mkbp
Miller Keffer Bullock Pedigo
Attorneys and Counselors

September 19, 2007

(Via email and FedEx)

Robert George
Kutak Rock LLP
214 W Dickson St
The Three Sisters Building
Fayetteville AR 72701-5221

Re: *State of Oklahoma v. Tyson et al.,*
No. 05-CV-0329-TCK-SAJ

Dear Robert:

Your letter of August 29, 2007, incorrectly characterizes the Plaintiff's production of it sampling data. Your charge that we did not complete our production as ordered, but "dribbled information and materials out to the defendants in seven separate installments" is a gross mischaracterization of our production. While it is true that there have been repeated supplements of our initial production, this is because as new data has been developed, it has been produced. It is our intent to continue to produce the data as it becomes available from our scientists until all of the data is produced.

Frankly, I do not understand your complaint that it is prejudicial to the Defendants for us to provide you the data at the point where it completes our internal QA/QC review. It is only at that point that the data becomes available to our scientists and eligible for inclusion in their analysis. The suggestion that Defendants are prejudiced unless they get data before Plaintiff's own scientists receive it is absurd. By providing it to you in this manner, we are meeting both the spirit and the letter of the Court's order.

As for your more specific issues, I will address them in the order in which you raised them:

III. Categories of Sampling Data and Materials Allegedly Being Withheld:

A. DNA/Microbial Source Tracking Test Results

I have discussed with my client the issue of whether to claim a proprietary interest in this method. While it is the result of what are well-established scientific methods, the application of these methods to tracking bacteria from poultry waste as it moves through the environment appears to be a significant advance in the traditional ways of tracking such waste. Even so, my client has determined not to make a proprietary claim on this

EXHIBIT
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method. There may be other states or municipalities who might wish to use this method to help them hold your client or other poultry integrators accountable for the damage done to their waters by the waste disposal methods employed by Tyson and others. The State has determined that it will not act in a manner to diminish such use.

We have now completed the process of using accepted scientific methods investigating the possible use of DNA to track poultry waste as it moves through the watershed. We have not yet determined whether we will offer any proof at trial or file an expert report concerning this method. It remains our view that federal law does not require the production of any of this information or the resulting analysis. This is classic attorney work product. Even so, without waiving our objections, I have enclosed with this letter the Standard Operating Procedure relating to the collection of samples related to this analysis. See SOP Section 5.3 on attached Disc STOK_CD18. Regarding your request for the data produced and the method used, I have received a report, but need to consult with the experts to assure that it is responsive to your request. I have scheduled a conference call with them for Friday. After that conference, I will report to you and hopefully be in a position to provide the information which you have requested.

At this time, I am not producing the reports concerning the process used in developing this method. That process is work product and involves the opinion of experts. The Court has not ordered the disclosure of that opinion. It has set a deadline for the production of expert opinion. If we decide to offer this in evidence, the expert opinion will be offered at that time. **I want to be clear that, in making this production, we are not waiving our claim of attorney work product and will not provide any discovery as to the expert opinions concerning the development of this method, its validity or the validity of the data produced until the date for filing expert reports.** That will be done only if we determine to offer an expert opinion relative to the use of this method.

Contrary to your assertion of prejudice by the timing of this production, providing this information and data at this time is a great benefit to the defendants. It is well in advance of the Court's schedule for the production of expert reports and will give you an advanced look at what might be presented to the Court.

B. Sediment Geoprobe Groundwater Sampling Data:

You appear to be under a misperception that our Geoprobe work has been directed at collecting sediment cores. We have not collected or analyzed sediments in connection with our Geoprobe sampling and therefore you will not be receiving any analysis of sediments from this effort. We have collected some water samples; and when the data has completed our internal QA/QC review, it will be provided. I checked with the CDM lab and they have not received the completed reports from the outside labs. In response to your great interest in this data, the CDM lab has asked the labs to expedite their processing of the water collected. I will provide that at the earliest possible time.

C. Data and Sampling Documents Still Listed on the State's Revised Privilege Log:

Item No. 213: This is a reference to the data which comprises the aerial photograph of the IRW which was provided to you in the February production. As explained in my February 1, 2007 letter, we produced it in the native format and informed you at that time that it could be viewed using either Arc View or Arcgis software. This will be removed from the privilege log.

Item No. 214: The digital data, analysis of agricultural census authored by Lithochimeia, is just that. It is the analysis of agricultural census data published by various government agencies. The data which was analyzed is generally available. This is classic work product and, to the extent that it is required to be produced, it will be produced when the expert reports are filed. Under the Court's order and the Federal Rules, you are not entitled to such analysis at this time.

Item No. 215: Field notes relating to the sediment sampling locations in 2005. Those were produced and you will find those at OK-PL 3947-4332. This will be removed from the privilege log.

Item No. 216. Regarding the photographs and digital photographs with included text, I believe that those were included in the previous production. In order to insure that you have received them, I am including a copy of them with this letter. See Disc STOK_CD17 (28825-28850). We will amend the privilege log to reflect this.

Item No. 217: An un-redacted Standard Operating Procedure, including Section 5.3, is being produced as indicated previously. See attached Disc STOK_CD18 (20762-20970). We will amend the privilege log to reflect this.

Item No. 218: See above.

D. QAPP and Validated Data Reports:

1. Quality Assurance Project Plans: The Plaintiff does not have a formal QAPP plan. QA/QC is provided in the lab reports.

2. Validated Data Reports: We do not have a Validated Data Report. Our QA/QC procedures provide the needed review of data.

IV. Alleged Incomplete Productions or Missing Information:

A. GPS Coordinates and Sampling Locations Information: As your letter indicates, on May 21 we provided you with the coordinates for approximately 354 sampling locations. As to the locations which you have questions about, I have made inquiries and will provide the information to you as soon as it is received.

B. Allegedly missing SOP's:

1. Sediment Cores collected in 2005. You will find the SOP for that at STOK 22211-22219 which was produced in March 2007.

2. Sub-bottom survey. This was conducted by a subcontractor and we do not have an SOP for that survey.

3. 2004 sediment grab sample. The protocol for that sample is attached. See Disc STOK_CD17 (28822-28824).

4. BIOSEP data. There was not an SOP for the collection of the BIOSEP data.

5. Sediment toxicity samples. The SOP for that is contained in the report from the lab

6. DNA fingerprinting. As discussed above, it is being produced.

C. Fish Kill Data: You will find attached a report by Jeffery Janik (STOK_CD18, 28821) and a spreadsheet with the relevant data (STOK_CD18, 29425-29427). This comprises all of the data analyzed related to this fish kill.

D. Benthic Macro-invertebrate and Periphyton Data:

1. Sampling and Location Information: The additional data which was not included is being assembled and will be provided.

2. Readable Benthic and Periphyton Data: You indicate that some of the data sheets regarding this are unreadable. If you will indicate which ones, I will see that you have readable information.

E. Maps:

1. Sample Location Maps. It is not clear what you are referring to when you reference maps. We have previously provided the aerial photo, and the blowups of that photo on which the sampling grids for soil sampling were laid out. As you indicate, you have also found maps in the field books. For example, in the Field Books for the 2005 Sediment Sampling, which you apparently overlooked, there are numerous maps. We did not keep road maps and other driving directions. I believe that we have produced all of the maps which were retained as part of our sampling program.

2. Isopach Maps. The Isopach Map is attached. See Disc STOK_CD16.

F. Sediment Data (2004/2005)

1. Sediment Core Data: There was no analysis of Cores 00 and 05. Similarly, there has not been any particle size data collected as to the Cores. As for the

Appendices, I have attached a complete copy of the reports and the appendices. See STOK_CD17 (28872-29424).

2. Incomplete Sediment Sample Data. Your letter suggests that you understand there were up to 515 possible sediment sampling locations that were considered. As indicated by your analysis, we analyzed only approximately 119 samples from these locations. You have all of the data concerning the analysis of these samples.

G. BIOSEP Bead Data: This is attached. See Disc STOK_CD17 (28851-28871).

H. Automated High Flow Sampling Data: The height and width information which you seek is in the field books.

I. QA/QC Lab Packages: We are reviewing all of the labs which you listed suggesting incomplete QA/QC reports. We will supplement to the extent that any of the reports are missing this information.

J. Chain of Custody: Other than pointing to one instance, you do not identify where there is not a complete chain of custody. In spite of that, we are conducting a complete review of this and will provide chain of custody information where needed.

We have produced a massive quantity of data and, contrary to your assertions, it has been well organized and presented in a timely manner. It is true that due to the fact that it has been produced as it has been developed, it has not been organized as it would have been had you waited for the data to be completely assembled and then produced. It is also true that we have not done the data entry task for you. But even there, we have assisted you to a great extent by providing a spread sheet with the sample identifications and locations; and consistent with that, we will provide information concerning the sample locations you asked about. I am confident that we have met not only the letter but the spirit of the Court's order.

If, after reviewing this letter, you conclude that it does not answer your questions adequately, we should schedule a meet and confer so that we have an opportunity to fairly resolve your concerns.

Sincerely,

Louis W. Bullock