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

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S OPPOSITION TO MOTION TO QUASH SUBPOENAS FOR INSPECTION AND SAMPLING OF PREMISES OWNED BY NON-PARTIES OR ALTERNATIVELY, MOTION FOR PROTECTIVE ORDER

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 ("the State"), hereby files its opposition to the Motion to Quash Subpoenas for Inspection and Sampling of Premises Owned by Non-Parties or Alternatively, Motion for Protective Order. [DKT #1306]

I. INTRODUCTION

On September 7, 2007, the State served seven poultry growing operations with subpoenas requesting inspection of their premises for the purpose of taking samples of poultry waste and/or soil samples.[1] *See* Ex. 1, September 7, 2007 Subpoenas. These subpoenas simply seek to obtain samples consistent with the Court's previous order, *see* DKT #757, at six poultry growing operations not previously sampled, and to conduct a second litter sampling at one poultry

[1] The Court has previously determined that soil, litter, and water sampling is relevant, and that certain protocols should be observed in connection with sampling. *See* DKT #757.

growing operation. The Poultry Growers' motion raises many of the same arguments unsuccessfully raised when the initial set of subpoenas was served, and for the same reasons those arguments were rejected then, they should be rejected now.[2] The few new arguments raised by the Poultry Growers are likewise without merit and provide no new grounds for quashing or altering the subpoenas. The Poultry Growers' motion should be denied in its entirety.

II. ARGUMENTS AND AUTHORITIES

A. Legal standard

A movant requesting that a subpoena be quashed or modified carries 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).

As this Court explained in its previous order on this issue [DKT #757], the standards to be applied when considering an objection to a subpoena are:

> 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 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 for 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.

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[2] The Poultry Growers adopt and incorporate by reference portions of the arguments set forth in their previous Motion to Quash [DKT #493], and likewise the State adopts and incorporates by reference the arguments set forth in Section II, subsections A, B, C, and G of its 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 [DKT #556-1].

> 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.

May 31, 2006 Order [DKT #757] *(citing Wiwa v. Royal Dutch Petroleum Co.,* 392 F.3d 812, 818 (5th Cir. 2004)).

The Poultry Growers suggest that they are entitled to special protection because they are not parties.[3] This is not the case. The plain terms of Rule 45 apply to the "person to whom it is directed," not a "party." Fed. R. Civ. P. 45. There is no general prohibition on discovery from non-parties to a lawsuit, and discovery should not be denied based merely on the nonparty status of the person subpoenaed. *See Truswal Systems Corp. v. Hydro-Air Engineering, Inc.*, 813 F.2d 1207, 1210 (Fed. Cir. 1987) ("The administration of justice would not be aided, however, by a rule relieving all persons from giving particular evidence on the sole ground that they are not parties to the suit.")

B. The evidence sought in the subpoenas is relevant.

As this Court has already held, "The Court concludes that Plaintiff has adequately demonstrated relevance." May 31, 2006 Order [DKT #757]. But rather than the logical analysis followed by the Court in its original review of the relevancy consideration, the Poultry Growers suggest that the Court should consider their argument that "[a]fter sixteen (16) months of discovery opportunities made available by this Court, Plaintiff has not provided a shred of evidence to support this allegation" that improper poultry waste disposal practices are responsible for pollution. *See* Motion to Quash, p. 4. This assertion is factually inaccurate, as

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[3] Poultry Growers cite one irrelevant case from the First Circuit, which simply holds that Microsoft could not enforce a subpoena because it sought material protected as pre-publication research, not because they were non-parties. *See* Motion to Quash, p. 4.

the State has turned over tens of thousands of pages of sampling data implicating Defendants in the pollution of the Illinois River Watershed. In addition, the Poultry Growers' position is premised on the legally flawed (and illogical) argument that sampling deemed relevant by this Court in May 2006 is no longer relevant to the case because, since the order was entered, the State has not yet made an additional evidentiary showing that the sampling is relevant. The simple fact of the matter is that the issues and allegations in this case are the same issues and allegations that this Court considered in its May 2006 order. The fact that time has passed, and discovery continues to be ongoing, does not make the same sampling this Court previously deemed relevant any less relevant. The State will set forth its evidence at trial, and it is not required to make an evidentiary showing prior to seeking relevant discovery via subpoena.

The Poultry Growers include in their relevancy argument the assertion that "the discovery accommodation this Court provided to the Plaintiff during that sixteen (16) months has been shown to be absolutely without justification, and detrimental and burdensome to the Poultry Growers." Motion to Quash, p. 4-5. Other than this unsupported claim, the Poultry Growers fail to provide any specific information about how the sampling that has taken place thus far in the case has been without justification, detrimental or burdensome to the Poultry Growers. The State followed the protocol set forth in the Court's May 2006 order, providing advance notice to the growers and making an effort to schedule sampling around their schedules. Furthermore, the State has not done any previous sampling at six of the seven poultry growing operations at issue in the September 7, 2007 subpoenas. The Poultry Growers' broad, baseless assertion regarding burden and detriment is insufficient to demonstrate that the subpoenas should be quashed or modified.

C. The need for the sampling has already been established.

The Poultry Growers' motion argues that the State has not demonstrated a need for sampling. Their argument addresses two separate types of sampling: (1) groundwater and storm water runoff sampling, and (2) soil and litter sampling.

The Poultry Growers' first argument is moot, because the State has conducted all of the groundwater and storm water sampling it plans to conduct in connection with soil and litter sampling.[4] It has no plans for this type of sampling at this time.

The Poultry Growers' second argument is also easily addressed. With regard to soil and litter sampling, the State's subpoenas mirror the subpoenas that were the subject of this Court's May 2006 order. [DKT #757] Sampling has not been performed previously at six of the seven poultry growing operations that have been subpoenaed. For these six poultry growing operations, the reasoning applied by the Court and the protocol set forth in the May 2006 order should apply to these poultry growing operations because the sampling sought is of the same sort as the sampling that is the subject of that order. As for the one poultry growing operation where sampling was conducted previously, Green Country Farms, the State seeks only litter samples, not soil samples, because the litter samples taken previously at this poultry growing operation were inadequate. A second round of litter sampling will not unduly burden this poultry growing operation, and the Poultry Growers' motion fails to provide any specific reason why taking a second litter sample would be unduly burdensome for this particular poultry growing operation. Obviously, the State would also prefer not to need to repeat this sampling, but an adequate

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[4] However, it may be deemed necessary at some point in the future to conduct edge-of-field or groundwater sampling independent of the soil and litter sampling. In the event such sampling is deemed necessary, the State will issue new subpoenas for this sampling, and would not rely upon the previously issued subpoenas.

sample is relevant evidence, and a few hours of trained personnel taking litter samples from the poultry growing operation will not create any significant interruption or detriment.

D. The State intends to follow adequate biosecurity measures during sampling.

The Poultry Growers' motion also argues that the State has not demonstrated the need to take the samples in light of the fact that incidents of LT disease were recently reported in Oklahoma. The Oklahoma Department of Agriculture, Food & Forestry (ODAFF) recently advised counsel for the State that LT has been identified at four poultry growing operations in Oklahoma. One of those poultry growing operations is among the seven where the State seeks to take samples. It is the State's plan to sample that poultry growing operation last so as to minimize the chance of spreading any infection from that poultry growing operation to others which are sampled. Furthermore, the personnel who will conduct the sampling at all seven poultry growing operations subject to the September 7, 2007 subpoenas have completed biosecurity training at ODAFF, including training on precautions to prevent potential spread of LT.

The State has adopted extensive biosecurity procedures that were used during the previous sampling effort and observed by Defendants and the representatives of the growers, including their counsel. The personnel conducting the sampling will follow all biosecurity precautions, including those pertaining to LT, and thus will not create any undue burden or risk for the poultry growing operations at which they take samples. Finally, it should not be overlooked that the Poultry Growers claimed an LT "outbreak" was underway at the time the previous samples were taken, but the sampling went forward without any LT related problems. For these reasons, LT is not a sufficient reason to quash the subpoena, or as the Poultry Growers request in the alternative, to delay the sampling.

E. The timing of the requests is reasonable.

The Poultry Growers argue that "the quiet enjoyment of their property" has been denied to them since the May 2006 order. The Poultry Growers then deliver the dramatic line that they have "lived with the constant knowledge that they were just a telephone call away from another invasion by Plaintiff for groundwater or storm water run-off sampling." Motion to Quash, pp. 6-7.

This line of argument is unsupportable. The State has never performed sampling at six of the seven poultry growing operations that are subject to the September 7, 2007 subpoenas. Thus, the poultry growing operations have experienced zero interruptions to date. Furthermore, the Court's May 2006 order sets forth various protocols designed to provide adequate notice to any poultry growing operations at which sampling will be done, and the State has worked to accommodate growers as sampling has been scheduled. The Poultry Grower's over-dramatized assertion is unrealistic, as six of the seven of them have not been subject to any prior sampling, and the interruptions caused to those growers where sampling has occurred truly have been minimal. The State has followed the Court's protocols regarding notice and made an effort to work with Poultry Growers' schedules, and there is no reason that this round of sampling will cause any greater interruption than that caused by the State's first round of sampling.

F. The Poultry Growers fail to demonstrate that the subpoenas are unduly burdensome.

The Poultry Growers argue that the seven subpoenas are unduly burdensome because "no non-party should have its life and business interrupted and the quiet enjoyment of its property destroyed." Motion to Quash, p. 7. The motion also states that the sampling causes interruptions

and aggravation.[5] *See id.* Other than these bare assertions, the Poultry growers offer no further facts or specific explanations of why the sampling at these seven poultry growing operations would be unduly burdensome or how it interrupts or aggravates the growers. This is the Poultry Growers' burden to establish, and their general, broad assertions are insufficient to support the motion to quash. The Court previously evaluated the Poultry Grower's arguments regarding burden in its May 2006 Order, and held that the sampling, when conducted with the protocols set forth in the Order, was not unduly burdensome. The State intends to follow the protocol set forth in the May 2006 Order, and thus the sampling will not be unduly burdensome to the growers.

III. CONCLUSION

As this Court has already held, the State's sampling subpoenas seek relevant evidence. What's more, poultry waste is perhaps the key piece of physical evidence in this entire case - its composition and its location are essential inquiries in this case. Nothing could be more relevant. Moreover, any concerns regarding burden have already been addressed by the Court, which has established various protocols to protect the Poultry Growers. The Poultry Growers will suffer minimal burden, and the State would be severely prejudiced if it could not obtain these samples.

Therefore, for the reasons stated herein, the Poultry Growers' Motion to Quash Subpoenas for Inspection and Sampling of Premises Owned by Non-Parties or Alternatively, Motion for Protective Order and Brief in Support, should be denied in its entirety, and the State should be permitted to move forward with the sampling set forth in the seven subpoenas served on September 7, 2007.

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[5] Poultry Growers are required to perform sampling of soil and litter on their poultry growing operations as part of their routine operations, thus the sampling the State seeks will not be an unusual or disruptive event for the Poultry Growers.

Respectfully Submitted,

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