

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

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

Case No. 05-CV-329-TCK-SAJ

Plaintiff(s).

vs.

TYSON FOODS, INC., INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,

Defendant(s).

ORDER

On this 17th day of May 2006, the Court heard argument on numerous objections, motions to quash, motions to compel, and motions for protective orders related to the subpoenas previously issued and served by Plaintiff. The motion to quash subpoenas by the "Poultry Growers" is denied. [Docket No. 493-1]. The motion for protective order by the Poultry Growers is denied. [Docket No. 503-1]. The motion to quash Plaintiff's subpoena for inspection and sampling by Defendant Tyson is denied. [Docket No. 512-1]. The motion to quash subpoena by Raymond and Shannon Anderson is denied. [Docket No. 536-1]. The motion to quash subpoena for inspection and sampling by Ren and

Georgia Butler is **denied**. [Docket No. 539-1]. The motion for protective order by certain Poultry Growers and Ren and Georgia Butler is **denied in part and granted in part**. [Docket No. 539-2]. The motion for a protective order by various Defendants is **denied in part and granted in part**. [Docket No. 540-1]. The motion to quash the subpoena filed by Tyson is **denied**. [Docket No. 557-1]. The motion to compel discovery filed by Plaintiff is **granted in part and denied in part**. [Docket No. 560-1]. The motion to quash filed by Tyson and transferred from the Eastern District of Oklahoma is **denied**. [Docket No. 577-1].¹⁷

I. THE MOTIONS

Plaintiff, at a prior hearing before the Court, was granted permission to issue subpoenas with regard to the gathering of soil, litter, groundwater and water runoff samples. Plaintiff began issuing subpoenas April 13, 2006, and the first objections were filed May 1, 2006.

Defendant Tyson Chicken, Inc. ("Tyson") filed an objection to the subpoena and moved to quash the subpoena. Several Defendants²¹ have requested that a protective order be entered if the Court permits the collection of the requested samples.

¹⁷ Some confusion has been created in this case due to duplicate filings of the parties, or filings of the same brief in response to more than one motion. Some of the difficulty appears related to the electronic case filing system. (See, e.g. [Docket Nos. 512, 577, 545, 557, and 577]). The Court asks the parties to consider the possibility of pleadings constituting one page "adoptions" of previously filed briefs to reduce duplicate filings. This will be discussed at the case management conference.

²¹ Defendants moving for a protective order include Tyson Foods, Inc.; Tyson Poultry, Inc.; Tyson Chicken, Inc.; Cobb-Vantress, Inc.; Cal-Maine Foods, Inc.; Cal-Maine Farms, Inc.; George's, Inc.; George's Farms, Inc.; Peterson Farms, Inc.; Simmons Foods, Inc.; Cargill Turkey Production, LLC; Cargill, Inc.; and Willow Brook Foods, Inc. [Docket No. 540-1].

Several non-parties to this action who own property were subpoenaed by Plaintiff. The non-parties are collectively referred to as the "Poultry Growers."^{3/} The Poultry Growers request that the subpoena be quashed, or that, alternatively, the Court enter a protective order.

In addition to the above-referenced motions, Plaintiff, the State of Oklahoma, has moved to compel discovery. [Docket No. 560-1].

II. MOTIONS TO QUASH AND FOR PROTECTIVE ORDER

The parties do not disagree on the standards applied by the Court in considering objections to document subpoenas whether in the guise of a motion to quash, a motion to compel, or an objection.

Whether a burdensome subpoena is reasonable must be determined according to the facts of the case, such as the party's need for the documents and the nature and the importance of the litigation. To determine whether the subpoena presents an undue burden, we consider the following factors: (1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; (6) the burden imposed. Further, if the person to whom the document request is made is a non-party, the court may also consider the expense and inconvenience to the non-party. A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad. Generally, modification of a subpoena is preferable to quashing it outright.

^{3/} In the objections and motion to quash [doc. No. 493-1], the Poultry Growers represent that they include: Bill R. Anderson; Steve Butler, allegedly d/b/a Green Country Farms; Julie Anderson Chancellor; Roger D. Collins; Franklin A. Glenn and Kenneth D. Glenn and Sondra D. Glenn; Juana Loffin; Larry McGarrah and Priscilla McGarrah; Jim L. Pigeon and Michele R. Pigeon; Joel J. Reed and Rhonda Reed and Caleb Reed and Cory Reed; W.A. Saunders and Bev Saunders; Robert V. Schwabe, II; and David R. Wofford and Robin L. Wofford. In addition, Raymond C. Anderson and Shannon Anderson separately filed an objection. [Docket No. 536-1]. Ren and Georgia Butler also separately adopted the motion of the non-party Poultry Growers. [Docket No. 493-1].

Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 818 (5th Cir. 2004) (citations omitted).

A. Relevance

Plaintiff has the burden of establishing the relevance of the requested information. In this case, Plaintiff is requesting that Plaintiff be permitted to take various soil, water, poultry litter and run-off samples for the purpose of testing.

Poultry Growers and Defendants articulate a fairly complicated relevance test which would require Plaintiff to establish the validity of any tests run, the reliability of the testing methods, and explicit detail regarding the collection of samples. Poultry Growers maintain that Plaintiff has not provided the sufficient minimal information necessary to make a causal connection between the alleged pollution and the requested sampling.

The Court has considered the arguments of counsel at oral argument and reviewed Plaintiff's Complaint. The Court concludes that Plaintiff has adequately demonstrated relevance. Plaintiff alleges that various entities and individuals engage in poultry growing operations on the various properties upon which subpoenas have been issued. Plaintiff alleges that such poultry growing operations generate poultry waste, and that the poultry waste is handled, stored, and disposed on lands within the Illinois River Watershed ("IRW"). Plaintiff alleges that the IRW has been polluted and that improper poultry waste disposal practices are responsible for the pollution. Plaintiff notes that poultry waste includes numerous elements including phosphorus, nitrogen, arsenic, zinc, copper, hormones, and microbial pathogens. Plaintiff also notes that elevated levels of these substances exist in the waters of the IRW. Plaintiff has adequately satisfied the relevancy requirement of Plaintiff's requests.

B. Undue Burden or Overly Broad

Fed. R. Civ. Proc. 45(c)(3)(A) provides that on timely motion a court may quash or modify a subpoena if the subpoena "subjects a person to an undue burden." Poultry Growers and Defendants assert that the subpoenas are facially overbroad and therefore unduly burdensome. The Court agrees that the currently issued subpoenas are not sufficiently specific as to the proposed testing times, places or procedures. However, rather than quash the subpoenas, in accordance with the Federal Rules of Civil Procedure the Court hereby modifies the subpoenas. The procedures outlined in the issued subpoenas will be complied with by the parties except as otherwise provided below.

The Court has reviewed the Protective Order (Proposed) submitted at the hearing, the hand delivered letter dated May 19, 2006 by Hall, Estill, the subpoena in a civil case issued by Plaintiff, and the Comparison of Parties Biosecurity Protocol Sampling Requirements submitted by Plaintiff. The provisions and protocols set forth in the subpoena shall be complied with except as modified by this Order. Any provisions which have not been agreed to by the parties and not specified in this Order are not in effect. The Court does note the submission by Plaintiff at the hearing of the "Comparison of Parties Biosecurity Protocol Sampling Requirements," which indicates numerous areas in which the parties have reached agreements. Nothing in this Order is intended, in any way, to abrogate any agreements previously reached by the parties, or any agreements which may subsequently be reached by the parties. Numerous details which have been agreed to be the parties are not specifically detailed in this Order, but the Court operates under the presumption that agreements between the parties will be followed.

Plaintiff may enter each premise one time for soil, poultry litter, and groundwater sampling. Plaintiff shall provide at least 72 hours notice to the Poultry Growers and Defendants prior to Plaintiff's entry for sampling. Plaintiff is permitted to enter each premise on four occasions to sample edge of field rainfall runoff. Plaintiff shall provide at least three hours notice to the Poultry Growers and Defendants with respect to rainwater sampling. Any Poultry Growers or Defendants who do not want to be notified with respect to sampling shall inform Plaintiff and Plaintiff shall be relieved of any notification requirements with regard to those Poultry Growers or Defendants. Poultry Growers and Defendants who want notice shall provide to Plaintiff a phone number or email address for such notice. After giving such notice Plaintiff may proceed with sampling when the requisite time frame for the notice has elapsed.

Plaintiff shall determine an off-site meeting point for each farm or property to be sampled where the parties can meet prior to sampling. Poultry Growers, Defendants, and their respective consultants are permitted to accompany Plaintiff's sampling teams during sampling activities. Plaintiff is required to give notice prior to beginning sampling. If Plaintiff gives the required notice, Plaintiff may proceed with sampling even if Poultry Growers, Defendants, or Defendants' representatives fail to appear for sampling or decline to participate in sampling.

Plaintiff shall identify a primary and a secondary contact person and apprise Defendants and Poultry Growers of the name and contact information for the primary and secondary contact person. The contact person is to be available to Poultry Growers and Counsel for Poultry Growers and Defendants to provide contact information (for the purpose of notice) to Plaintiff, and to provide location information for off-site meeting.

Plaintiff shall, as soon as practicable, provide all Defendants and Poultry Growers with a schedule for sampling properties. The schedule does not relieve Plaintiff of the 72 hour notice requirement. However, to the degree Plaintiff is able to determine a schedule for the sampling and obtaining samples from properties, Plaintiff shall provide that schedule to Defendants and Poultry Growers.

Plaintiff has agreed to generally adhere to a 48 hour waiting period with respect to all poultry houses. With regard to Defendant Tyson's poultry houses, Plaintiff agrees to honor a 72 hour waiting period. Plaintiff agrees to a seven day waiting period with respect to the Cobb-Vandress farms. The edge of field rainfall runoff sampling is excepted from these requisite waiting periods.

Plaintiff shall provide, upon request of Defendants or Poultry Growers, samples for Defendants' or Poultry Growers' independent analysis. Defendants or Poultry Growers shall request, at least 24 hours prior to Plaintiff's entry for sampling, that Defendants or Poultry Growers be provided with a sample. With respect to water samples, sufficient water shall be collected by Plaintiff to provide a split sample to requesting parties in the field. With respect to soil and waste samples, the State will split the soil and waste samples in the laboratory and provide a split sample to any requesting party.^{4/} Defendants and Poultry Growers may take their own soil samples in the fields.

Plaintiff is permitted to sample in accord with the proposed method outlined by Plaintiff at the hearing before the Court. At each field between one and four areas will be

^{4/} Plaintiff explained, at the hearing, that the splitting of soil samples in the field was not possible or practical. Defendants maintained the need for soil samples to be split in the field, but never suggested a method by which soil samples could be split in the field. The Court concludes, based on the information supplied by the parties, that the best method is to split the soil samples as proposed by Plaintiff.

identified. On each area between one and ten acres, 20 sampling locations will be identified. Plaintiff will use a triangle for each identified location, and three soil samples will be taken, one sample for each point of the triangle. Plaintiff is permitted to take one larger sample at some point within the triangle rather than three smaller samples. Plaintiff is limited to a total of 240 samples per property. Plaintiff shall use a two inch probe to perform the sampling, and obtain a sampling that is six inches in depth.^{5/}

Groundwater sampling shall be done by use of the geoprobe. Plaintiff agrees not to use an auger drill rig. Plaintiff will not install a concrete pad. Plaintiff will not place a plastic pipe in the probe hole to permit repeated sampling of groundwater. Plaintiff will close the hole after the groundwater sample is obtained. Plaintiff may also obtain water samples at water wells and springs.

Edge of field runoff sampling, soil, and geoprobe sampling will not occur within 150 feet of a poultry house absent prior Order of the Court.

Defendants and Poultry Growers are permitted to visually record, by photograph or video recording, the sampling activities conducted by Plaintiff.

The Poultry Growers ask that samples be taken by the Poultry Grower or his designated representative. Poultry Growers maintain, and the documents reviewed by the Court indicate,^{6/} that the initial Sampling Protocol documents that were provided by Plaintiff

^{5/} Plaintiff represented at the hearing that due to the rocky nature of some soil, the top part of the soil must be first cut off prior to the sample being taken. Such action is permissible, with Plaintiff taking, for sampling purposes, a sample that is six inches in depth.

^{6/} The Court reviewed a document purportedly produced by Plaintiff and titled "Illinois River Watershed Soil and Litter/Manure Sampling Protocol." The document provides "[c]ollection of litter from the poultry houses will be conducted by the owner or his representative." This specific issue was not discussed at the hearing. Further, Plaintiff has identified a "zig zag" pattern by which the litter samples are to be taken. Therefore, the Court will not prohibit Plaintiff from entering the poultry house or designating the individual(s) to take the samples.

provided that such samples would be taken by the owner or his representative. The samples may be taken in any manner that is agreed upon by the parties. Absent agreement of the parties, Plaintiff may designate an individual to take the samples. This Order in no way is intended to prohibit a representative of Plaintiff from entering into a poultry house during the time that a sample is obtained.

To the extent practicable, every effort shall be made by the parties to coordinate sampling during a time when no birds are in the poultry houses.

Defendant Tyson notes at least one property upon which Defendant Tyson represents that no poultry litter has been applied within the last 17 years. Plaintiff asserts that poultry litter has been stored and observed on such property, and that Plaintiff has observed application of litter on the property in question. Plaintiff is permitted to sample and test the referenced property.

C. Biosecurity Concerns

Numerous biosecurity concerns have been worked out between the parties. Of the remaining concerns, Plaintiff has agreed to the time periods referenced by Defendant Tyson and the Cobb-Vandress farms. The Court is unaware of any other biosecurity concerns that require additional modifications to the subpoena.

D. Fifth Amendment Rights

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." See U.S. Const. Amend. V. The Poultry Growers and some Defendants maintain that the questions which Plaintiff must ask to ascertain the

areas which must be sampled constitute compelled testimony and is therefore prohibited by the Fifth Amendment.

The subpoena contains no specific questions. Plaintiff represents that Plaintiff would like to ask the Poultry Growers or Defendants about the areas to which litter has been applied, but that such questions would be voluntary and not compelled. Because no one is currently under any obligation to answer such questions the Court concludes that Fifth Amendments rights, which protect against compelled testimony, are not implicated. Plaintiff may ask questions, but Poultry Growers, Defendants, or property owners are not obliged to answer such questions.

E. Eminent Domain – Taking by the State

The Poultry Growers and some Defendants suggest that the Plaintiff's subpoena request amounts to a taking of property without just compensation. Plaintiff has agreed not to install a concrete pad or plastic pipes to permit repeated sampling of groundwater. The remainder of Plaintiff's sampling will constitute groundwater, rain water and a collection of up to 240 samples⁷¹ of soil that is two inches wide by six inches deep. The Court has reviewed the cases relied upon by the Poultry Growers and some Defendants and they are factually distinguishable. *See, e.g., Nichols v. Council on Judicial Complaints*, 615 P.2d 280 (Okla. 1980); *Koch v. Okla. Turnpike Authority*, 257 P.2d 790 (Okla. 1953). The Court concludes that the proposed sampling does not constitute a taking by the State.

⁷¹ Poultry Growers and Defendant Tyson refer to the possibility of 720 samples of soil per farm. *See, e.g.,* [Docket No. 611-1 at 2]. The Court understood Plaintiff to be requesting a limit of 240 samples per property, and this Order so limits Plaintiff.

F. Work Product Concerns and "Related Acts"

Defendant Tyson maintains that Plaintiff has failed to comply with the requirements of Fed. R. Civ. Proc. 34(b) because the subpoena does not specify the "manner of making the inspection and performing the related acts." Defendant Tyson interprets such language as requiring Plaintiff to specify the exact testing which Plaintiff will conduct on any samples. Defendant references no cases suggesting that "related acts" is or should be interpreted to include all tests which Plaintiff anticipates or contemplates performing on obtained samples. The Court is unwilling to adopt such an expansive definition.

Plaintiff additionally asserts that the type and specifics of testing and the test results which Plaintiff contemplates is protected by attorney work product. Plaintiff therefore asserts a privilege. Defendant Tyson requests the documents as necessary to find the subpoena permissible. The Court concludes that the language of Fed. R. Civ. Proc. 34 cannot be interpreted as expansively as urged by Defendant. The Court concludes that the dispute as to whether or not the specifics of testing performed and the results are privileged is best reserved for another day. If Defendants serve discovery requests which require the production of test procedures and results to which Plaintiff asserts a work product privilege, the issue will be addressed by the Court at that time.^{8/}

G. Installation of Monitoring Wells

The Poultry Growers and some Defendants assert that Plaintiff's proposed installation of monitored wells violates certain regulations and is unlawful. Plaintiff represented at the hearing that Plaintiff will not install such wells.

^{8/} The Court notes that such a motion has recently been filed and will be set for hearing by the Court.

H. Bond Issues

The Poultry Growers and some Defendants request that the Court order the state to execute a bond due to the possibility of damages to the Poultry Growers and some Defendants from the entry by Plaintiff onto the Poultry Growers and Defendants' properties and the proposed sampling. At this stage of the process, the possibility of damages is speculative. The Court declines to require the state to post a bond concluding that such a requirement in the circumstances of this case would be extraordinary. However, if the Poultry Growers or some Defendants do incur damages which are caused by Plaintiff, the Court will entertain any claims by the Poultry Growers or Defendants in this lawsuit to the full extent permitted under the law. The Court is not, at this stage of the litigation, prejudging this issue. The Poultry Growers have presented some authority which the Poultry Growers suggest permits a claim for damages in this Court. Plaintiff has suggested that the Governmental Tort Claims Act would require a different procedure. The Court is willing to consider, in this lawsuit, any claims by the Poultry Growers and Defendants for damages as permitted by the law.

Dated this 31st day of May 2006.