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August 29, 2007

VIA E MAIL AND U.S. MAIL

Louis W. Bullock
Miller, Keffer, Bullock & Pedigo LLC
222 S. Kenosha Avenue
Tulsa, Oklahoma 74120

Dear Louis:

Re: Oklahoma, et al. v. Tyson Foods, Inc., et al.

This letter is intended to memorialize defendants' serious concerns with the manner in which the State has conducted its "court-ordered scientific production." In our view, the State continues to intentionally delay the production of sampling data and related documents in an effort to deprive defendants and their experts of the time necessary to review and evaluate these materials prior to the current February 1 deadline for defense expert reports. Moreover, our review of the materials produced to date have identified numerous instances of what we believe to be incomplete or missing data or materials. The defendants' concerns, outlined in more detail below, are serious matters which must be addressed immediately by the State. The State's actions have already prejudiced the defendants to the degree that some of the deadlines in the current scheduling order will need to be revisited. Any continued delays by the State in addressing these matters will only further delay the timetable for completing this litigation.

I. The State's Obligations Under the January 5, 2007 Order

In its January 5, 2007 Order, the Court ordered the State to produce "monitoring, sampling, and testing data performed by Plaintiffs and related documents" that the State had put "at issue" in the case. *See* January 5, 2007 Order at 8. The Order also required the State to produce the documents included in its "offer of voluntary production" made during oral arguments on December 15, 2006, which was to include the following category of documents requested in Cobb-Vantress' first set of written discovery:

1. For each instance of sampling, monitoring or testing:
   (a) the date and location of sampling;
   (b) the name, address, and telephone number of each person involved in sampling;

(c) the media or material sampled, and
(d) all tests or laboratory analysis performed.

2. Copies of all sampling, monitoring or testing documents, which includes laboratory results, assay reports, QA/QC documents, sampling protocols, photographs, maps and site sketches.

3. Copies of all documents relating to the scientific investigation of groundwater contamination which includes laboratory results, assay reports, QA/QC documents, sampling protocols (unless developed by an attorney), photographs, maps and site sketches.

Id. at 9.[1] The Court further ordered that the State:

> shall produce all documents identified by Plaintiffs and the Court by February 1, 2007. Within one week of producing all of the documents identified by Plaintiffs and the Court, Plaintiffs shall prepare a supplemental privilege log which identifies all documents which Plaintiffs continue to claim as privileged which Plaintiffs have not produced.

Id. at 11 (emphasis added).[2] Finally, the Court indicated that "[a]fter the defendants have reviewed the production ordered herein and the revised privilege log... the Defendants may reurge their motion to compel further production if they think it necessary and appropriate." *Id.*

II. State's "Rolling" Production

The State did not complete its production of sampling data and related documents by February 1. Rather, the State has dribbled information and materials out to the defendants in seven separate installments (February 1, February 8, March 6, May 1, May 21, July 2 and August 7). In recent conversations, you have confirmed that the August 7 production is not the last production planned by the State. You further indicated that the State's "court-ordered production" is expected to continue over the next several months. The State has refused to indicate when this production will be complete.

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[1] The Court also ordered that the documents submitted by the Plaintiffs for *in camera* inspection by the Court were to be produced as being included within the Plaintiffs' offer of voluntary production. *Id.* at 10.

[2] This deadline, as it pertained to the production of field notebooks, was extended to February 8, 2007 by an unopposed motion.

In your February 1, 2007 production, you indicated that "[o]n an ongoing basis, we will be supplementing this production on the first of each month and data not included in this production will be produced as the QA/QC information is completed." *See* February 1, 2007 letter from L. Bullock to R. George at 1. Nothing in the Court's January 5, 2007 Order allows the State to withhold monitoring, sampling and testing data until it has been fully QA/QC'd. Instead, the State should have produced all monitoring, sampling and testing data by February 1 for existing data, and should have produced, on an ongoing basis, additional data as it was generated. Once QA/QC packages and validated data reports were generated, the State should then have supplemented its earlier production.

The work of Defendants and their experts in reviewing the State's sampling data and test results can not begin in earnest until we have a complete set of the State's data. The end result (and likely the goal) of the State's never-ending, piecemeal, rolling production of sampling data is to limit defense experts to one or two months (at best) to review sampling data and test results which it took the State and its experts almost two years to generate. This is unacceptable to the defendants.

The State, therefore, should produce any and all monitoring, sampling and testing data, and related documents currently in its possession that have not yet been produced. Going forward, the State should produce any new data in its possession on the first of each month. The State should then supplement its production of any previously produced data as QA/QC reports and validated data reports are generated.

III. Categories of Sampling Data and Materials Still Being Withheld by the State

Obviously, defendants do not know the precise nature of all data and materials which the State has withheld. However, based on our prior conversations and information otherwise available to defendants, we are aware of several categories of data, described below, which the State is continuing to withhold. This data and related documents must be produced immediately.

A. DNA/Microbial Source Tracking Test Results

We have discussed on numerous occasions the fact that the State has collected and analyzed samples under a protocol which the State believes will allow it to "track" or "fingerprint" substances found in water back to poultry litter application sites.[3] In these conversations, the State has boasted about the "revolutionary" nature of this work. It is obvious

[3] *See* March 5, 2007 letter from R. George to L. Bullock; May 1, 2007 letter from L. Bullock to R. George; July 3, 2007 e mail from R. George to L. Bullock; August 2, 2007 e mail from Richard Garren to R. George.

that the State views this work as central to its "scientific" case against the defendants. Despite all the rhetoric about this work, the State has refused to provide the defendants with any of the test results or documents related to the collection, handling or testing of samples under the State's "fingerprinting" protocol. Any continued withholding of these materials is highly prejudicial to the defendants.

Over the course of our discussions, the State has consistently promised to produce this data and related materials but the projected date of production varies with each conversation. Initially, you orally promised to produce this data "before the summer" of 2007. However, in your May 1, 2007 letter, you stated that "the best that I can tell you at this time is that we are within thirty to sixty days of having the [method] completed. As we have promised, once the testing methodology is completed, it will be provided to you." *See* May 1, 2007 letter from L. Bullock to R. George. Sixty days later, on July 3, I wrote to you again to determine the status of the State's promised production. In that e mail, I again requested a copy of the revised Standard Operating Procedure (SOP) related to the State's DNA investigation, which you had indicated would be produced soon. In addition, I reiterated our request that you immediately produce the field collection, chain of custody and laboratory analysis documents related to any prior sampling or testing that may have occurred as part of the DNA investigation. *See* July 3, 2007 e mail from R. George to L. Bullock.

In an August 2, 2007 e mail from Richard Garren, the State indicated that it will not produce the SOP or supporting data for its DNA investigation until sometime in September. Mr. Garren stated that he information would be withheld until "we [the State] have determined the extent to which it is possible to track poultry waste using DNA," and that it would only be produced at this indefinite future date if the parties agree upon a "suitable protective order" because the "method developed for using DNA to track poultry waste through the environment is proprietary and warrants particular protection." *See* August 2, 2007 e mail from R. Garren to R. George and M. Bond. Again, as explained above, the State cannot withhold the SOP or data that has been collected as part of the DNA investigation, on the grounds that the State has not yet determined whether it is useful data. Further, we do not agree that the Court's January 5, 2007 Order requires the parties to enter into a protective order before the State must produce this data.

The data related to the State's purported "DNA investigation" has been withheld for far too long. It must be produced immediately.

B. Sediment Geoprobe Groundwater Sampling Data

The defendants recently learned from a source outside of this lawsuit that the State has conducted sediment or geoprobe groundwater sampling events in the Oklahoma portion of the watershed for which we have received no data. I wrote to you about this subject in my letter of July 9, 2007. Attached to that letter was a map showing the locations where these samples were

reportedly collected. The State still has not produced the data and documents related to these sampling events.

In his August 2, 2007 e mail, Mr. Garren confirmed that the samples at issue were geoprobe groundwater samples collected pursuant to the SOP at Bates Number STOK 0022191. *See* August 2, 2007 e mail from R. Garren to R. George. In that e mail, Mr. Garren stated that the geoprobe data will be produced "after the lab has done its analysis, and CDM's internal lab has completed its QA/QC." *Id.* As explained above, the Court's January 5, 2007 Order does not allow the State to delay production pending completion of the QA/QC process. Instead, the State should produce this geoprobe data now, and should supplement its production once the QA/QC process is complete.

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

On February, 8, 2007 the State produced a revised privilege log. Included on that privilege log were the following items:

Item No. 213. Digital data, GIS (ArcView) files for the Illinois River Watershed and immediately surrounding areas from 2004 and 2005, authored by Lithochimeia, Inc.

Item No. 214. Digital data, analysis of agricultural census data for Arkansas and Oklahoma, authored by Lithochimeia, Inc.

Item No. 215. Field notes, sediment sampling locations from 2005, authored by Lithochimeia, Inc.

Item No. 216. Photographs and digital photographs with included text, sediment sampling locations from 2005, authored by Lithochimeia, Inc.

Item No. 217. Standard Operating Procedures (SOPs), Section 5.3 and portions redacted.

Item No. 218. Manure sampling protocol, Section 5.3 and redacted portions.

Pursuant to the Court's January 5, 2007 Order, GIS data, agricultural census data, sediment sampling locations, SOPs and sampling protocols must be produced. The State has offered no valid justification for why this information can be withheld in light of the Court's January 5, 2007 Order The State should produce this information immediately.

D. QAPPs and Validated Data Reports

Pursuant to the Court's January 5, 2007 Order, the State was required to produce all sampling, monitoring or testing documents, including documents relating to quality assurance and control and sampling protocols. The State, however, has not produced the following types of documents to date:

1. **Quality Assurance Project Plans.** We have not yet received a copy of the State's Quality Assurance Project Plans (QAPPs) for the sampling conducted to date.

2. **Validated Data Reports.** We have not yet received a copy of any validated data reports.

The above-described materials should be produced immediately.

IV. Incomplete Productions or Missing Information

In addition to the categories of information described above which the State has withheld entirely, we have identified numerous "gaps" or instances of incomplete or missing information within the documents already produced. As you know, the State has conducted its "rolling" production of "court-ordered" materials in an unorganized manner. We believe this disorganization by the State is intentional and designed to hamper the defendants' ability to efficiently review and analyze these materials. Nonetheless, defendants have done their best to wade through the shuffled morass of documents to confirm that the production is complete. We are disappointed to have now realized that the production is far from complete. The reminder of this letter describes areas of the State's production which appear to be incomplete:

A. GPS Coordinates and Sampling Location Information

Pursuant to the Court's January 5, 2007 Order, the State must provide the location of sampling for each instance of sampling, monitoring or testing.

Recall that defendants first raised concerns about the completeness of the State's production of sampling locations in February, 2007. *See* February 28, 2007 letter from R. George to L. Bullock. I wrote to you again concerning this subject of April 24, 2007. In response to those concerns, you finally responded in an April 25, 2007 letter that "with only some minor exceptions, we are confident that our production is complete as to coordinates" and that you would be "supplementing our previous production with coordinates from our sample sites…" but the "only exception to this will be the coordinates for the sediment sampling. It will be produced in the following month's production. The Bates numbers for the field notes

concerning that sediment sampling are contained in OK-PL 5864-5946." *See* April 25, 2007 Letter from L. Bullock to R. George.

It was not until May 21, 2007 that the State finally produced additional sampling location information. *See* May 21, 2007 e mail from L. Bullock to R. George. However, to date, we are still missing GPS coordinates for the sediment sample locations identified on the State's privilege log and discussed in Section III(C) above and for the following samples:

Sample Id	Sample Id
SP-Jones-012307 filtered	GW-Madwell-012307 Non-Filtered
GW-Kindle-012307 Filtered	GW-McAlpine-012307 Non-Filtered
GW-Madwell-012307 Filtered	GW-Reese-012307 Non-Filtered
GW-McAlpine-012307 Filtered	GW-Jones-012307 Non-Filtered
GW-Reese-012307 Filtered	GW-Beaver-012207 Non-Filtered
GW-Jones-012307 Filtered	GW-IGO-012207 Non-Filtered
GW-Beaver-012207 Filtered	GW-McCoy-012207 Non-Filtered
GW-IGO-012207 Filtered	GW-E-Ames-012207 Non-Filtered
GW-McCoy-012207 Filtered	EOF-222-041307
GW-E-Ames-012207 Filtered	EOF-259-041307
SP-Jones-012307 Non-Filtered	RS-68-032907
GW-Kindle-012307 Non-Filtered	SD-001
SD-002	SD-03
SD-04	SD-04
SD-05	SD-07
SD-08	3*
0.02 Spring*	37824*
13861*	65461*
RS-0000114	RS-0000176
RS-0000222	RS-0000244
RS-0000322	RS-0000333
RS-0000337	RS-0000413
RS-0000419	RS-0000450
RS-0000675	RS-0000711

Sample Id	Sample Id
RS-0000712	RS-0000785
RS-0009010	RS-0000017
RS-0000105	RS-0000356
RS-0000512	RS0000798

Samples denoted with an asterisk (*) in the above chart were identified in field notebooks produced by the State. *See* STOK0000937-STOK0001037. If the State has produced GPS coordinates for the samples identified in the table above, please direct us to where this information exists. Otherwise, the State must supplement its earlier production with the GPS coordinates for these sample locations.

In our attempt to review the data produced to date, it appears to us that different sample identifiers were used by the State for the same samples. The same sample may be referred to as a different number when used in a field notebook, compared to how it is reported in a lab sheet, and/or compared to how it is described when additional information is produced about that sample (such as GPS coordinates). For example, it appears that Sample Number 16837 in the State's field notebooks (*see* STOK0000937-STOK0001037), is referred to as Sample Number GW-40 by the State in relation to the lab reports and GPS coordinates for that sample. The use of multiple sample identifiers has prejudiced the defendants in their review of the data produced to date. While we understand that the State has produced some correlation information, to match up different sample identifiers, we do not believe the State has provided such correlation information for all samples and sample locations. Obviously, the State and its consultants have a key or chart that correlates sample numbers used in field notebooks with sample numbers shown on lab reports. Please produce a complete correlation table for all samples.

B. Missing SOPs

While the State has produced a number of written SOPs for the various sampling and testing conducted in the watershed, there are several types of work for which we have sampling data but no governing SOP. These include:

1. sediment cores collected by the State in 2005 (STOK0019558)

2. the sub-bottom survey conducted by the State (STOOK0019501)

3. the 2004 sediment grab sample collected by the State (STOK0019461)

4. the BIOSEP Bead data collected by the State (STOK0020402)

5. the sediment toxicity samples collected by the State (STOK0015176) and

6. the DNA "fingerprinting" or microbial source tracking program.

If these SOPs exist, they must be produced.

C. Fish Kill Data

Field notebooks produced by the State refer to a fish kill in the Illinois River in April 2006, and entries note that algae, water, and fish samples were collected. The State should have produced all chemical analyses for the following samples, as well as all other fish data and fish information collected in the IRW:

ILL-FK-A1 (STOK0000089)
ILL-FK-P1 (STOK0000089)
ILL-FK-A2 (STOK0000089)
ILL-FK-P2 (STOK0000090)
ILL-FK-P3 (STOK0000090)
ILL-FK-P3 (STOK0000090)
ILL-FK-A3 (STOK0000090)

If the State did produce this information, please direct us to where the information exists. Otherwise, the State must supplement its earlier production to include this information.

D. Benthic Macro-invertebrate and Periphyton Data

1. Complete Sampling and Location Information for Benthic Macro-invertebrates. The State's SOP 7-3 (Benthic Macro-invertebrate Sampling) indicates benthic organism collection was planned using fine-meshed dip nets and benthic seines. The 2005 benthic macro-invertebrate field data sheets (STOK0016943–STOK0017146) contain selected handwritten notes such as "300 individuals picked from riffles" and "1 m^2 kick net" indicating that individual benthic samples were collected at these stations. While we have received notebooks containing tallies of benthic invertebrates at the family taxonomic level (STOK0000170–STOK0000256), it appears that we have not received complete benthic macro-invertebrate data. The State must produce all sampling and location information for each of these benthic collection sites and for all other benthic organism studies.

2. Readable Benthic and Periphyton Data. The handwritten notes produced regarding benthic and periphyton surveys conducted by the State are unreadable. We therefore

request copies of the State's electronic version of these survey data for the following sample locations and any other sample locations where periphyton or benthic data were collected:

Periphyton and Rapid Periphyton Survey Data Station ID	**Benthic and Rapid Bioassay Data Station ID**
BS-08	BS-28
BS-117	BS-62A
BS-208	BS-HF04
BS-28	BS-HFS-22
BS-35	BS-REF2
BS-62A	BS-REF3
BS-68	
BS-HF04	
BS-HF28A	
BS-HFS-22	
BS-REF1	
BS-REF2	
BS-REF3	

E. Maps

The State must produce all maps created related to any sampling, monitoring or testing or conducted, including the following:

1. Sample Location Maps. The field notebooks produced by the State indicate that maps were available showing the station locations where samples were collected, but the maps were not produced. The State must produce any maps identifying sample locations.

2. Isopach Maps. With respect to the sub-bottom survey conducted by the State, the State has not yet produced the Isopach map that is mentioned in the electronic file produced by the State (Tenkiller Report.rtf (at pg. 1)).

F. Sediment Data (2004/2005)

It appears that the State has failed to produce complete sediment core data and other sediment sample data. The State must produce the following data, to the extent it exists:

1. 2005 Sediment Core Data. With respect to sediment cores collected by the State in 2005, the State has not yet produced:

- data and sampling information for cores 00 and 05 (which are mentioned in field notes) (STOK0019572);

- particle size data for the cores; and

- the following appendices for the 2005 sediment core data reports:
  Appendices 1, 2, 3, 6 (Core 1) (STOK0019574)
  Appendix 6 (Core 2) (STOK0019651)
  Appendix 2, 3, 6 (Core 3) (STOK0019774)
  Appendix 2, 3, 6 (Core 4) (STOK0019859).

2. **Incomplete Sediment Sample Data.** It appears that we have not received all of the sediment sample data collected by the State. The identification numbers for the sediment samples go up to SD-515, suggesting that 515 samples were taken, but we only received data for approximately 117 sediment samples. Please confirm that only 117 sediment samples were analyzed or produce the results for the remaining 398 sediment samples immediately.

G. BIOSEP Bead Data

The field notes we received indicate that BIOSEP bead data has been collected (STOK0020402), but it does not appear that the State has produced this BIOSEP bead data. Pursuant to the Court's January 5, 2007 Order, this data should have been produced. The State, therefore, should either direct us to where this data is in the productions made to date or supplement its earlier productions with this data.

H. Incomplete Automated High Flow Sampling Data

In SOP 2-1, the State references its plan to use ISCO automated samplers to: 1) directly measure and summarize flow-weighted concentrations of key pollutants of concern associated with runoff events in small watershed tributaries, and; 2) investigate potential correlations between these concentrations and land use characteristics, poultry operations, and storm event hydrograph characteristics. While we received velocity data from this sampling effort, we have been unable to locate storm hydrographs that provide height and width information or direct width measurements taken at the ISCO samplers in the State's production. Without this information, it is impossible to interpret the State's reported results. The State, therefore, should either direct us to where this data is in the productions made to date or supplement its earlier productions with this data.

I. QA/QC Lab Packages

While we recognize that certain QA/QC information has been produced by the State, it does not appear that the State has produced QA/QC reports for all samples analyzed for each lab. The State must direct Defendants to where complete QA/QC information may be found within the State's productions to date or immediately supplement its production with QA/QC lab packages for each sample analyzed.

J. Chain of Custody Forms

It appears that the State has not produced complete chain-of-custody forms for its labs (GEL, Aquatic Research, Inc, Aquatec Biological Services, Great Lakes Environmental Center, Alpha Woods Hole Analytical, Water's Edge Scientific, Jeff Janik, and Reservoirs Environmental) for all samples collected and analyzed. For example, attached to this letter is a lab report from Great Lakes Environmental Center for which we are unable to locate a corresponding chain of custody form. This is merely one example of many instances in which we have been unable to find chain custody forms. The State must produce all chain of custody forms for all samples analyzed or direct us to where they are located in the information produced to date.

Again, we recognize that it is possible that we have overlooked some data that may have been produced by the State due to the format in which the information was produced. The defendants therefore request the opportunity to meet and confer with the State about these issues next week. To the extent the State has already produced any of the information described above, we ask that you please direct us to where the information is located in the documents and files the State has produced to date. To the extent the information described above has not been produced and the State is unwilling to produce it immediately, we regrettably will have no choice but to file a motion to compel compliance with the Court's January 5, 2007 order.

We would appreciate your response to these concerns as soon as possible including, of course, a proposed date and time when we might meet and confer concerning these issues. I look forward to your response.

Sincerely,

Robert W. George

Cc: Counsel of Record (via e mail)