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

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-CV-00329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE'S RESPONSE IN OPPOSITION TO POULTRY GROWERS' OBJECTIONS AND MOTION TO QUASH SUBPOENAS FOR INSPECTION AND SAMPLING OF PREMISES OWNED BY NON-PARTIES, OR ALTERNATIVELY, MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT

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COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, (hereinafter "the State") and for their Response in Opposition to the Objections and Motion to Quash Subpoenas for Inspection and Sampling of Premises owned by Non-Parties or in the Alternative, Motion for Protective Order filed on May 1, 2006 at docket entries 493 and 503 by certain Poultry Growers,[1] Response in Opposition to the Motions to Quash filed by other identified Poultry Growers at docket entries 536[2] and 539,[3] respectfully submits the following. Additionally, to the extent that any of Poultry Growers' Motions seek a Protective Order, the State incorporates herein its arguments set forth in response to the Poultry Integrator Defendants' Motion for Protective Order (docket entry 540) which is filed simultaneously herewith.

I. INTRODUCTION

The Poultry Growers argue that the subpoenas issued by the State in this action should be quashed for a myriad of reasons only one of which, undue burden, is contemplated in Fed. R. Civ. P. 45(c) as grounds for quashing a subpoena. The Poultry Growers are correct that they are not parties to this case and the State is not seeking to make them parties to this case. In fact, the State seeks only to perform minimally

[1] The Poultry Growers are identified in their Objection and Motion to Quash (493)(503) as the non-parties listed in footnote 1.

[2] Non-party Poultry Growers Raymond C. Anderson and Shannon Anderson object to the State's subpoena at docket entry 536. The arguments presented in their Objection are addressed herein.

[3] Non-party Poultry Growers Ren Butler and Georgia Butler adopt the Objections and Motion filed by the certain Poultry Growers.

invasive sampling and testing of the premises in connection with its effort to stop and clean-up the pollution of the natural resources of Oklahoma -- a benefit to all Oklahomans and to all who visit and vacation in our State. The testing and sampling requested will neither prejudice nor unduly burden the Poultry Growers. The Poultry Growers' Motion should be overruled.

II. ARGUMENTS AND AUTHORITIES

A. Rules of Civil Procedure and Standard

A movant requesting that a subpoena be quashed or modified has the burden of proof and must meet "the heavy burden of establishing that compliance with the subpoena would be 'unreasonable and oppressive.'" Williams v. City of Dallas, 178 F.R.D. 103, 109 (N.D. Tex. 1998); see also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 669 F.2d 620, 623 (10th Cir. 1982) (stating that a movant seeking to quash a subpoena has a "particularly heavy burden" as contrasted with a movant seeking only limited protection).

The determination of whether a subpoena constitutes an undue burden is committed to the discretion of the court. Jones v. Hirschfeld, 219 F.R.D. 71, 74 (S.D.N.Y. 2003). Moreover, the decision whether to quash or modify a subpoena is also within the district court's discretion. Tiberi v. CIGNA Ins. Co., 40 F.3d 110, 112 (5th Cir. 1994). In ruling on a motion to quash a subpoena, the court is not limited to the remedy of quashing the subpoena; it may also modify it to remove its objectionable features. Ghandi v. Police Dep't of Detroit, 74 F.R.D. 115, 117 (E.D. Mich. 1977). Indeed, modification of an unduly burdensome subpoena generally is preferred to outright quashing. Linder v. National Sec. Agency, 94 F.3d 693, 698 (D.C. Cir. 1996).

The Poultry Growers assert that because they are non-parties, this factor is entitled to "special weight" in evaluating the balance of competing needs. (Movants' Objs. at 6.) This assertion is directly contradicted by case law and other authorities. "There is some suggestion that a different test of relevancy might apply when the subpoena is directed to a person who is not a party in the action, but it seems that there is no basis for this distinction in the rule's language." 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2459 (2d. ed. 1995); see also Composition Roofers Union v. Graveley Roofing Enters., Inc., 160 F.R.D. 70 (E.D. Pa. 1995) (refusing to treat nonparty differently in evaluating discovery burden). As Wright and Miller note, "Rule 26(c) and Rule 45(c) provide ample power for the proper protection of third parties from harassment, inconvenience, or disclosure of confidential documents without resorting to a different test of relevance for the purposes of defining the scope of a subpoena." 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2459 (2d. ed. 1995).

B. The Subpoenas are Neither Facially Overbroad Nor Unduly Burdensome

Factors considered in an undue burden analysis include "relevance, the need of the party for the [discovery], whether the request is cumulative and duplicative, the time and expense required to comply with the subpoena (relative to the responder's resources), and the importance of the issues at stake in the litigation." Linder v. Calero-Portocarrero, 180 F.R.D. 168, 174 (D.D.C. 1998) (citing Fed. R. Civ. P. 26(b)(2); Williams v. City of Dallas, 178 F.R.D. 103, 110-11 (N.D. Tex. 1998); United States v. IBM Corp., 83 F.R.D. 97, 104 (S.D.N.Y. 1979)). Here, all the factors point away from a finding of undue burden.

The information from the requested testing clearly is relevant to the State's claims. Indeed, the Court has already determined that the requested samples are relevant, so the need is obvious. (Tr. of Expedited Hearing March 23, 2006 at 82)("This lawsuit is about whether or not the Illinois River watershed has been polluted by the application of chicken litter, so obviously the samples requested are relevant.") The Poultry Growers will have no expenses involved with the testing, and the time required of them certainly will not rise to the level of unduly burdensome. Finally, the importance of the issues at stake in the litigation is tremendous: whether the State of Oklahoma and its citizens will be able to enjoy a clean, clear, safe, and unpolluted watershed.

The Poultry Growers' claim that the subpoenas at issue are "facially overbroad" and therefore impose an undue burden is unconvincing. The requirement that a discovery request not be overbroad "is but a restatement of the proposition that the relevance of and need for [the discovery] sought will bear on the reasonableness of the subpoena." United States v. IBM Corp., 83 F.R.D. 97, 106 (S.D.N.Y. 1979). A subpoena runs the risk of being found overbroad and unreasonable when it "sweepingly pursues material with little apparent or likely relevance to the subject matter" of the suit. Id. at 106-07. A subpoena may be broad without being unreasonably so. Id. at 107. Here, the subpoenas have as their result material and information that obviously has great relevance to the subject matter of the suit.

Nowhere in their Objections do the Poultry Growers claim that the State does not need the information to be obtained pursuant to the subpoenas or that such information is irrelevant to the case. Nor can they. The gravaman of Plaintiff's case is that runoff and discharges of poultry waste for which the Poultry Integrator Defendants' are responsible

is polluting the waters of Oklahoma, and testing done at the source of the alleged pollution obviously is thus needed and highly relevant. When relevance and need of a discovery request have been demonstrated "'[t]he fact that the materials requested cover an extended period of time . . . will not render the subpoenas invalid.'" Id. at 107 (quoting Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394, 1396 (D.D.C. 1973)).

The Poultry Growers also claim the subpoenas must be quashed because of their "lack of specificity." (Movants' Objs. at 6.) However, the degree of specificity for a discovery request "depends upon the facts and circumstances of each case." See IBM, 83 F.R.D. at 107. The specificity required must be "'adequate, but not excessive, for the purposes of the relevant inquiry.'" Id. (quoting Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 209 (1946)). Also, this case involves the interests of Oklahoma and its citizens in protecting human health and the environment. While the burden in this instance is minimal, the nature and importance of a case may justify "a substantial burden of compliance" and "considerations of cost and burdensomeness must give way to the search for truth" in cases of importance to the public good. Id. at 109. Under Federal Rule 45(c)(3)(A) "'[a]n evaluation of undue burden requires the court to weigh the burden to the subpoenaed party against the value of the information to the serving party." Moon v. SCP Pool Corp., 232 F.R.D. 633, 637 (C.D. Cal. 2005) (quoting Travelers Indem. Co. v. Metropolitan Life Ins. Co., 228 F.R.D. 111, 113 (D. Conn. 2005)).

The Poultry Growers' claim that the subpoenas are "facially overbroad" is not supported by cases discussing that concept. For example, in Schaaf v. SmithKline Beecham Corp., 233 F.R.D. 451 (E.D.N.C. 2005) the court described a subpoena requesting from a nonparty all company documents from the past ten years as "a

paradigmatic example of a facially overbroad subpoena," and noted that a large quantity of the material sought had "no connection to anything involved in this case." Id. at 455. The court therefore quashed the subpoena for being facially overbroad and unduly burdensome. Likewise, the Moon court labeled as "overbroad on their face" subpoena requests asking for information over a ten year or greater period, much of what was clearly not relevant to the litigation. Moon, 232 F.R.D. at 637-38.

Finally, a court dealing with the issue of a subpoena issued to property owners for environmental testing on their land refused to quash the inspections. Thomas v. FAG Bearings Corp., 846 F. Supp. 1382 (W.D. Mo. 1994). In Thomas a party served Rule 45 subpoenas on third party landowners requesting permission to access their property to conduct geophysical surveys and soil-gas, soil, and groundwater testing. Id. at 1399. Like Movants here, the third parties objected to the requests. The court rejected the third parties' objections, noting that the inspections were "to be conducted by and at the expense of defendants and they do not appear to involve any burdensome requests." Id. at 1400.

The cases on which the Poultry Growers rely for their "facially overbroad and unduly burdensome" argument are wildly different from the facts of this case. For example, in Williams v. City of Dallas, 178 F.R.D. 103 (N.D. Tex. 1998) the subpoena asked for documents unlimited by temporal or documentary descriptions and the court determined the subpoena to be "overbroad on its face." Id. at 110. The court described the request as "akin to an impermissible attempt to 'obtain every document which could conceivably be relevant to the issues in this case.'" Id. (quoting Borden, Inc. v. Florida E. Coast Ry. Co., 772 F.2d 750, 756 (11th Cir. 1985)). Moreover, the Williams court

made clear that subpoenas do not always have to specify time or other limitations to avoid the undue burden restriction and that the question of undue burden is fact specific. Id. at 110 n.6. "'Management of discovery is a largely empirical exercise, requiring judges to balance the inquirer's right to know against the responder's right to be free from unwarranted intrusions, and then to factor in systemic concerns.'" Id. (quoting Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 187 (1st Cir. 1989)).

Another case on which the Poultry Growers rely, Linder v. Calero-Portocarrero, 180 F.R.D. 168 (D.D.C. 1998), is similarly inapposite. The Linder court found the plaintiffs' request unduly burdensome because "records responsive to plaintiffs' expanded search would only be marginally relevant" and, because there were no time limitations on the document requests, such a search would "generate many irrelevant documents." Id. at 174 & n.9. The court also found that the plaintiffs' proposed search would be unreasonably cumulative or duplicative of information the plaintiffs already had. Id. at 175. Finally, the court considered the claim by the respondents that it would involve hand searching over one million pages of documents and could take over 27 person-years of effort to comply with the request. Id. Thus, the court found that the respondents met the undue burden test. Id. at 176. Here, there is no issue of the relevance, cumulative character, or expense and effort required of respondents that would support a finding of undue burden as there was in Linder.

The court in Amcast Indus. Corp. v. Detrex Corp., 138 F.R.D. 115 (N.D. Ind. 1991) – another case on which the Poultry Growers rely – described the request in question as not merely a "fishing expedition," but as "an effort to 'drain the pond and collect the fish from the bottom.'" Id. at 121 (quoting In re IBM Peripheral EDP Devices

Anti-Trust Litig., 77 F.R.D. 39, 41-42 (N.D. Cal. 1977)). The request would have required the responder to produce "all writings relating to . . . any cleanups, 'removal' actions . . . 'remedial action' . . . remedial investigation or feasibility study" involving the defendant, regardless of whether the circumstances surrounding such actions bore any similarity to the subject matter involved in the case. Id. The request in Amcast bears no similarity to the subpoena requests in this case.

The Poultry Growers place great emphasis on Belcher v. Basset Furniture Industries, Inc., 588 F.2d 904 (4th Cir. 1978). (Movants' Objs. at 8-9.) The facts of Belcher are so different from the facts of the present case that any comparison of the cases for support of the Poultry Growers' Objections is meaningless. The Belcher court noted that, unlike this case:

- "[w]hat the 'significant' evidence might be was unspecified."
- The request "fail[ed] to specify any reason or need for the inspection."
- "The interrogation of the employees, conducted informally, would also be . . . tantamount to a roving deposition, taken without notice, throughout the plants, of persons who were not sworn and whose testimony was not recorded, and without any right by the defendant to make any objections to the questions asked."
- The motion for discovery was for "blanket discovery upon bare skeletal request" without any showing of need.
- Only "small utility" could be derived from the inspection.
- The requester "made no effort to establish either the area of inquiry to which the inspection is to be directed or why."
- The proposed inspection would not have "any meaningful direction."

Belcher, 588 F.2d at 907-09. Thus, the Poultry Growers entreaty that "this Court should follow the Belcher court and quash these Subpoenas" (Movants' Objs. at 9) rings hollow.

None of the undue burden factors supports quashing the subpoenas. Rather, each factor supports a rejection of the Poultry Growers' Objections. The State's subpoenas are not "facially overbroad," as the Poultry Growers claim. None of the cases the Poultry Growers cite support their position that these subpoenas are unduly burdensome. Therefore, the Court should reject the Poultry Growers' Objections and Motion to Quash.

C. The Poultry Growers are Aware of The States' Biosecurity Guidelines

The Poultry Growers complaint that the State has failed to provide any biosecurity guidelines is specious at best. During the counsel meeting April 25, 2006, at which counsel for the Poultry Growers was present, specific and detailed discussions were had concerning the State's biosecurity measures. The subpoenas had been issued and served prior to this meeting providing every opportunity for Poultry Growers' counsel to raise any legitimate concerns held.

Additionally, the Poultry Growers' counsel have participated in discussions concerning biosecurity protocols with the State as early as November 8, 2005. Poultry Growers' counsel received a document entitled "Poultry Premise Entry Biosecurity Protocols For Regulatory Personnel" along with an affidavit of Becky Brewer-Walker, D.V.M., the State Veterinarian and Director of the Animal Industry Division of the Oklahoma Department of Agriculture Food and Forestry, in a proceeding in State court where the Department of Agriculture was seeking samples from some of the same non-party growers subject to subpoena in this matter. Attached hereto and marked as Exhibit "1" is a copy of one of the pleadings with the affidavit and protocols which were presented to the Poultry Growers' counsel.[4] In her affidavit Dr. Brewer-Walker states:

[4] Excluding counsel for the Anderson's, Ms. Griffith. However, only soil and/or water sampling is being sought from the Andersons.

> "The Department has developed specific biosecurity protocols that are equivalent to biosecurity programs developed by Tyson Chicken, Inc., George's, Inc., Cobb-Vandress, Inc. and Simmons Foods, Inc."

In her affidavit Dr. Brewer-Walker further states that the guidelines are "sufficient to allow poultry operations to be safely sampled even under conditions where disease is present." For the Poultry Growers to now assert that the State has provided no biosecurity guidelines is unwarranted, false and misleading. Counsel for the Poultry Growers have been in possession of biosecurity guidelines proposed by the State for months.

Though the State's biosecurity protocols are sufficient even in the presence of disease, to address the issue raised by the Poultry Growers of the chance that any chickens will be harmed, scared or infected, the State has proposed that sampling or testing conducted inside the poultry houses may be conducted when there is no flock present in the house. In other words, after a mature flock has gone on to the next step in the process and before a new flock is deposited in the house, the State would then conduct testing and sampling. The Poultry Growers inexplicably do not address or acknowledge this proposal in their Motion to Quash as it would obviously alleviate many, if not all, of their concerns.

Simply put, the States' biosecurity guidelines are adequate as evidenced by the affidavit of Dr. Brewer-Walker the State Veterinarian who is the authority on animal health biosecurity protocols related to the Agriculture Code in the State of Oklahoma.

D. The Sampling is Not a Taking.

The Poultry Growers suggestion that the State, through the issuance of a lawful subpoena, has created a "proposed invasion and taking of private property" is without

merit. (Movants' Objs. at 12.) None of the facts support quashing the subpoenas for this reason. The State is not engaging in the process of condemnation through the power of eminent domain, nor is the sampling and inspection contemplated likely to result in damage to the Poultry Growers' property interests in their land. Rather, the State, as a private litigant and through validly issued Fed.R.Civ.P. 45 subpoenas, has requested reasonable entry and inspection of the Poultry Growers' land. The cases cited by the Poultry Growers are wildly different on their facts and all involve situations where sovereign entities were exercising their right of eminent domain. Therefore, the Court should reject the Poultry Growers' Objections and Motion to Quash.

The Poultry Growers, arguing the issue of eminent domain, confuse the actor with the act. The State, like any private litigant, through validly issued subpoenas is seeking discovery. The State is not, contrary to the argument of the Poultry Growers, exercising sovereign power to enter upon land. The one case which the Poultry Growers cite constituting a taking, Nichols v. Council on Judicial Complaints, 615 P.2d 280 (Okla. 1980) is distinguishable from the facts at hand. In Nichols, the bank claimed a taking without just compensation for issuance of a subpoena duces tecum for broad categories of records. The Oklahoma Supreme Court held, "that claim could be anchored on the financial burden imposed on the business by the government's command to locate, retrieve and reproduce a large volume of requested material." The court went on to state "a demand for production of records may, in some circumstances, constitute a constitutionally impermissible 'taking' of private property without just compensation." Here, unlike Nichols, no such claim has been asserted. The State is undertaking the

sampling on the Poultry Growers' land at its own expense and has provided reasonable measures to assure that no damage will result in these lawful sampling activities.

Even assuming, arguendo, that the lawfully issued subpoenas may effect a taking for which the Constitution requires just compensation, and assuming further that the Constitution requires the payment of money damages to compensate for such a taking, the Poultry Growers' claims are premature. The State's entry and inspection, contrary to the assertions of the Poultry Growers, will create no damage to the Poultry Growers' land and therefore will not effectuate a taking. As was the case in Boise Cascade Corp. v. U.S., "transient, nonexclusive entries" by the State to conduct inspection and sampling "do not permanently usurp [the Poultry Growers'] exclusive right to possess, use, and dispose of its property." Boise Cascade Corp. v. U.S., 296 F.3d 1339, 1355 (Fed. Cir. 2002). The State's incursion into the Poultry Growers' land is, like the Boise case, more in the nature of a temporary trespass-though obviously sanctioned by the District Court. Id. Therefore, the requested sampling and inspection is not a permanent physical occupation or an easement of some kind, but rather a lawfully requested part of discovery permitted by the Federal Rules of Civil Procedure. *See* Thomas v. FAG Bearings Corporation, 860 F.Supp. 663 (W.D.Mo. 1994).

Further, the State has yet to enter onto the Poultry Growers' land and any claim of taking requiring just compensation is not ripe. See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson, 473 U.S. 172, 105 S. Ct. 3108 (1985). There is no judicially recognized claim for a "proposed" taking and no authority for such is cited by the Poultry Growers. Even if this were a taking, which it is not, the Constitution does not proscribe a taking of property; it proscribes a taking without just

compensation. Nor does it require "that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exists at the time of the taking." Williamson, at 194. The State's sampling will cause no damage to the Poultry Growers' land and poses truly minimum burdens on the Poultry Growers. Clearly the law authorizes the State, like any other private litigant, to issue such subpoenas. Argument that the law of eminent domain prevents the sampling which the State has requested is without any merit.

E. The States' Geotechnical Borings Comply with the OWRB Regulations

As still another red herring argument in an attempt to thwart the inevitable the Poultry Growers claim that the State's proposed geotechnical borings violate the Oklahoma Water Resources Board ("OWRB") regulations as set forth in the Oklahoma Administrative Code at 785:35-7-2 and 3. In support of this allegation, the Poultry Growers attach an affidavit from environmental consultant Bert Smith. Mr. Smith's conclusions are, however, inapposite and should be disregarded.

The Oklahoma Water Resource Board is authorized to adopt rules and regulations governing licensing persons engaged in commercial drilling and drilling of geotechnical borings. Okla. Stat. tit. 82, §§1020.16, 1085.2. The specific OWRB regulation applicable to the use of the geoprobe described in the sampling protocols submitted by the State are 785:35-7-2(a) which discusses the general requirements to be applied to the geotechnical borings and 785:35-11-2(c) which sets forth requirements for plugging the boring hole. The State's sampling request is designed to comply with all such regulations with the use of a licensed driller.

The State's sampling protocol and procedures have been discussed with Mr. Kent Wilkins, State Program Coordinator for the Well Drilling and Pump Installation Program of the Oklahoma Water Resources Board, the State employee in charge of these matters. Mr. Wilkins conveyed to the State's counsel that he agrees that the State's proposed groundwater sampling is in accordance with such regulations. See Affidavit of Kent Wilkins attached hereto and labeled as Exhibit "2".

As the State's protocol and procedures contemplate geotechnical borings as opposed to monitoring wells, the statements asserted by Mr. Smith are inapplicable. Mr. Smith's affidavit and the Poultry Growers' arguments in this regard are unpersuasive.

F. Fifth Amendment Privilege is Inapplicable in this Instance

The Poultry Growers "suggest" to the Court, without legal authority, that submitting land for inspection, testing and sampling may be the equivalent of compelled self-incriminating testimonial communication warranting assertion of the Fifth Amendment privilege. The Poultry Growers' premise regarding Fifth Amendment protection ignores a critical distinction. The Fifth Amendment privilege "attaches only to testimonial compulsion and does not attach to demonstrative, physical or real evidence." United States v. Delaplane, 778 F.2d 570, 575 (10th Cir. 1985). To receive Fifth Amendment protection, a compelled communication must be testimonial. In Doe v. United States, 487 U.S. 201, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988), the Supreme Court recognized that in order to be testimonial, a "communication must itself, explicitly or implicitly, relate a factual assertion or disclose information" that expresses "the contents of [an individual's] mind". Id. at 210-11. A compelled statement that is not testimonial and, therefore, not protected by the privilege cannot become so because it will lead to

incriminating evidence. Id. at 208-209. The United States Supreme Court has held that certain acts, though incriminating, are not within the privilege. For example, suspects have been compelled to furnish blood samples, to provide handwriting exemplars, to provide voice exemplars, to stand in a lineup, and/or to wear certain clothing without running afoul of the privilege against self-incrimination. Id. at 210 (citations omitted).

> Unless some attempt is made to secure a communication-written, oral or otherwise-upon which reliance is to be placed as involving [the accused's (i.e. the Poultry Growers)] consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one.

Id. at 211. Additionally, the Fifth Amendment privilege protects only individuals and may not be invoked by artificial entities such as corporations. Doe, at 206.

Clearly, the demand upon the Poultry Growers in the case is not a testimonial demand. If an individual can be compelled to give samples of blood or urine without violating the Fifth Amendment, it is illogical to argue that inspection, testing and sampling of land which requires virtually no communication directly with the Grower would somehow be more invasive or intrusive so as to violate the Growers' right against self-incrimination. The Fifth Amendment protection against self-incrimination is inapplicable in this matter and the arguments of the Poultry Growers concerning same should be disregarded.

G. The Sampling Clearly is Reasonably Calculated to Lead to Admissible Evidence

The Poultry Growers contend, quite amazingly, that "none of the requests are reasonably calculated to lead to admissible evidence." (Movants' Objs. at 17.) The Court should reject such a preposterous claim out of hand not only for the reasons stated

below, but because the Poultry Growers have cited no authority allowing a non-party to argue the admissibility of evidence. Admissibility is not the standard in discovery.

First, it is relevancy, not admissibility, that is the test in determining whether evidence sought by a subpoena is proper. Steamship Co. of 1949 v. China Union Lines, Hong Kong, Ltd., 123 F. Supp. 802, 805 (S.D.N.Y. 1954). Second, the Poultry Growers' argument is internally inconsistent. On the one hand, they claim that "it is impossible to fully evaluate the technical basis, criteria or merits of the approach to collection of scientific data." (Movants' Objs. at 17.) But then, on the other hand, they claim that any such data gathered by such an approach will not be reliable. Id. These claims are simply contradictory. Third, the Poultry Growers appear to be suggesting to the State how to do the testing. But "each party is free to prepare and perform tests in the manner he deems best, but he cannot compel another party to perform the same tests, and he cannot make evidentiary use of the party's refusal to perform the same tests." Sperberg v. Firestone Tire & Rubber Co., 61 F.R.D. 80, 83 (N.D. Ohio 1973). Finally, the issue of the reliability or meaningfulness of the State's proposed testing is best reserved for any Daubert motions that the Poultry Integrator Defendants are sure to make, and claims about how the State must go about proving its case are simply premature and irrelevant to objections to subpoenas and a motion to quash.

CONCLUSION

The Poultry Growers have failed to show that a legitimate basis exists to warrant an order quashing the subpoenas at issue. The importance of the issues at stake in the litigation is tremendous: whether the State of Oklahoma and its citizens will be able to

enjoy a clean, clear, safe, and unpolluted watershed and a healthier environment. The Poultry Growers' Objection and Motion must be overruled.

Respectfully Submitted,

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