UNITED STATES DISTRICT COURT
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 Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma, Plaintiffs, v. Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, 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., Defendants.	05-CV-0329 GKF-SAJ THE CARGILL DEFENDANTS' MOTION FOR MODIFICATION OF SCHEDULING ORDER Plaintiffs Do Not Agree To This Motion

Defendants Cargill, Inc. and Cargill Turkey Production, LLC ("The Cargill Defendants") respectfully move the Court for an order modifying and extending the dates in the Court's March 9, 2007 (Docket No. 1075). As this complex litigation has developed, a number of events, delays, and complications have arisen that have made clear to all parties that this case cannot reasonably go forward on the existing schedule with the anticipated trial in January of 2009. See, e.g., Barbara Hoberock, *AG won't try to unseat Inhofe*, Tulsa World, Sept. 5, 2007 at A11 (quoting Attorney General Edmondson: "If we haven't resolved it by 2010, I'll run for re-election, and they will have me to deal with for another four years."). For these reasons, the Cargill Defendants respectfully request that the Court modify the existing Scheduling Order as follows:

Event	Date Under Original Scheduling Order	Proposed New Date
Plaintiff's Experts Reports on injury and causation and all other issues except damages	December 3, 2007	March 1, 2008
Defendants' Expert Reports on all issues except for damages	February 1, 2008	March 1, 2009
Exchange of final fact witness lists	May 1, 2008	August 1, 2009
Plaintiff's expert report on damages	May 1, 2008	December 1, 2008
Defendants' expert report on damages	June 1, 2008	September 1, 2009
Discovery Cut-Off	July 1, 2008	January 1, 2010
Dispositive Motion deadline	August 1, 2008	February 1, 2010
Exchange of exhibits and deposition designations	October 1, 2008	April 1, 2010
Proposed jury instructions	November 3, 2008	May 1, 2010
Motions in limine	November 3, 2008	May 1, 2010
Pretrial briefs (if necessary)	November 3, 2008	May 1, 2010
Trial	January 2009	July 2010

PROCEDURAL BACKGROUND

The factors counseling modification of the Scheduling Order fall into a variety of categories. A discussion by subject matter is probably more helpful than a strict chronological recitation.

A. The Size and Scope of the Case.

As a threshold matter, the sheer size of the present case has been a major factor in slowing the progress of this litigation. Plaintiffs' present complaint has 146 paragraphs of factual and legal allegations and a list of nine proposed remedies. Docket No. 1215. Plaintiffs seek to recover under ten different legal theories, some state law and some federal, some common law and some statutory. The factual allegations concern the conduct of thousands of farmers in a million-acre, two-state watershed over the period of the five-plus decades since the formation of Lake Tenkiller.

The case involves a mammoth number of documents from both sides of the aisle. On the plaintiffs' side, the case involves tens of thousands of hard-copy and electronic documents scattered at more than a dozen state agencies, departments, and other offices. On the defendants' side, the 14 separate defendants also have thousands of documents in a variety of different electronic and hard copy storage systems.

The amount of scientific data at issue in the case is also enormous in both breadth and scope. Without going in depth into the expert issues (discussed more fully below), the parties have already conducted soil, water and/or other sampling at least 518 different sampling stations, and Plaintiffs have recently noticed additional requests to take even more such samples on grower sites. Based on these samples, the State has produced to Defendants some 100,000 pages of sampling data and related information, with more yet to come. In addition, Defendants believe Plaintiffs may have taken or may be in the process of taking a number of other samples from other sites that they have not yet disclosed to Defendants.

In sum, the scope of this case is mammoth in almost every respect: legal, factual, geographical, chronological, and scientific. Given this scope, it is not surprising that the progress of discovery and factual development has progressed more slowly than the parties and the Court had originally contemplated.

B. Delay in Decisions on Dispositive Motions.

Plaintiffs commenced the present suit on June 13, 2005. Between October 3, 2005 (Docket No. 67) and March 13, 2007 (Docket No. 1076), the Defendants individually and collectively brought over a dozen motions intended to dispose as a matter of law with some or all of Plaintiffs ten separately pled counts. In the course of these filings, the case was transferred from Judge Ellison to Judge Kern (Docket No. 203) and finally from Judge Kern to Judge Frizzell (Docket No. 1044). Because of these transitions and the status of Judge Ellison's and Judge Kern's dockets, the Court was unable to hold any hearings on those motions until June 14 and 15, 2007. Although Judge Frizzell ruled quickly once he heard the motions, this nevertheless resulted in an up-to-20 month delay in the resolution of these motions.

The delay in resolving these dispositive motions unavoidably affected all parties' discovery efforts. One of the purposes of early dispositive and partially dispositive motions, of course, is to eliminate superfluous claims at the outset and avoid the effort and expense of investigation and discovery concerning issues that are not, as a matter of law, properly part of the case. As a result, although both Defendants and Plaintiffs served some written discovery requests during this "hiatus" before the dispositive motion hearing, the pace of such discovery was slow (particularly in the early months). These early discovery efforts lacked any sense of urgency, extensions of time to answer were frequently requested and usually granted, the few

depositions taken largely addressed preliminary issues, and none of the parties brought any motions to compel. Since the dispositive motion hearing and Judge Frizzell's rulings, the parties know what the claims in the case will be, at least through the summary judgment stage. At that point, as the Court is aware, all the parties' discovery efforts (including motion practice) have become much more intense.

In sum, through no fault of either the parties or the Court, the delay in resolution of the Defendants' dispositive motions has unavoidably slowed the progress of this case as contemplated by the original Scheduling Order.

C. Delays in Discovery.

The parties in this case have experienced a number of delays in their pursuit of discovery in this case. Some of these delays result purely from the large and complicated nature of the case, as discussed above, while many others result from Plaintiffs' numerous and repeated failures to comply with their discovery obligations, as detailed in other motions presently before the Court. The Cargill Defendants offer the following non-comprehensive summary of the nature, scope, and severity of these discovery delays.[1]

1. Hard Copy Documents from State Agencies.

The following time-line recounts Defendants' multiple efforts to complete the agency document productions and Plaintiffs' failure or refusal to complete the productions in a timely manner.

[1] This summary of discovery delays is necessarily from the Cargill Defendants' perspective. The Cargill Defendants anticipate that other Defendants may be able to cite other instances of discovery delay. Where the details of a particular discovery issue are already before the Court in another motion, this motion summarizes the issue briefly and refers the Court to the other motion rather than again setting out the full facts and procedural history.

08/22/06	The Cargill Defendants serve First Amended Interrogatories and Requests for Production of Documents
10/31/06	Plaintiffs serve their "Objections and Responses to Cargill Turkey Production, LLC's First Amended Requests for Production of Documents" and "Objections and Responses to Cargill, Inc.'s First Amended Requests for Production of Documents." Plaintiffs direct the Cargill Defendants that responsive documents that may be found at ODEQ, OWRB, OCC, OSRC, OSE, ODAFF, ODTR, and ODWC. Plaintiffs do not serve any actual documents with their Objections and Responses.
12/08/06	Counsel for the Cargill Defendants meet and confer with counsel for Plaintiffs. Counsel for the Cargill Defendants request dates for the agency document productions, including ODAFF.
12/11/06	Plaintiffs serve their Objections and Responses to Cargill Defendants Interrogatories, which respond to many of the Cargill Defendants' interrogatories by directing the Cargill Defendants to documents at the identified agencies pursuant to FED. R. C IV. P. 33(d).[2]
11/27/06	Counsel for Peterson Farms, Inc. deposes ODEQ's Custodian of Records. (See Exhibit 1: Notice of Deposition.)
11/28/06 - 11/29/06	Defendants review documents made available at ODEQ's main office in Oklahoma City.
12/18/06- 12/19/06	Defendants depose OWRB's Custodian of Records and review documents at OWRB's main office in Oklahoma City. (See Exhibit 2: Notice of Deposition).
01/09/07- 01/12/07	Defendants depose OCC's Custodian of Records and review documents at OCC's office in Oklahoma City. (See Exhibit 3: Notice of Deposition).
01/24/07	All Defendants meet and confer via telephone with Plaintiffs' attorneys, Trevor Hammons and Sharon Gentry, to discuss ODAFF document production. Plaintiffs agree for first time to make documents available for review by all Defendants at ODAFF. *See* T. Hill Letter dated 06/29/07 referring to Meet and Confer, Exhibit 4.
02/05/07	Defendants depose OSRC's Custodian of Records. (See Exhibit 5: Notice of Deposition).

[2] Pursuant to agreement between Plaintiffs and the Cargill Defendants, Plaintiffs agreed to supplement their Interrogatory responses on June 1, 2007 "under the same standards as set forth in the Court's Orders dated February 26, 2007 and April 4, 2007 [Docket.#1061, 1118]." (Docket. 1150 at 2.) Plaintiffs withdrew some of their Rule 33(d) designations, but continue to refer the Cargill Defendants to agency documents in response to several interrogatories.

02/06/07- 02/08/07	Defendants review documents at OSRC's office in Tahlequah. Plaintiffs fail to make all responsive documents available, explaining that Plaintiffs' attorneys had not completed their review of documents for privilege documents. This incomplete production forces Defendants to schedule a second inspection at OWRC.
03/15/07	Defendants depose OSE's Custodian of Records and review documents [at OSE?]. (See Exhibit 6: Notice of Deposition.)
03/22/07	Defendants request schedule from Plaintiffs for document productions from ODAFF, ODWC, and ODTR. (See Exhibit 7: E-mail from Theresa Hill to Trevor Hammons).
03/22/07	Counsel for Plaintiffs fails or refuses to provide a schedule. (See Exhibit 8: E-mail response from Trevor Hammons to Theresa Hill stating *"I will get you dates. It is easier to schedule them one at time [sic.] because the agencies has [sic] to get the documents pulled and we have to review them. Tourism should be the next agency and I will check their progress in pulling documents."*)
04/06/07	Defendants again request a date for the next agency document review. (See Exhibit 9: E-mail from Theresa Hill to Trevor Hammons stating *"Following our conversations today, we look forward to receiving a date for the Agency Document Review at the Department of Tourism as soon as possible."*)
04/11/07	Defendants again request a date for the next agency document review. (See Exhibit 10: E-mail from Theresa Hill to Trevor Hammons.)
04/12/07	Plaintiffs' attorney responds to the Defendants' multiple requests for dates by advising *"I am going over on the 23rd to review documents at Tourism. . . ."*, but again fails to confirm any dates for any of the remaining agency document productions. (See Exhibit 11: E-mail from Trevor Hammons to Theresa Hill.)
04/27/07	The Court conducts a hearing on The Cargill Defendants' Motion to Compel [Docket. #1054] and The Cargill Defendants' Motion to Address Electronic Discovery Issues [Docket. #1135]. The status of Plaintiffs' hard-copy document production is discussed at the hearing.
05/04/07	Defendants again request dates to complete the onsite document production at ODAFF, ODTR, and ODWC. Defendants also advise Plaintiffs that they want to visit local offices of agencies: ODH, ODM, and OCC. Defendants ask Plaintiffs attorneys whether they represent Oklahoma Geologic Survey and Oklahoma Biological Survey. (See Exhibit 12: Email from Theresa Hill to Trevor Hammons.)

05/07/07	The Cargill Defendants again request a date to complete the onsite document productions, urging ODAFF as a priority. (See Exhibit 13: Email from Theresa Hill to Trevor Hammons: *"We would like to make ODAFF a priority. However, if you have started the review of documents at Tourism and we can complete that review in the next two weeks, then by all means to keep things moving, we can go to Tourism next."*)
05/09/07-05/10/07	Defendants return to OSRC for the second part of the OSRC document production.
05/17/07	Defendants again request dates for the onsite document production at ODAFF, ODTR, and ODWC. Defendants inquire (1) whether prior productions included documents from specifically identified local offices of ODEQ and OWRB and (2) whether responsive documents may exist at ODAFF's local office. Defendants also inquire whether Plaintiffs' attorneys have determined whether they represent County Health Departments, the Oklahoma Geological Survey, the Oklahoma Biological Survey; and local conservation districts. (See Exhibit 14: E-mail from Theresa Hill to Trevor Hammons.)
05/17/07	This Court orders the parties "to meet and confer to schedule document production for these agencies [ODAFF, ODWC, ODTR, ODH] . . ." (Docket. 1150.)
05/22/07	Defendants request dates to complete the agency document productions in compliance with Judge Joyner's Order, Docket. #1150. Pursuant to Plaintiffs' request, the Cargill Defendants advise Plaintiffs of the specific RFP's served by Cargill Turkey Production, LLC that seek information from Oklahoma Corporation Commission, Oklahoma Department of Health, and Oklahoma Department of Mines. (See Exhibit 15: Letter from Theresa Hill to Richard Garren and Trevor Hammons.)
06/22/07	The parties discuss the remaining agency document production during a conference call focusing on ESI. Based on Plaintiffs' representations during that call, Defendants understand that by 06/25/07 Plaintiffs will finally provide a schedule for the remaining document productions at the agencies. (See Exhibit 4: Letter from Theresa Hill to Trevor Hammons dated 06/29/07.)
06/25/07	Plaintiffs' attorney Trevor Hammons sends an email to Defendants: *"I did not include in the letter anything regarding the scheduling of remaining agencies. However, I am working on trying to set aside the week of July 23 for ODAFF. I will let you know if that week is available."* (See Exhibit 16.)
06/29/07	Defendants again request a schedule for completing the production of all responsive information at the identified State agencies and offices and request a response by July 6, 2007. (Exhibit 4: Letter from Theresa Hill to Trevor Hammons.)

07/06/07 Plaintiffs fail to supply a schedule but promise to provide one the following week. Plaintiffs advise Defendants for the first time that Plaintiffs are considering whether an onsite production at ODTR and ODWC is necessary. Plaintiffs state that they have not determined whether the local agency offices have responsive information. Plaintiffs advise Defendants that Plaintiffs are "*also making inquiries at the Department of Health.*" Plaintiffs do not address Defendants' requests concerning the ODM or OCC. (See Exhibit 17: Letter from Robert Nance to Theresa Hill responding to 06/29/07 letter.)

07/10/07 Defendants request a meet-and-confer session to discuss Plaintiffs' document production at the remaining agencies outlined in the June 29, 2007 letter, including Oklahoma Department of Health, Oklahoma Department of Mines, and Oklahoma Corporation Commission. (See Exhibit 18: Letter from Theresa Hill to Robert Nance stating "*Please advise when you are available for a meet and confer to discuss. We are surprised to learn that you have not evaluated whether the Department of Health, Department of Mines and Corporation Commission have documents responsive to the Cargill Defendants' discovery. Please refer to my letter of May 22, 2007 to Richard Garren and Trevor Hammons wherein I advised that we expected to find 'ESI and documents responsive to our Requests for Production' at these three agencies. See attached, emphasis added. . . .*")

07/18/07-07/19/07 Defendants review documents at ODAFF. Plaintiffs fail to produce:

1) any documents from ODAFF's local office in Tahlequah;
2) ODAFF's rule-making files;
3) Pre-1997 complaint files;
4) Complaint files for 2000 through 2003 for the IRW;
5) Closed dairy files for the IRW;
6) Closed CAFO files for the IRW; and
7) ODAFF Poultry Inspector's individual files.

(See Exhibit 19: July 20, 2007 Letter from Nicole Longwell to Sharon Gentry and Trevor Hammons.)

07/20/07 Plaintiffs' attorneys promise a "*time very soon to review the closed files*" and advise that Plaintiffs will confirm whether the ODAFF Poultry Inspectors have individual files. (See Exhibit 20: E-mail from Trevor Hammons to Nicole Longwell.)

08/02/07 Defendants depose John Littlefield, an ODAFF Poultry Inspector. Mr. Littlefield testifies that he maintained a file from his poultry inspections. Plaintiffs' attorneys tell Defendants that they just learned of the existence of these documents. (See Exhibit 21: Excerpts from John Littlefield deposition.)

08/17/07 Defendants again request a schedule to complete the agency document production and propose the weeks of September 10 or September 17. Defendants request

confirmation by August 25, 2007. (See Exhibit 22: Letter from Theresa Hill to Sharon Gentry and Trevor Hammons.)

08/24/07 Plaintiffs acknowledge the request, but fail to confirm any dates to complete the production at any agency. (See Exhibit 23: Letter from Trevor Hammons to Theresa Hill.)

08/29/07 Defendants depose David Berry, ODAFF Poultry Inspector. Mr. Berry testifies that he maintained documents in his briefcase, including his poultry inspection book and maps of the watershed and poultry growers' operations. Mr. Berry further testifies that no one has asked him for those documents. Mr. Berry testifies that he does not maintain copies of his email correspondence with the Oklahoma City office and that no one has advised him to maintain any documents. (See Exhibit 24: Excerpts from David Berry deposition.)

09/07/07 Defendants advise Plaintiffs' counsel that their 08/24/07 letter is non-responsive and leaves Defendants no choice but to seek relief from the Court. (See Exhibit 25, Letter from Theresa Hill to Trevor Hammons.)

09/12/07 At a meet-and-confer session, Plaintiffs promise document productions by September 26, 2007 from the Department of Tourism, the Department of Wildlife Conservation, the OCC, and (to the extent not already produced) ODEQ. Plaintiffs also state that they are ready to produce additional ODAFF documents from the missing categories, but cannot confirm whether these will include the poultry inspectors' files. Plaintiffs state that the Department of Mines is moving and its documents will not be available until at least October. Plaintiffs state that they are still trying to determine whether the Department of Health has any responsive documents.

2. Electronically Stored Information (ESI).

The status of Plaintiffs' responses to Defendants' year-old requests for ESI discovery is set forth in detail in The Cargill Defendants' Motion to Compel Production of Responsive ESI (Docket No. 1261) and Peterson's joinder in that motion (Docket No. 1268), and need not be repeated at length here. In brief, even today, Plaintiffs' ESI production remains unusable and incomplete. Plaintiffs continue to deny any obligation to identify the information responsive to the Cargill Defendants' requests within their blanket native-format production to all defendants. Plaintiffs refuse to produce responsive information from the ORACLE and SQL databases at

ODWB and OCC unless Defendants agree to inspect the information on the State's premises. Plaintiffs also refuse to provide a deadline as to when the Cargill Defendants can expect their ESI production to be complete.

3. Indices to the State's Documents.

Despite a Court Order requiring them to do so (Docket No. 1150), Plaintiffs have not to date provided any means by which Defendants can determine which of the tens of thousands of pages of documents Plaintiffs have produced are responsive to a particular document request or interrogatory. Absent either accurate and complete indices or tabbed pages, the Cargill Defendants are effectively unable to determine how Plaintiffs have actually responded to discovery requests or what documents or information Plaintiffs believe support their claims against the Cargill Defendants. The Cargill Defendants are in the final stages of the second set of conferences with Plaintiffs concerning this issue, and a motion to compel and/or for sanctions is likely in the near future.

4. The State's Privilege Log.

In response to various Defendants' discovery requests, Plaintiffs have withheld from disclosure large numbers of documents based on claims of attorney-client privilege and attorney-work-product protection. As detailed in Peterson Farms, Inc.'s Motion to Compel with Regard to Plaintiffs' Agency Privilege Logs (Docket No. 1276), many of the entries on Plaintiffs' privilege log do not contain sufficient information to analyze the privilege claim. In addition, the information provided for a number of the documents demonstrates that Plaintiffs have no valid basis for the privilege claims asserted.

Despite numerous meet-and-confer sessions between Plaintiffs' and Peterson's attorneys, Plaintiffs still have not provided the necessary information or produced the non-privileged documents, forcing Peterson's now-pending motion. Precisely what effect the wrongfully withheld documents will have on future discovery efforts is of course unknown, given that Defendants have not yet seen the documents. What is certain is that Plaintiffs' unjustified withholding of these documents for months has substantially prolonged the discovery process contemplated by the original Scheduling Order.

5. Plaintiffs' Testing Data.

In its order of January 5, 2007 (Docket No. 1016), the Court ordered Plaintiffs to produce to Defendants by February 1, 2007 "monitoring, sampling, and testing data performed by Plaintiffs and related documents" that Plaintiffs had put "at issue" in the case. Plaintiffs made partial productions of this data on February 1, February 8, March 6, May 1, May 21, July 2 and August 31, 2007. Plaintiffs have confirmed that this production is not yet complete and have refused to say when they will complete it.

In addition to these repeated delays, Plaintiffs' production of this data has had a number of holes and other problems, including:

- Missing raw data,
- Missing categories of test results (particularly results for DNA/microbial source tracking and sediment geoprobe groundwater sampling),
- Mistaken claims of privilege,
- Lack of QA/QC and sampling protocols,
- Lack of validated data reports,
- Missing GPS coordinates for samples,
- Missing Standard Operating Procedures (SOPs) for several types of testing and sampling,
- Missing fish kill data,
- Incomplete Benthic macro-invertebrate data,
- Illegible Benthic and Periphyton data,
- Missing maps of sample locations and Isopach maps,
- Missing and incomplete sediment core data,

- Missing BIOSEP bead data,
- Incomplete automated high flow sampling data;
- Missing QA/QC lab packages, and
- Missing chain-of-custody forms.

Defendants have discussed these issues on multiple occasions with Plaintiffs' attorneys and wrote Plaintiffs' attorneys a letter on August 29 summarizing the issues. (See Exhibit 26.) On September 20, 2007, Plaintiffs responded with production of some additional data, promises to produce additional data at some point in the future, and identification of a number of areas in which the parties disagree about Plaintiffs' obligation to produce data. (See Exhibit 27.) Tyson and the Cargill Defendants expect to continue to pursue discussion of this missing data and, if necessary, move again to compel compliance with the Court's January 5, 2007 Order.

6. Interrogatory Responses.

For more than a year, the Cargill Defendants have been trying to get Plaintiffs to answer simple, direct interrogatories describing the specific instances of conduct by the Cargill Defendants on which Plaintiffs base their claims, specifically Plaintiffs' claims concerning "releases" of hazardous substances and violations of state or federal statutes or regulations. Despite a Court order expressly directing Plaintiffs to provide such information, Docket No. 1150, Plaintiffs have yet to provide adequate and responsive answers to threshold questions, answers critical to much of the Cargill Defendants' future discovery and the preparation of its defense. The failings of Plaintiffs' responses and the effects on the Cargill Defendants are set forth in detail in The Cargill Defendants' Rule 37(b) Motion and Brief in Support, Docket No. 1252, and will not be repeated here.

7. Other Discovery Delays.

In addition to the specific instances of discovery delay discussed above, Plaintiffs' entire approach to the discovery process has resulted in significant delays in the litigation. Even when the Court has granted Defendants' motions and compelled Plaintiffs to produce documents or answer questions, Plaintiffs have repeatedly delayed that discovery ever further by coming back to the Court with motions for reconsideration. See, e.g., Docket Nos. 1074, 1153, 1129. Plaintiffs also submitted to the Court an "Agreed" motion erroneously representing that the Cargill Defendants had agreed to an indefinite extension of the deadline for Plaintiffs to comply with the Court's Order compelling production of documents. See Docket No. 1168. When the Cargill Defendants pointed out that they had not in fact agreed to any such motion, refused to withdraw the motion or advise the Court that the motion was in fact disputed. Docket No. 1178.

To cite the most recent example of delay, Plaintiffs' response (or rather lack of response) to the Cargill Defendants' Rule 30(b)(6) deposition notices continues to delay the progress of the Cargill Defendants' discovery efforts. As detailed in The Cargill Defendants' Motion To Compel Plaintiffs To Designate Deponents Under Rule 30(B)(6) (Docket No. 1270), the Cargill Defendants served 30(b)(6) deposition notices addressing five subject areas corresponding to Plaintiffs' factual allegations against the Cargill Defendants in the Second Amended Complaint. In response, Plaintiffs refused either to produce the witnesses as scheduled or to propose alternative dates, all without raising a single specific objection to any of the notices. (Plaintiffs suggested that they would raise specific objections at some unspecified future date.) The issue is now before the Court on the Cargill Defendants' motion to compel.

D. Judge Frizzell's Docket.

Although the Court is in a much better position than the parties to judge this factor, several of Judge Frizzell's comments at recent hearings suggest that the docket that Judge Frizzell assumed on taking the bench was a heavy one, and that as a result his schedule may not realistically permit the Court to maintain the present litigation schedule in this case in any event. For example, at the dispositive motion hearing, Judge Frizzell commented to the parties that he had inherited hundreds of pending dispositive motions that needed rulings. See 6/15/07 Tr. at 86-87.

DISCUSSION

I. THE COURT SHOULD MODIFY AND EXTEND THE SCHEDULING ORDER.

Based on the circumstances set out above, the Cargill Defendants respectfully ask the Court to extend the Scheduling Order for the litigation as set forth in the chart at the beginning of this document. All of the factors above, from the sheer scope of the case to the unavoidable effect of the judicial transitions, counsel for such an extension.

In particular, discovery in the case has been difficult at best, much more difficult than Defendants could reasonably have anticipated. As detailed above, many of Plaintiffs' responses to Defendants' various discovery efforts have been incomplete, incremental, or delayed, often for months. In extreme instances, Plaintiffs have essentially refused to respond to discovery at all.

These various incomplete or inadequate responses have resulted in numerous, lengthy meet-and-confer sessions, many spanning periods of weeks or, in the case of Plaintiffs' oft-delayed state agency document productions, many months. In the course of these sessions, Defendants have on multiple occasions thought that they had reached agreements on issues only

to discover that Plaintiffs have later changed their minds or that the issue has been reassigned to another attorney who has no knowledge of the prior agreement. Moreover, despite all the meetings and conferences, many of these informal efforts at resolving disputes have ultimately failed, necessitating motions to compel. Even after the Court orders discovery, such orders are often met with motions to clarify that prolong the discovery process even more.

Although the Cargill Defendants believe that all these discovery delays may be part of a conscious litigation strategy on the part of Plaintiffs, the motivation behind them has no direct bearing on the present motion. Regardless of whether these delays are intentional or not, the fact is that they have occurred, and as a result the litigation is not nearly as far advanced as the original litigation schedule anticipated it would be. Forcing the parties to maintain the original schedule will have serious and unfair prejudicial effects on the Defendants and their abilities to properly prepare their cases.

This prejudice is particularly severe in the area of expert disclosures. Under the present scheduling order, Plaintiffs must disclose their experts on December 1, 2007 and Defendants on February 1, 2008. Barely four months before their deadline, however, Defendants have been unable to obtain much of the information critical even to *selecting* experts, much less to preparing and disclosing their reports. Critical ESI and hard-copy documents from many state agencies, including agencies essential to expert preparation such as ODAFF, Tourism, and Health, either have not been produced or have been withheld on uncertain and untested grounds of privilege. Many of the documents Plaintiffs *have* produced, particularly in the ESI arena, have simply been "dumped" on Defendants with no way to identify responsive documents or determine which documents Plaintiffs believe support their claims. Plaintiffs even continue to

refuse to identify the most basic evidence bearing on expert evaluation: precisely what conduct of the Cargill Defendants constituted a "release" or violated state or federal regulations so as to cause a nuisance.

Without this foundational information, Defendants can only guess at what experts they will need to retain or the data and the opinions those experts will have to rebut. The delays in discovery have effectively paralyzed Defendants' expert efforts, and the only reasonable and fair solution is to extend the litigation schedule to permit resolution of the discovery disputes and production of the documents and information to which Defendants are entitled. The Defendants' entitlement to this information is not mere speculation; as discussed above, in many instances the Court has already ruled that Plaintiffs must produce the information or documents, and the Defendants' current efforts consist of trying to get Plaintiffs to comply with those Orders. See, e.g., Docket Nos. 1016, 1063, 1150. Forcing Defendants to proceed with expert disclosures while lacking both the disclosures the Court has already ordered and the disclosures sought by the pending motions would impose unnecessary and unfair prejudice on Defendants.

Conversely, the reasonable extension of the Scheduling Order described above will not unduly prejudice Plaintiffs. Although Plaintiffs' complaint alleges an "imminent and substantial endangerment to health or the environment," Docket No. 1215 at ¶ 94, nothing in Plaintiffs' discovery responses to date offers any support for these allegations. Perhaps more significantly, despite being over two years into the lawsuit, Plaintiffs have made no motion for any injunction to address this supposed "endangerment," tacit acknowledgement that delay in addressing the issues raised here can have no serious effect on Plaintiffs' case.

Both the parties and the public deserve a fully and fairly litigated lawsuit, and the best route to that result is a modification and extension of the Scheduling Order.

II. THE COURT SHOULD EXPAND THE TIME BETWEEN PLAINTIFFS' EXPERT DISCLOSURES AND DEFENDANTS' RESPONSIVE DISCLOSURES.

The Cargill Defendants also urge the Court to expand the time between Plaintiffs' required expert disclosures and Defendants' expert disclosures from the current two months to at least a year. The development of the case over recent months has made clear that Defendants will likely need far longer than two months in which to analyze plaintiffs' multiple expert theories, retain and/or educate their own experts on those theories, develop data to challenge those theories, and produce a report analyzing and rebutting those theories. A number of factors have arisen in the course of discovery that support such an extension.

1. Delays in discovery. Not only have Plaintiffs' delays in discovery seriously impaired the Defendants' ability to retain and prepare their experts, as discussed above, the delays have also made clear the need for a greater window between the parties' respective disclosure dates. The original Scheduling Order necessarily contemplated that the Defendants would retain and begin working with their experts before Plaintiffs made their expert disclosures. The delays in Plaintiffs' discovery responses—the still-incomplete hard-copy and ESI document productions, the uninformative indices, and in particular Plaintiffs' refusal to identify the specific "releases" and regulatory violations underlying their claims against the Cargill Defendants—have severely hampered the Cargill Defendants' efforts even to identify the areas in which they will need expert testimony, much less to actually retain experts and direct their work. Indeed, Plaintiffs' responses to the Cargill Defendants' interrogatories concerning instances of "release" and "nuisance" consist almost entirely of deferrals to as-yet undisclosed expert opinions. See

Docket No. 1272-3. Because Defendants' experts have not had and presumably will not have the necessary information to analyze *before* Plaintiffs' expert disclosures, they must have that time after Plaintiffs' disclosures.

2. Ongoing testing. Within the last several weeks, Plaintiffs have noticed their intention to conduct additional sampling at numerous sites in the IRW, presumably to gather data for the use of Plaintiffs' experts. Defendants' experience suggests that the Defendants will have to wait months to receive copies of Plaintiffs' data from that sampling. That delay means that the data may well not even reach Defendants and their experts until well after Plaintiffs' expert disclosures.

3. Plaintiffs' eight different expert approaches. Although Plaintiffs have not yet disclosed the substance of or basis for their expert evidence, they have represented that they intend to present "a circumstantial case which rests upon the testimony of experts who will present the case through at least eight separate means." Docket 1272 at 4. These "means" will include (at least) opinions in the fields of soil science, lake and stream hydrology, groundwater hydrology, agronomy, microbiology, genetics, environmental engineering, agricultural engineering, geology, geochemistry, aquatic chemistry, aquatic biology, fisheries sciences, limnology, natural resources, economics, veterinary science, fluvial geomorphology, ecology, paleoecology, toxicology, hydrogeology, aquatic environment, eutrophication, core analysis, physics, and comparative history. See, e.g., Docket No. 1272-3 at 12-13.

Given this sheer volume and variety of expert opinions that Plaintiffs promise to produce, the Cargill Defendants respectfully submit that Defendants' experts cannot reasonably be expected to review these opinions, analyze the theories behind them, gather any necessary data,

test the relevant facts and conclusions, and prepare responses all in a period of only two months. It is both unrealistic and unfair to expect Defendants experts to in essence duplicate that work in a mere 60 days.

4. New expert theory. Beyond the sheer volume of Plaintiffs' promised expert opinions, Plaintiffs' attorneys have represented that Plaintiffs' anticipated method of analyzing DNA/Microbial Source data in particular is new and valuable, and has even talked about asserting a proprietary claim for the new technology. (Exhibit 27, 9/19/07 letter from Bullock to George). Plaintiffs have not yet disclosed to Defendants exactly what this new technology is.

Putting aside for the moment whether such technology could by its nature ever satisfy the Daubert standard, no Defendant could possibly prepare a responsive expert report in two months under such circumstances. By Plaintiffs' own description, this is "a significant advance in the traditional ways of tracking" poultry waste. (Exhibit 27 at 1.) In order to respond, Defendants will need to try identify a scientist with sufficient relevant expertise (if one exists) or alternatively pay a scientist to develop that expertise. Once the expert is in place, at the very least he or she will need to (1) educate him- or herself on Plaintiffs' new "advance", (2) analyze the theoretical viability of the new technology, (3) test the new technology for real-world validity using samples with known qualities, (4) gather from the IRW whatever samples or data the technology uses, (5) test those samples or data using the new technology, and (6) compare those results with the results offered by Plaintiffs and analyze any differences. Depending on the nature of the as-yet unrevealed DNA technology, merely validating the method could take years; Defendants cannot reasonably be expected to complete the entire validation, data gathering, testing, and analysis process in just two months.

5. Need for additional testing. Even if Plaintiffs were not intending to use a new, untested technology to support their case, Defendants' experts will nevertheless likely need more than the two months provided to gather their own new data. Defendants do not presently know either all the data that Plaintiffs have gathered or how Plaintiffs' experts intend to use that data. Once that information is revealed, however, Defendants experts can be expected to question that data, including what data was gathered, where it was gathered, how it was gathered, and what information was not gathered. Addressing these issues may well require Defendants' experts to gather their own new data and take their own samples, a process that could take weeks or months, depending on the data needed and the availability of the samples. For example, as Plaintiffs own submissions acknowledge, some types of sampling can be done only at certain times of the year, or under certain weather conditions.

Expecting to accomplish this data-gathering and sampling process in a two-month period is unrealistic on its own; squeezing it in the same two-month period with all the other necessary expert tasks would be all but impossible. Again, Plaintiffs have had years to gather their samples and data, and have been able to pick the time of year and weather to do so. Defendants should be accorded the same opportunity.

CONCLUSION

For the reasons discussed above, the Cargill defendants respectfully urge the Court the modify the Scheduling Order as set forth on page 2 of this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 26th day of September, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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