.'"[40] In accordance with the CWA, Decatur obtained a permit from the Arkansas Department

32. *Id.* at 1272-73.
33. *Id.*
34. *Id.*
35. *Id.* at 1273.
36. *Tyson*, 258 F. Supp. 2d at 1272.
37. *Id.*
38. *Id.* at 1274.
39. *Id.* at 1273.
40. *Id.* at 1274 (quoting 33 U.S.C. § 1362(14) (2000)).

of Environmental Quality, under authority of the United States Environmental Protection Agency ("EPA"), to discharge pollutants.[41] This permit "contain[ed] no numerical limits for phosphorus" discharge.[42] The only requirements were that Decatur "monitor and report its discharge periodically."[43]

Concerned that phosphorus from poultry waste, if left unabated, would lead to more severe problems with Tulsa's water supply, Tulsa filed suit in the Northern District of Oklahoma against the City of Decatur and several corporate defendants in the poultry industry ("Poultry Defendants"), who had contracted with poultry growers within the watershed, including: Tyson Foods, Inc. ("Tyson"), George's, Peterson, Cargill, Inc., Cobb-Vantress, Inc., and Simmons Foods, Inc.[44] Tulsa alleged that Decatur and Poultry Defendants, through both acts and omissions, polluted Tulsa's water supply.[45] Accordingly, Tulsa sought cleanup cost recovery and contribution from Poultry Defendants pursuant to CERCLA.[46] Cross motions for summary judgment were filed, and the district court judge considered the various arguments.[47]

The court first assessed whether Poultry Defendants were the sole responsible parties for the excess nutrients in Tulsa's water supply. As a result of this inquiry, the court found that on several occasions, from 1983 until at least 1991, Tulsa siphoned and decanted human sewage containing phosphates into Lake Eucha from the Eucha Sewer Lagoons, a wastewater treatment facility operated by Tulsa.[48] Tulsa conceded that wastewater discharged from the sewer lagoons from 1972 through 1987 contained phosphates.[49] However, Tulsa contended that the

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41. *Tyson*, 258 F. Supp. 2d at 1274.

42. *Id.*

43. *Id.*

44. *Id.* at 1270, 1272.

45. *Id.* at 1270.

46. *Tyson*, 258 F. Supp. 2d at 1270. In addition to CERCLA claims, Tulsa sought compensatory and punitive damages from Poultry Defendants, under Oklahoma statutory and common law, for intentional nuisance and trespass claims; likewise, they sought to recover for intentional nuisance and trespass claims against both Peterson and Decatur under Arkansas common law; and they sought recovery for "unjust enrichment claims against Poultry Defendants under Oklahoma law and against Peterson and Decatur for the 'point source' discharge pursuant to Arkansas law." *Id.*

47. *See id.* at 1311-12 (listing the motions filed and the court's ruling on each).

48. *Id.* at 1272.

49. *Id.*

amount of phosphates for which it was directly responsible was minimal when compared to the amount that resulted from poultry operations within the watershed.[50] The district court, not persuaded by this argument, found that Tulsa could only seek a contribution claim because it was a potentially responsible party under CERCLA.[51]

The court then considered Tulsa's claim that the watershed should be designated as a CERCLA facility because the hazardous substance, phosphorus-saturated poultry litter, could be found virtually throughout the watershed.[52] The court found that the CERCLA definition of facility was broad enough to include the entire watershed.[53] However, the court refused to consider the watershed as a facility because the factual record presented by the plaintiffs was insufficient.[54]

Next, the court reviewed Tulsa's contention that Poultry Defendants acted as "arrangers" under CERCLA, and thus, whether they were ultimately liable for the costs incurred by Tulsa to clean up its water system.[55] In support of this argument, Tulsa cited the undisputed fact that Poultry Defendants contractually retained ownership of the actual birds at all times.[56] To supplement this argument, Tulsa contended that Poultry Defendants also established Best Management Practices ("BMPs") to direct poultry growers as to the proper application of poultry litter.[57] Poultry Defendants countered this argument by showing that their contract with poultry growers vested ownership of the manure in the growers.[58] In response to these arguments, the court, adopting the case-by-case approach of the Eleventh Circuit, determined that fact questions must first be decided before Poultry Defendants could be deemed to have CERCLA arranger liability.[59]

50. *See Tyson*, 258 F. Supp. 2d at 1272.

51. *See id.* at 1278-79.

52. *Id.* at 1279 & n.9.

53. *Id.* at 1280.

54. *Id.*

55. *Tyson*, 258 F. Supp. 2d at 1280.

56. *Id.*

57. *Id.*

58. *Id.* at 1281.

59. *Id.* at 1282-83; *see also infra* notes 139, 144-45 and accompanying text. Through this decision, the court creates the possibility that poultry companies could be found liable for the litter spread by poultry growers with whom they contracted, provided the facts in

The court also considered whether poultry litter should be a hazardous substance under CERCLA.[60] Tulsa argued that phosphorus is a component of the phosphate compound found in poultry litter, which would make poultry litter a hazardous substance.[61] Poultry Defendants countered that phosphate was not specifically listed in CERCLA as a hazardous substance.[62] The district court, agreeing with Tulsa, concluded that because poultry litter contained components of hazardous substances, it could be considered a hazardous substance under CERCLA.[63]

The court further considered whether the spreading of poultry litter within the watershed fell within the "normal application of fertilizer" exception to CERCLA liability.[64] Tulsa argued that poultry litter application did not amount to the normal application of fertilizer because it placed excessive amounts of phosphorus in the soil.[65] Poultry Defendants contended that normal application is determined by the common practice of poultry growers.[66] While the court did not rule as a matter of law that poultry litter application was not a normal application of fertilizer, it refused to agree with Poultry Defendants' argument that it was.[67]

Although the court's rulings on CERCLA claims constitute the most important conclusions of the *Tyson* decision, the court also considered common law claims of nuisance and trespass.[68] With regard to these claims, the court found as a matter of law that: (1) poultry businesses were vicariously liable for state law trespass or nuisance created by growers;[69] (2) the rule of concurrent negligence applied to state law claims;[70] (3) contributory negligence was not a defense to intentional

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the particular case (such as "Poultry Defendants' arrangement with their growers . . . and participation in the alleged disposal of poultry waste through land application of poultry litter") reveal that the defendant arranged for the disposal of poultry litter. *Tyson*, 258 F. Supp. 2d at 1283.

60. *Tyson*, 258 F. Supp. 2d at 1283.

61. *Id.*

62. *Id.*

63. *Id.* at 1285.

64. *Id.* at 1287; *see also* 42 U.S.C. § 9601(22) (2000).

65. *Tyson*, 258 F. Supp. 2d at 1288.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 1297.

70. *Tyson*, 258 F. Supp. 2d at 1298-99.

trespass and nuisance claims;[71] (4) the City of Decatur, Arkansas, was not protected by municipal immunity;[72] and (5) the CWA did not bar Tulsa from asserting Arkansas law nuisance claims.[73]

III. HISTORICAL DEVELOPMENT

Without looking to the past, one cannot fully understand the decisions of the present. The past contains the customs and ideologies that have influenced the decisions of today. Therefore, this section of the case note will briefly examine: (1) the ideological birth of "the American farm," (2) the evolving practice of production poultry operations, and (3) the creation of CERCLA, with its ambiguous definitions and judicial attempts to interpret "arranger liability."

A. Overview of "The American Farm"

In order to fully realize the bold step taken by the district court in *City of Tulsa v. Tyson Foods, Inc.*,[74] one must understand the historically-romanticized attitude toward agriculture and farms that was rejected in this decision. Dating back to the early days of the American Republic, farmers have enjoyed a special place in the hearts of both American citizens and politicians.[75] Thomas Jefferson went so far as to recommend that "if one region of the United States should ever become thoroughly commercialized, the remaining agrarian region should secede in order to remain immune to the attendant corruptions."[76] From such ideals, farming in America became a

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71. *Id.* at 1302.

72. *Id.* at 1308.

73. *Id.* at 1309.

74. 258 F. Supp. 2d 1263, 1276-88 (N.D. Okla. 2003) (allowing for potential CERCLA liability for certain aspects of agricultural operations).

75. *See* Williams, *supra* note 8, at 22; *see also* JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 137 (1997) (expressing Thomas Jefferson's belief that the United States would be most virtuous as an agrarian society).

76. ELLIS, *supra* note 75, at 258-59. Perhaps the best example of America's love affair with the farmer can be found in one of Thomas Jefferson's most famous utterances:

> "Those who labour in the earth are the *chosen people* of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit of genuine virtue. It is the focus in which he keeps alive that sacred fire, which otherwise might escape from the face of the earth."

"deeply-rooted cultural institution . . . ."[77] At the heart of this "cultural institution" is the idea that farmers have a special relationship with the land and water, and also serve as stewards of the land.[78] In keeping with this idea, farmers and agriculture have "escaped serious regulatory attention" as Congress has actively excluded farmers and agriculture "from the burdens of federal environmental law" and has thus erected a "vast 'anti-law' of farms and the environment."[79]

Congress's protection of farmland stewardship is, in reality, protecting a source of environmental degradation.[80] The broad range of environmental harms caused directly by farms includes habitat loss and degradation, soil erosion, water resources depletion, soil salinization, chemical releases, animal waste disposal, water pollution, and air pollution.[81] The farm practices that create these harms range from the use of pesticides and commercial fertilizers on crops and pastures, to soil erosion from croplands.[82] Yet none "of these experiences . . . comes close to the near total devastation that results from the practice of confined animal feeding operations," such as poultry and swine production.[83]

Id. at 137 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 164-65 (William Peden ed., Univ. of N.C. Press 1955) (1787)) (emphasis added).

77. Ruhl, *Farms*, *supra* note 1, at 266.

78. Williams, *supra* note 8, at 22.

79. Ruhl, *Farms*, *supra* note 1, at 266-68. In considering the federal approach toward farming, one must realize that agriculture comprises one of the most massive, self-interested, economically anti-competitive, and politically powerful industries in the United States. *See generally* Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 810-16, 826-31 (1995).

80. J.B. Ruhl, *Farmland Stewardship: Can Ecosystems Stand Any More of It?*, 9 WASH. U. J.L. & POL'Y 1, 11 (2002) [hereinafter Ruhl, *Farmland*].

81. Ruhl, *Farms*, *supra* note 1, at 274.

82. *Id.* at 277-79, 282-85, 288-89, 292.

83. Ruhl, *Farmland*, *supra* note 80, at 12. "'Livestock in the United States produce approximately 1.8 billion metric tons of wet manure per year, much of which reaches surface water supplies after being applied to fields as natural fertilizer.'" Ruhl, *Farms*, *supra* note 1, at 290 (quoting David Zaring, *Federal Legislative Solutions to Agricultural Nonpoint Source Pollution*, [1996] 26 Envtl. L. Rep. (Envtl. L. Inst.) 10,128, 10,129). To put this figure into perspective, "the United States produces 200 times more livestock waste than human waste." *Id.* at 285.

B. Contract Poultry Operations

While farmers still cling to their image as stewards of the land,[84] the fact is that "the reigning idyllism of farms and farmers is based on a lost history."[85] The farms of today do not resemble Jefferson's vision of America as an agrarian garden.[86] Agriculture is not the "open production" system of old, but rather has become an industry relying heavily on "contract production" and "vertical integration."[87] Livestock production, specifically the poultry industry, is an excellent illustration of this break from the Jeffersonian model.[88]

"Production contracts, whereby the contractor and grower . . . each provide significant inputs into the production process,

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84. *See* Ruhl, *Farmland*, *supra* note 80, at 6-7; Edward Thompson, Jr., *"Hybrid" Farmland Protection Programs: A New Paradigm for Growth Management?*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 831, 831 (1999) (affirming the fact that many farm advocates of the stewardship theory cling to the belief that farms "provide environmental amenities like scenic open space, wildlife habitat and unpaved watersheds"). The nostalgia for the American farmer has not dissipated, as evidenced by a quote in an article released through the United States Environmental Protection Agency website declaring that "one should not overlook the many positive environmental benefits of agriculture." EPA, Ag 101: Potential Environmental Impacts of Animal Feeding Operations, http://www.epa.gov/agriculture/ag101/impacts.html (last visited Apr. 10, 2006).

85. Williams, *supra* note 8, at 29.

86. *Id.* at 29-30. The Jeffersonian model emphasized the role of the individual farmer in an agrarian economic based society. *See supra* notes 75-77 and accompanying text. While many view the farmer of the past with romantic notions, an examination of historical evidence reveals that farmers have caused widespread environmental harm for centuries. *See generally* DANIEL E. VASEY, AN ECOLOGICAL HISTORY OF AGRICULTURE: 10,000 B.C.-A.D. 10,000 (1992).

87. *See generally* ECONOMIC RESEARCH SERV., UNITED STATES DEP'T OF AGRIC., VERTICAL COORDINATION BY FOOD FIRMS RISING, ALONG WITH CONTRACT PRODUCTION (June 2006), http://www.ers.usda.gov/publications/summaries/vertical.htm. Contract production occurs when a "firm commits to purchase a commodity from a producer at a price formula established in advance of the purchase." *Id.* Vertical integration occurs when a "single firm controls the flow of a commodity across two or more stages of food production." *Id.*

88. *See* STEVE MARTINEZ, UNITED STATES DEP'T OF AGRIC., VERTICAL COORDINATION OF MKTG. SYS.: LESSONS FROM THE POULTRY, EGG AND PORK INDUS. 2-3 (Apr. 2002), http://www.ers.usda.gov/publications/aer807/aer807.pdf [hereinafter MARTINEZ, LESSONS]. Cash (or spot) production, relied upon in Jefferson's time and well into the mid-1900s, in which agricultural output was not committed until completing production, was largely replaced by contracts and vertical integration by the mid-1950s. *See id.* at 2. By 1994, nearly 100% of broiler and egg production and nearly 90% of turkey production was the result of contracts and vertical integration. *Id.* at 3. Another excellent example of this break from open-market production is the United States pork industry, which, more recently, has also seen a dramatic increase in contracting and vertical integration. *Id.* at 4.

[are] the dominant means of coordinating broiler [and turkey] production . . . ."[89] Through this contractual relationship, poultry businesses, such as Tyson, contract with individual farmers under terms typically specifying that "the processors will provide the baby chicks, feed, and management and veterinary services. The growers provide the labor and chicken houses and receive a payment per pound of live broilers produced, based on a grower's performance relative to other growers."[90]

Through the production contract, a poultry company "retains *control* over the chicks as they are raised by the producer, as well as prescribes specific inputs and special management practices throughout the production cycle."[91] Poultry companies retain this level of control to "ensure final-product attributes"—the company wants to make sure that the final poultry product conforms with the company's marketing needs.[92] Thus, "[s]ignificant production decisions—such as the size and rotation of flocks, the flock's genetic characteristics, and the capacity of chicken houses—are made by the [poultry company]."[93] As a result, "the grower is essentially a *custodian* of the production operation for the [poultry company]"[94] and has no ownership interest in the poultry production. In fact, the typical poultry contract only requires growers to provide "land, housing facilities, utilities, and labor, and cover[] operating expenses (repairs, maintenance, and manure disposal)."[95]

The grower's responsibility to bear the burden of manure disposal arises from express provisions in the production contract vesting ownership of the manure in the grower.[96] Yet despite this apparent grower ownership, poultry companies

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89. *Id.* at 2.

90. MARTINEZ, LESSONS, *supra* note 88, at 3.

91. JOY HARWOOD ET AL., UNITED STATES DEP'T OF AGRIC., MANAGING RISK IN FARMING: CONCEPTS, RESEARCH, AND ANALYSIS 21 (Mar. 1999), http://www.ers.usda.gov/publications/aer774/aer774.pdf (emphasis added). The two basic types of production contracts are "production management contracts and resource-providing contracts." *Id.* at 21-22. The resource-providing contract is the type ordinarily used in the broiler industry. *Id.* at 22.

92. *Id.*

93. *Id.*

94. HARWOOD, *supra* note 91, at 22 (emphasis added).

95. *Id.*

96. *Tyson*, 258 F. Supp. 2d at 1281.

maintain an element of control over litter disposal, as they require their growers to follow specified criteria in disposing of poultry litter known as "Dry Poultry Litter Handling [BMPs]."[97] In providing this "guidance" for growers, poultry companies educate and provide growers with guidelines for the proper "storing, land application, and transportation of poultry litter."[98]

C. CERCLA

Just as the American farm has evolved over the years, so too has the federal government's approach to national environmental concerns. This fact is evidenced by the enactment of CERCLA and its application to poultry businesses in *Tyson*.[99] This portion of the case note first provides a brief overview of the creation and purpose of CERCLA.[100] This is followed by a focused examination of key CERCLA terms that were addressed in *Tyson*; specifically, this case note examines CERCLA arranger liability.[101]

1. Creation of CERCLA

Congress enacted CERCLA "in 1980 as a response to the increasing environmental problems resulting from the release and disposal of hazardous substances."[102] CERCLA's purpose was to "'provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the

97. *Id.* at 1273.

98. *Id.* The creation of BMPs arose from growing environmental concerns about water pollution caused by land application of poultry litter. *Id.* Specific criteria for BMPs include guidelines such as: "Spread litter uniformly . . . with an annual application of no more than 4 tons per year"; "[d]o not apply poultry litter on land when the soil is saturated, frozen, covered with snow," or when raining; "[d]o not apply litter within 100 feet of streams, ponds, lakes, springs, sinkholes, wells, water supplies and dwellings"; "[c]over or tarp vehicles when transporting litter on public roads"; and "[d]evelop a good relationship with the surrounding community." KARL VANDEVENDER ET AL., UNIVERSITY OF ARKANSAS, UTILIZING DRY POULTRY LITTER—AN OVERVIEW 3, http://www.uaex.edu/Other_Areas/publications/PDF/FSA-8000.pdf (last visited Apr. 10, 2006).

99. *See generally Tyson*, 258 F. Supp. 2d 1263.

100. *See infra* notes 102-12 and accompanying text.

101. *See infra* notes 113-49 and accompanying text. As stated in the introduction, this case note does not thoroughly discuss all CERCLA issues, but rather only CERCLA arranger liability. For a listing of other CERCLA findings, see generally *Tyson*, 258 F. Supp. 2d 1263.

102. CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc., 769 F. Supp. 432, 434 (D.N.H. 1991).

environment and the cleanup of inactive hazardous waste disposal sites.'"[103] While the purpose of CERCLA was clear, the coverage of the Superfund bill was a controversial subject among members of Congress prior to its passage.[104] As is usually the case with federal acts, the Superfund bill was the result of Congressional compromise.[105] However, the fact that "all discussions and negotiations took place behind closed doors" is somewhat unusual.[106] Since these discussions were "private and off-the-record . . . no part of the deliberations could be incorporated into the legislative history."[107] How helpful these legislative discussions would have been in understanding the meaning of CERCLA terms such as "arranger" is doubtful, as Senator Robert T. Stafford remarked: "I am afraid that there may still be some confusion in the minds of some Members as to what was deleted . . . in our original compromise."[108]

In short, it appears that Congress deliberately created "ambiguity" in order to pass the Superfund bill.[109] Once the bill passed, the courts carried the burden of determining CERCLA meanings and definitions.[110] One court summarized the federal judiciary's frustration with this heavy burden by declaring:

> those courts which have attempted to unravel CERCLA's definitions have found no solace in either the "plain meaning" of the statute or the reams of legislative history. Instead, in an attempt to glean legislative intent, courts seem to resort to a sort of "Purkinje phenomenon", hoping

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103. 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1357 (9th Cir. 1990) (quoting Pub. L. No. 96-510, 94 Stat. 2767 (1980)).

> CERCLA imposes liability for the clean up of contaminated sites on four classes of parties: (1) "the owners and operators of a facility at which there is a release or threatened release of hazardous substances;" (2) "the owners or operators of such a facility any time in the past when hazardous substances were disposed of;" (3) "any person who arranged for the treatment or disposal of a hazardous substance at the facility;" and (4) "the persons who transported hazardous substances to the facility."

Mathews v. Dow Chem. Co., 947 F. Supp. 1517, 1523 (D. Colo. 1996) (quoting United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989)).

104. ALFRED R. LIGHT, CERCLA LAW AND PROCEDURE 14 (1991).

105. *See id.* at 12-25.

106. *Id.* at 14.

107. *Id.*

108. *Id.* at 15.

109. LIGHT, *supra* note 104, at 14, 17.

110. *See id.* at 12.

> that if they stare at CERCLA long enough, it will burn a coherent afterimage on the brain.[111]

The product of this judicial frustration can be found in various interpretations of CERCLA provisions, with different courts coming to different conclusions as to the definition of CERCLA terms such as "arranger."[112]

2. "Arranged for" Under CERCLA

The plain language of CERCLA defines an "arranger" as:

> any person who by contract, agreement, or otherwise *arranged for* disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . .[113]

This provision makes it clear that "CERCLA does not define the term 'arranged for.'"[114] For this reason, three varying definitions of the term have evolved among the circuit courts, most notably, those articulated by the Seventh, Eighth, and Eleventh Circuits.[115] Considering CERCLA's overwhelmingly remedial statutory scheme, it is not surprising that each circuit offered a different definition of the all-important term.[116] These approaches are addressed separately below and illustrate: (1) a narrow interpretation of "arranged for" adopted by the Seventh Circuit, (2) a broad interpretation used by the Eighth Circuit, and (3) a middle ground, totality of the circumstances approach developed by the Eleventh Circuit.[117]

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111. *CP Holdings*, 769 F. Supp. at 435 (footnote omitted). Other examples of judicial frustration in determining CERCLA definitions and meanings exist. *See also* Exxon Corp. v. Hunt, 475 U.S. 355, 363 (1986); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989); Violet v. Picillo, 648 F. Supp. 1283, 1288 (D.R.I. 1986). The "Purkinje phenomenon" refers to an "optical illusion named for Johannes E. Purkinje (1787-1869), whereby the eye retains an afterimage of an object in a different color from the original." *CP Holdings*, 769 F. Supp. at 435 n.3.

112. *See Tyson*, 258 F. Supp. 2d at 1280-83 (evaluating the differing definitions of arranger liability in other circuits).

113. 42 U.S.C. § 9607(a)(3) (2000) (emphasis added).

114. *Mathews*, 947 F. Supp. at 1523.

115. *Tyson*, 258 F. Supp. 2d at 1281-83.

116. *Mathews*, 947 F. Supp. at 1523.

117. *Id.* at 1523-25.

a. A Narrow Interpretation

The most restrictive interpretation of "arranged for" was offered by the Seventh Circuit in *Amcast Industrial Corp. v. Detrex Corp.*[118] In this case, the principal plaintiff, Elkhart Products Corp. ("Elkhart"), "manufacture[d] copper fittings at a plant in Indiana."[119] One of the chemicals Elkhart used in the manufacturing process was trichloroethylene ("TCE"), which Elkhart purchased from the defendant Detrex Corp. ("Detrex"), a chemical manufacturer.[120] Detrex sometimes delivered TCE, a hazardous substance, "in its own tanker trucks and sometimes hired a common carrier, [Transport Services, Inc. ("Transport Services")], to deliver it."[121] TCE was discovered in the groundwater on an adjacent property, and there was evidence that both Detrex and Transport Services had accidentally spilled TCE on Elkhart's property while placing the substance in Elkhart's storage tanks.[122] The issue arising from these facts was whether Detrex could be considered to have arranged for the disposal of hazardous substances by hiring Transport Services to deliver TCE to Elkhart.[123]

In addressing this issue, the Seventh Circuit stated that the words "arranged for" implied "intentional action," and in this case the "only thing that Detrex arranged for Transport Services to do was to deliver TCE to Elkhart's storage tanks."[124] Furthermore, it "did not arrange for spilling the stuff on the ground" because

> when the shipper is not trying to arrange for the disposal of hazardous wastes, but is arranging for the delivery of a useful product, he is not a responsible person within the meaning of the statute and if a mishap occurs en route his liability is governed by other legal doctrines.[125]

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118. 2 F.3d 746 (7th Cir. 1993).
119. *Id.* at 747.
120. *Id.*
121. *Id.* at 747-48.
122. *Id.* at 748.
123. *Amcast*, 2 F.3d at 749.
124. *Id.* at 751.
125. *Id.*

The Seventh Circuit thus concluded that Detrex had not "arranged for" the spillage from the trucks of the common carrier.[126]

b. A Liberal Interpretation

The Eighth Circuit adopted a broader definition of "arranged for" in *United States v. Aceto Agricultural Chemicals Corp.*[127] In *Aceto*, the defendants were pesticide manufacturers who had hired a company to mix and package pesticides for them.[128] The plaintiff contended that the pesticide manufacturers owned the pesticide chemicals throughout the formulating and packaging process, although the formulating company was the party that actually mixed and packaged the pesticide.[129] In addition, the plaintiff alleged that the generation of pesticide waste through spills, cleaning equipment, and mixing pesticides was "inherent" in the formulation process.[130] In light of this fact, the plaintiff argued that the pesticide manufacturers, by hiring the formulating company, "'arranged for' the disposal of hazardous substances."[131] In response, the defendant pesticide manufacturers argued that they contracted with the formulating company for the processing of a useful product, not the disposal of hazardous waste, and that the formulating company alone controlled the disposal of any resulting waste.[132]

In analyzing the parties' claims of "arranged for" liability, the court noted "two essential purposes" of CERCLA: (1) to provide the federal government with the tools necessary for a prompt and effective response to the problems resulting from hazardous waste disposal, and (2) to ensure that those responsible for problems caused by the disposal of hazardous waste bear the costs and responsibility for the harm they caused.[133] To further the latter purpose, the court determined that the plaintiff's allegations—that defendant pesticide

126. *Id.*
127. 872 F.2d 1373.
128. *Id.* at 1375.
129. *Id.*
130. *Id.* at 1375-76.
131. *Id.* at 1376.
132. *Aceto*, 872 F.2d at 1376.
133. *Id.* at 1380.

manufacturers owned the pesticides throughout the formulating process and that the formulation was done for the benefit of the defendants—were sufficient to constitute a CERCLA "arranged for" claim.[134]

In addressing the CERCLA claim, the district court considered three factors when determining arranger liability: (1) whether the manufacturers supplied raw materials to be used in making a finished product, (2) whether they retained ownership or control of the work in process, and (3) whether the generation of hazardous wastes was inherent in the production process.[135] The district court found that the plaintiffs' allegations satisfied these factors, met the definition of "arranged for," and denied the summary judgment motion.[136] In fact, according to the appellate court, "Any other decision, under the circumstances of this case, would allow defendants to simply 'close their eyes' to the method of disposal of their hazardous substances . . . ."[137] Thus, the Eighth Circuit found that the allegations were sufficient to support a claim that the pesticide manufacturers had arranged for the disposal of hazardous waste despite the fact that there was no evidence that the pesticide manufacturers *intended* the formulating company to do so.[138]

c. A Middle Ground

The Eleventh Circuit rejected a *per se* rule to determine what constituted "arranged for" under CERCLA in *South Florida Water Management District v. Montalvo*.[139] In *Montalvo*, aerial spraying services hired to spray landowners' crop and pasture land with pesticides sought contribution from the landowners by alleging that landowners "arranged for" the disposal of agricultural pesticides.[140] In support of this allegation, the sprayers cited the fact that landowners "owned the pesticides throughout the application process . . . ."[141] In

134. *Id.* at 1381-82.

135. United States v. Aceto Agric. Chems. Corp., 699 F. Supp. 1384 (S.D. Iowa 1988).

136. *Id.*

137. *Aceto*, 872 F.2d at 1382.

138. *See id.* at 1379-80.

139. 84 F.3d 402 (11th Cir. 1996).

140. *Id.* at 405.

141. *Id.* at 407.

addition, the sprayers contended that "the generation of hazardous wastes [from the spraying chemicals] was a necessary incident to the application process" because of the mixing, loading, and cleaning of the spraying chemicals at the contaminated site.[142]

Rather than being willing to infer that the landowners knew about the creation of hazardous waste, as was the case in *Aceto*,[143] the court made a determination that "arranged for" should "focus on all of the facts in a particular case."[144] The court went on to say that while "factors such as a party's knowledge (or lack thereof) of the disposal, ownership of the hazardous substances, and intent are relevant to determining whether there has been an 'arrangement' for disposal, they are not necessarily determinative of liability in every case."[145] In addition, the court went on to find that the plaintiffs in this case failed to allege any facts from which the court could infer the landowners had implicitly agreed to the disposal of the chemical wastes.[146] For instance, the sprayers had not alleged that the landowners assisted in the loading or rinsing of the application tanks or that the landowners knew of the chemical spills.[147] There were no allegations that the landowners had a duty or even the authority to monitor or control the activities of the sprayers.[148] Thus, the Eleventh Circuit held that the landowners had not arranged for the disposal of any hazardous substances and that dismissal of the sprayers' complaint was proper.[149]

IV. ANALYSIS

Prior to *City of Tulsa v. Tyson Foods, Inc.*,[150] American agriculture was largely insulated from CERCLA liability because of the historical nostalgia surrounding the American farm and the unwillingness of the federal government to attack a

142. *Id.*
143. *See generally Aceto*, 872 F.2d at 1379-83.
144. *Montalvo*, 84 F.3d at 407.
145. *Id.*
146. *Id.* at 408.
147. *Id.* at 407.
148. *Id.* at 407-08.
149. *Montalvo*, 84 F.3d at 409.
150. 258 F. Supp. 2d 1263 (N.D. Okla. 2003).

tradition that dates back to the founding of the Republic.[151] While the *Tyson* decision seemingly landed a blow to this ideology, this remains largely unresolved. In part, this is because of the fact that the *Tyson* court failed to recognize that Poultry Defendants had arranged for the disposal of poultry litter. Therefore, this section of the note examines the leniency of this approach by first looking at the court's reasoning in adopting the totality approach to arranger analysis. This section then concludes by showing that poultry production contracts, as a matter of law, satisfy the totality approach.

A. The *Tyson* Court's Adoption of the Totality Approach and Possible Confusion

In *Tyson*, the district court considered for the first time the appropriate analysis for CERCLA arranger liability.[152] Like other circuits, the Tenth Circuit had yet to resolve a clear definition of "arranged for" under CERCLA.[153] Thus, in an effort to arrive at the proper definition, the court considered three varying approaches adopted by other circuit courts.[154]

The *Tyson* court began its analysis of the varying approaches by rejecting the "narrow interpretation"[155] applied by the Seventh Circuit in *Amcast Industrial Corp. v. Detrex Corp.*[156] The *Tyson* court then proceeded to reject the broad interpretation of "arranger liability" adopted by the Eighth Circuit in *United States v. Aceto Agricultural Chemicals Corp.*[157] because it "looked beyond defendants' characterization of their intent . . . ."[158] Ultimately, the court adopted the case-by-case approach applied by the Eleventh Circuit in *South Florida Water Management District v. Montalvo.*[159]

151. *See supra* notes 75-79 and accompanying text.

152. 258 F. Supp. 2d at 1281-83.

153. *See id.* at 1281.

154. *See id.*; *see supra* notes 118-49 and accompanying text.

155. 258 F. Supp. 2d at 1281; *see also supra* notes 118-26 and accompanying text.

156. 2 F.3d 746, 751 (7th Cir. 1993).

157. 872 F.2d 1373, 1384 (8th Cir. 1989).

158. *Tyson*, 258 F. Supp. 2d at 1281; *see also supra* notes 127-38 and accompanying text.

159. *Tyson*, 258 F. Supp. 2d at 1282 (adopting *Montalvo*, 84 F.3d 402, 409 (11th Cir. 1996)); *see also supra* notes 139-49 and accompanying text.

Upon review of the *Montalvo* decision, the *Tyson* court was "persuaded that the appropriate analysis of arranger liability" is the totality of the circumstances test.[160] According to the court, this approach is "'most faithful to the statutory language and purposes of CERCLA.'"[161] In reality, this statement is far from accurate, as the adoption of the totality approach opened the door to further ambiguity and uncertainty in the application of CERCLA arranger liability.

Under the case-by-case approach, a court must consider a myriad of factors when determining arranger liability. Although the factors identified by the *Montalvo* court[162] may be helpful in determining the existence of arranger liability, they do not necessarily provide a bright-line determination for such liability.[163] In fact, the *Montalvo* court added even more confusion when it stated that the factors defined as germane to the determination of arranger liability were "not necessarily determinative of liability in every case."[164]

Without the existence of a bright-line definition, the question becomes what minimum connections must exist before a defendant can be held liable as a CERCLA arranger.[165] The answer to this question creates several difficulties because the field of agriculture has previously been largely insulated from the application of CERCLA liability.[166] First, this confusion circumvents CERCLA's remedial purpose.[167] Second, potential arrangers may not be able to adequately protect themselves, as they will not fully understand their possible liability under

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160. *Tyson*, 258 F. Supp. 2d at 1282.

161. *Id.* at 1283 (quoting Mathews v. Dow Chem. Co., 947 F. Supp. 1517, 1525 (D. Colo. 1996)).

162. *See supra* text accompanying note 145.

163. *See* David Brose, Comment, *Ending the Arranger Debate: Integrating Conflicting Interpretations in Search of a Uniform Approach*, 10 MO. ENVTL. L. & POL'Y REV. 76, 82 (2003).

164. 84 F.3d at 407; *see also* Morita, *supra* note 3, at 589-92 (examining the application of what appears to be a more lenient standard in assessing the importance of determinative factors under the totality approach).

165. *See* Morita, *supra* note 3, at 569.

166. *See supra* note 79 and accompanying text.

167. *See* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982). Many courts have cited this passage when defining the main policy concerns of CERCLA. *See, e.g.*, *Aceto*, 872 F.2d at 1380.

CERCLA.[168] In addition, the lack of a bright line prevents parties from knowing in advance whether they will be strictly liable for any release of hazardous substances, which would make them more likely to seek safer methods of hazardous waste disposal.[169]

B. Poultry Production Contracts Should Satisfy, as a Matter of Law, the Totality Approach

The district court in *Tyson* accepted as "*undisputed facts* that [poultry companies] retain ownership of the birds, provide feed and medication and pick up and process the birds when they are ready."[170] In addition, Tulsa presented evidence that poultry companies "regularly oversee the growing conditions and [establish] BMPs to direct their growers as to the application of poultry waste generated by the birds they own."[171] Nevertheless, the district court held this evidence insufficient to find, as a matter of law, that Poultry Defendants should be liable as CERCLA arrangers.[172] Interestingly, the district court went so far as to say that fact questions remained with regard to the poultry companies' "arrangement with their growers, which include ownership, authority to control, and participation in the alleged disposal of poultry waste through land application of poultry litter."[173] Such facts should not be required. Instead, the more appropriate approach is to create a presumption of arranger liability for poultry companies because: (1) poultry companies determine the location of poultry processing plants,

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168. Some courts have emphasized the need for a clear and uniform standard to determine arranger liability. *See, e.g.*, Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1225 (3d Cir. 1993) (mentioning "the federal interest in uniformity in the application of CERCLA"); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1464 (9th Cir. 1986) (Reinhardt, J., dissenting) ("[B]oth the policy and legislative history of CERCLA necessitate the formulation of uniform federal rules of liability under section 107."); *see also* United States v. Shell Oil Co., 294 F.3d 1045, 1055-56 (9th Cir. 2002) ("There is no bright-line test . . . . Rather, we are required to sort through the fact patterns of the decided cases in order to find similarities and dissimilarities to the fact pattern of our case.").

169. *See Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1520 (1986) (promoting a strict liability scheme as the most efficient means of encouraging the development of safer waste disposal techniques).

170. *Tyson*, 258 F. Supp. 2d at 1280 (emphasis added).

171. *Id.*

172. *Id.* at 1283.

173. *Id.*

which results in their control over the concentration of poultry waste; (2) poultry production contracts result in a bargaining power imbalance, which allows poultry companies to control the disposal of poultry waste; and (3) poultry companies exhibit their authority to control the disposal of poultry waste through the implementation of their own BMPs.

Where there is poultry production, there is poultry waste. Poultry companies, well aware of this fact, essentially control where producers will dispose of this waste. This control is largely a result of the nature of poultry production.[174] In order to prevent weight and quality loss in slaughter-size poultry, the birds can only be shipped a limited distance.[175] This means that all poultry production is situated in close proximity to poultry processing plants.[176] Naturally, this also means that poultry waste related to poultry production is disproportionately concentrated around these processing plants. Poultry companies must realize the level of control they have over this concentration of hazardous waste resulting from poultry production. Therefore, this factor should lead to a presumption of control in the case-by-case analysis in the context of poultry production.

While the location of poultry processing plants is a persuasive factor, stronger evidence favoring a presumption of control is available in the contractual relationship of the parties themselves, in this case the poultry production contract.[177] In

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174. The concentration of confined animal feeding operations resulting from contract farming is evidenced in several key areas of the United States. Generally these concentrated areas of CAFOs are "clustered regionally to facilitate the transportation of animals among facilities in the supply chain . . . ." Marc Ribaudo, *Managing Manure: New Clean Water Act Regulations Create Imperative for Livestock Producers*, AMBER WAVES, Feb. 2003, at 30, *available at* http://ers.usda.gov/AmberWaves/Feb03/Features/Managing Manure.htm.

175. The National Sustainable Agriculture Information Service emphasizes the necessity of processing being located in close proximity to the grow-out ranches for the purposes of ensuring food quality control. *See* Attra, Small-Scale Poultry Processing, http://attra.ncat.org/attra-pub/poultryprocess.html (last visited Apr. 10, 2006).

176. *See generally* NOEL GOLLEHON ET AL., UNITED STATES DEP'T OF AGRIC., CONFINED ANIMAL PRODUCTION AND MANURE NUTRIENTS (June 2001), http://www.ers. usda.gov/publications/aib771/aib771.pdf. The USDA has provided illustrations in the form of charts and maps of the concentration of manure nutrients where poultry processing plants are located. *See id.*

177. *See* Stephen F. Matthews, *Ag Production Contracts: Freedom to Contract, Public & Private Goods* (Oct. 15, 2001), http://www.ssu.missouri.edu/faculty/SMatthews/

Tyson, the district court refrained from finding as a matter of law that poultry companies were CERCLA arrangers because of explicit contract provisions between poultry growers and companies.[178] Specifically, the poultry companies pointed to "their contracts with the growers as undisputed evidence that the manure and wastes generated by poultry while under the care of the growers is vested in the growers and therefore they lack authority to prohibit the growers from land application of litter."[179]

In order to assess the validity of the preceding statement, the disadvantages of production contracts for poultry producers must be examined. In the first instance, the "primary disadvantage associated with agricultural production contracts is that producers *lose independence or control* over their farming operations."[180] This independence or control is lost because the contract "specifies the methods and practices that must be used to produce the covered agricultural commodity, thus removing authority from the producer."[181] In addition, poultry growers lack bargaining power, which also disadvantages the farmer.[182] This lack of power is a result of "concentration in the agricultural industry," which leaves "little competition between processors, resulting in a situation where producers have little bargaining power and must accept unfavorable contracts because they have no other economically feasible options."[183]

The magnitude of this disadvantage is illustrated in the fact that various states have considered laws to protect farmers from inequitable production contracts.[184] For instance, Georgia

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ag_production_contracts.htm.

178. *See* 258 F. Supp. 2d at 1281.

179. *Id.*

180. *See* THE NAT'L AGRIC. LAW CTR., PRODUCTION CONTRACTS: AN OVERVIEW, http://www.nationalaglawcenter.org/assets/overviews/productioncontracts.html (last visited Apr. 10, 2006) (emphasis added).

181. *Id.*

182. *Id.*

183. *Id.*

184. *See* Matthews, *supra* note 177. The Iowa Attorney General has led efforts for the adoption of legislation to protect farmers found in weak bargaining positions as a result of production contracting. *Id.* As of 2001, at least sixteen other state attorneys general were receptive to this effort. *Id.* In fact, several states have introduced legislation to address the weak bargaining position created by production contracts. *See generally id.* In general, these statutes address common issues and proposed solutions that, among others, include: (1) "Readability of Contracts: Put the contracts in 'plain language' with

adopted a statute declaring a poultry production contract voidable if the producer "has not been afforded the opportunity to have the proposed production contract reviewed . . . by an attorney . . . for at least three business days prior to execution . . . ."[185] This will allow the producer to be advised of the legal ramifications surrounding the contract provisions.

Though helpful in providing insight as to which party has actual control in poultry production contracts, current legislation does not hold poultry companies responsible for environmental harms caused by excessive poultry litter.[186] Typical poultry contract provisions require poultry producers to assume ownership of the manure, while other provisions seek to indemnify poultry companies from environmental liability.[187]

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captioned sections," (2) "Three-Day Right to Review: Producers should have the right to cancel a production contract within three business days after the contract is signed," (3) "Right to Contract with Other Contracting Companies: Contracts cannot tie up (make exclusive) a producer with the contracting company." *Id.* For a complete list of the common issues and proposed solutions, see generally Matthews, *supra* note 177.

185. GA. CODE ANN. § 2-22-2 (Supp. 2005). The relevant section of this statute provides:

> (a) Any production contract entered into, extended, renewed, or amended on or after July 1, 2004, shall be voidable by the contract grower or contract producer if:
>
> (1) The contract grower or contract producer has not been afforded the opportunity to have the proposed production contract reviewed outside the business premises of the integrator or processor or its agents by an attorney or adviser of the contract grower's or contract producer's choosing for at least three business days prior to execution; provided, however, that this paragraph shall not apply to the mere extension or renewal of an existing contract with no change in material terms from the existing contract other than the period covered thereby . . . .

GA. CODE ANN. § 2-22-2.

186. *See, e.g.*, KAN. STAT. ANN. § 16-1701 (Supp. 2004).

187. *See* Matthews, *supra* note 177. A typical disclaimer and indemnity provision of a production contract reads as follows:

> Disclaimer: Under no circumstances shall the contracting company be liable to the producer for any losses, damages, whether direct, indirect, special, incidental, consequential, or punitive damages. The contracting company makes no warranties regarding the condition, merchantability, or fitness for a particular purpose of the poultry or swine, feed, medicine, equipment, and other supplied [sic] provided by the contracting company, and the producer accepts all such goods "as is."
>
> Indemnity or Hold-Harmless: Producer shall indemnify, protect, and hold harmless the contracting company, its employees, agents, servants, successors and assigns from and against all losses, damages, injuries, claims, demands and expenses, including without limitation, legal expenses of whatsoever nature, arising out of or in connection with the producer's raising of swine (or poultry) pursuant to this agreement.

While these contract provisions appear to vest control in poultry producers, ultimately, control remains with poultry companies.

If poultry companies retain control over the poultry producer's actions, then it logically follows that poultry companies' actions satisfy, as a matter of law, the *Montalvo* totality approach.[188] In light of legislative recognition and legal commentary, there can be no doubt that poultry companies, through their bargaining advantage, retain control of poultry producers. Using this control, they arrange for the disposal of the hazardous poultry waste through these poultry producers.

What should be a third and final determinative factor in assessing poultry companies' liability under the *Montalvo* totality test is the fact that poultry companies control how poultry producers dispose of poultry litter by requiring them to follow BMPs.[189] The *Tyson* court refused to recognize that poultry companies "regularly oversee the growing conditions and have established BMPs" that poultry producers must follow, which should be sufficient to find, as a matter of law, that poultry companies should be subjected to CERCLA arranger liability.[190] A closer look at the intrusiveness of BMPs, however, reveals that control for the disposal of poultry litter lies in the poultry companies.[191] Essentially, BMPs are orders from the poultry companies that instruct the poultry producer as to the proper disposal of the poultry waste.

If ownership of the poultry litter truly lies in the poultry producer, as Poultry Defendants argued in *Tyson*, then where do poultry companies, who supposedly have no interest or ownership in the poultry litter, find the authority to control how poultry producers must dispose of poultry litter? The answer lies in the fact that poultry companies, through bargaining leverage and the use of BMPs, retain control over how the producers dispose of the poultry litter.[192] Evidence of such control provides a persuasive argument, which, when combined with the additional evidence viewed by the *Tyson* court, should

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Id.

188. *See supra* notes 139-49 and accompanying text.

189. *See supra* notes 97-98 and accompanying text.

190. *See Tyson*, 258 F. Supp. 2d at 1280, 1283.

191. *See supra* notes 97-98 and accompanying text.

192. *See generally* VANDEVENDER ET AL., *supra* note 98 and accompanying text.

have allowed the court to find, as a matter of law, that poultry companies should be subject to CERCLA arranger liability.

V. CONCLUSION

City of Tulsa v. Tyson Foods, Inc.,[193] at least in part, challenges the American tradition of insulating farms from environmental liability for the harms they cause by creating the possibility of CERCLA liability for the Northwest Arkansas poultry industry. Thus, attorneys in Arkansas and surrounding areas must understand how CERCLA could potentially affect poultry growers, poultry companies, and the agricultural community as a whole. Initially, this understanding should center upon the disposal of poultry litter, but attorneys should also consider possible CERCLA liability for other traditional agricultural practices.

Environmental lawyers can learn much from the *Tyson* decision about impending CERCLA liability. From this holding, it is clear that a watershed may now qualify as a CERCLA facility,[194] which will potentially subject hundreds of thousands of square miles to CERCLA regulations. Additionally, after the *Tyson* decision, poultry litter is now considered a CERCLA hazardous substance because it contains phosphorus.[195] A third and equally important result of the *Tyson* decision is the refusal of the court to recognize the disposal of poultry litter as falling under the "normal application of fertilizer" exception to a release under CERCLA.[196] This further closes a loophole once available to agricultural operations to escape CERCLA liability. In view of these important findings, the *Tyson* court made several historic rulings that truly brought CERCLA to the farm. The court, however, perhaps unwilling to venture any further into a previously hands-off area, failed to provide necessary clarity in the area of CERCLA arranger liability.

The adoption of the totality of the circumstances approach to arranger liability left the door open for agricultural operations, specifically poultry companies, to escape CERCLA liability.

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193. 258 F. Supp. 2d 1263 (N.D. Okla. 2003).

194. *See id.* at 1279.

195. *See id.* at 1284.

196. *See id.* at 1287-88.

The approach adopted by the court creates further confusion and uncertainty as to when CERCLA arranger liability attaches. While some guidelines can be identified, questions remain concerning the minimum connections poultry companies must maintain with their producers before the courts can find that they have arranged for the disposal of a hazardous waste. Instead of providing the guidance needed for counsel of poultry companies and producers, the *Tyson* court closed its eyes to the true nature of the poultry production contract. Despite the overwhelming evidence of control retained by poultry companies, the court refused to find that the existence of a poultry production contract provided the crucial dispositive factor for determining liability in the case-by-case analysis.

The *Tyson* decision follows the current trend of expanding CERCLA liability, as the field of agriculture has now fallen within the parameters of the Superfund bill. This judicial expansion, however, specifically in the area of arranger liability, has not provided the clarity necessary for CERCLA's intrusion into the historically protected area of agriculture. The possible variations on circumstances and agreements, as well as the varying emphasis each court places on several factors, pose especially problematic questions for attorneys representing agricultural parties suddenly faced with the possibility of CERCLA liability.

The current situation invites legislative clarification of the scope of CERCLA arranger liability, something Congress failed to provide when CERCLA was originally enacted. Such legislative guidelines should clarify what the agricultural community can and cannot do, which attorneys could then use to protect the future of Arkansas's poultry industry. Until then, however, environmental lawyers can do nothing more than seek to understand judicial holdings such as *Tyson*.

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