David P. Page
222 S. Kenosha
Tulsa, Oklahoma 74120
Tel 918-743-4460
Fax 918-743-6689

Miller Keffer & Bullock, PC

Fax

To:	Roger Olson	**From:**	David P. Page
Fax:	(303) 293-8236	**Pages:**	7 including cover page
Phone:		**Date:**	September 14, 2005
Re:	Oklahoma Poultry	**CC:**	

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

● **Comments:**

Attorney-Client
Privileged Work Product

OPL – STRATEGY/GUIDELINES FOR PRELIMINARY INJUNCTIVE RELIEF

I. INTRODUCTION

Goal: an injunction that there will be no land application of poultry waste above agricultural limits and Defendants must properly dispose of and manage waste (not growers).

II. LEGAL BASIS FOR PRELIMINARY INJUNCTION

Proof: Ownership of Waste

[legal authorities that this is Integrator's waste]
[proof/facts establishing ownership]

Fed R. Civ. P. 65: A preliminary injunction will issue if the moving party establishes:

(1) irreparable injury will be suffered unless the injunction issues; [environmental injury can seldom be remedied by money damages and is often permanent or long lasting – therefore, the balance of laws usually favor an injunction to protect the environment] *Amoco Production Co. v. Village of Gabrill*, 480 U.S. 531, 545 (1987)' *Castron Co. Bd. Of Comm'rs v. U.S. F & W Service*, 73 F.3d 1429, 1440 (Cir.1996) and *Wilson v. Amoco Corp.*, 989 F Supp. 1159, 1177, (D. Wyo. 1998), Citizens v. U.S., 731 F.Supp 970, 996 (D. Colo. 1989);

(2) the threatened injury outweighs the damage the injunction may cause the opposing party;
[what are Defendants' damages?]

(3) the injunction is not adverse to the public interest; and

(4) there is substantial likelihood of success on the merits of Plaintiff's claim.
[if claim is based on – RCRA - need to prove elements and waste – imminent and substantial endangerment]

Herman v. Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003) (quoting Resolution Trust Corp v. Cruce, 972 F.2d 1195, 1198 (10th Cir. 1992)); Star Fuel Marts, LLC v. Sam's East, Inc., 362 F.3d 639, 651 (10th Cir. 2004).

Proof: There are heightened proof requirements for:

(1) a preliminary injunction that disturbs the status quo;

(2) a mandatory vs. a prohibitory preliminary injunction; and

(3) a preliminary injunction that affords movant substantially all of his relief.

[NOTE: Our case includes all of these elements that would require heightened proof.]

(4) No proof of actual injury required. It is enough to show that damage or endangerment "may" exist. Wilson v. Amoco Production, 878 F. Supp 1091, 1092 (D. Wyo. 1998).

(5) But, a court should be cautious and will not find an imminent and substantial endangerment exists if the risk of harm is remote in time, speculative in nature and de minimis in degree. *Id.*

RCRA Citizen's Suit: To prevail on action for preliminary injunction under RCRA: follow Wilson v. Amoco Corporation, 989 F. Supp 1159 (D. Wyo. 1998).

III. PROOF OF IMMINENT AND SUBSTANTIAL ENDANGERMENT

The type of "imminent" injury that can be collected and used in the near term concerns injuries caused by bacteria, eutrophication (THMs and D.O.), sediment toxicity containing high arsenic, and violation of water quality standards (edge of field metals, phosphorus, and other impaired water segments (§303(d)) listings. The proof will require showing the release of hazards from poultry waste land application, the casual connection between the release and injury and the injury or that the release may cause an injury. The following is an outline of the proof we can develop with tasks associated with development.

A. Bacteria Injury

The bacteria we have focused on are: campylobacter (poultry/avian dominant), salmonella, e.coli, total coliform, fecal coliform, enterococus and staphylococcus.

(1) Proof of Release and Transport from Land Application and Proximity to Injury

(a) Literature/Articles. Identify and review articles describing bacteria presence and content in poultry manure, litter and land applied fields, and near streams and rivers. [These articles would be relied upon by expert (Olson, Harwood) to testify concerning release and presence in environment in proximity to identified and potential injures.]

(b) Dr. Rod O'Connor Samples/Analysis. CDM to obtain Dr. O'Connor waste and soil analysis. Evaluate whether Dr.

O'Connor could/should testify directly or Olson/Harwood use O'Connor's data to support their opinion on release.

(c) Edge of Field Samples/Analysis. Use existing/current CDM analysis data (with evidence from investigators concerning recent land application on adjoining field for samples and evidence of location of active poultry houses) to show bacteria in surface water runoff. Proximity of field plus principle component analysis by CDM to show bacteria is associated with land applied poultry waste.

Additional Tasks: (i) Develop new campylobacter analysis methods and collect new edge of field samples and; (ii) complete CDM poultry waste and soil analysis project (waiting on Dept. of Agriculture).

(d) Instream Samples and Analysis. Use existing/current CDM analysis data and USGS data – base and high flows – to show presence of bacteria and principle component analysis and high flow samples to show relationship of bacteria with poultry waste. Use historical USGS bacteria data to show "history" of probable releases.

(e) Tenkiller Lake Samples and Analysis. Use existing/current CDM data plus historic USGS data to show presence of bacteria in lake water.

(f) Sediment Sampling and Analysis. Use current/existing CDM data on river and lake sediment analysis along with principle component analysis to show that bacteria originated from land applied poultry waste.

(g) Spring Water Samples and Analysis. Use current/existing CDM data that shows bacteria in spring water.

(h) Location of Existing Active Chicken Houses, Recent Land Application, and Amount and Location of Land Application. Testimony of expert (?) connecting and relying on investigator documented active poultry houses and recent land application. Also, computation of the amount of land application in 2005 as well as application proximity to active chicken houses using active chicken houses count and industry information as to number of poultry, flock and amount of manure produced. The concept is to use the data we have about active houses, industry information on the number of poultry per house and waste generated with an industry expert who would testify as to the amount of waste generated and industry practices to land apply

waste near the poultry house. Opinion will quantify the amount of land applied waste recently and annually a applied in the IRW. Also, the expert would testify that waste is applied at or near where it is produced.

(i) Groundwater Infiltration. Geologist (hydrologist) (expert) to testify that the karst geology in the IRW allows for infiltration of contaminants of concern (COC). Land applied poultry waste will infiltrate groundwater in the area and show itself in springs. Additionally, this groundwater (with the contaminants) will travel to surface waters.

Task: Obtain well water samples and analysis in areas of contaminated springs and GBS victims.

(j) Source of Bacteria. Dr. Jody Harwood will testify that the types and volume of bacteria in environment is likely from land applied poultry waste and viruses associated with it.

[PCR analysis may be used if we obtain poultry manure samples.]

(2). Proof of Injury

(a) WQ Standard Comparison. Expert (Olson) to compare Oklahoma WQ standard to contaminant levels for bacteria analyzed in current CDM samples from lakes and streams that exceed the standards.

(b) Risk Assessment. Expert (Teaf/Coleman- HSWMR) to testify concerning risk and hazard of recreation users exposure to documented levels of bacteria in sediments, river waters and lake waters.

(c) Non Attainment Listing. Testimony from DEQ or expert (Olson) concerning IRW waters that do not meet Oklahoma WQ standards and non-attaining use as reported in Oklahoma's W.Q. Assessment Integrated Report (303(d) Report)).

(d) GBS Incidents. Development of the Rutherford evidence that the area of the IRW has seen a significant increase of Guillain Barre Syndrome (GBS). With HSWMR and/or an Epidemiologist, establish that GBS is caused by bacteria (campylobacter) associated with poultry waste and that the increase of this poultry litter bacteria may have resulted in numerous new cases of GBS and/or may lead to many more new cases of GBS.

(e) Other Epidemiology. Possible development through local clinics of other increased disease/sickness due to high bacteria levels.

(f) Well-Groundwater. Use spring data plus new data form wells in the area to establish high bacteria levels in groundwater. Use HSWMR risk assessment to show hazard of use of such water in potable applications, i.e., drinking, bathing, cooking, etc. Also compare groundwater analysis with groundwater W.Q. Standards (OAC 785:45-7).

B. Eutrophication Injury

(1) Proof of Release and Transport from Land Application and Proximity to Injury

(a) Literature/Articles. Identify and use articles that discuss Phosphorus in poultry waste and its transport to surface and groundwater. (Expert testimony uses again).
- Obtain and add sampling and analysis of poultry waste (Dept. of Agriculture).

(b) Edge of Field, Instream and Lake Tenkiller (water and sediment) Samples and Analysis. Use all data collected by CDM and using principle component analysis to establish that the Phosphorus in chicken waste is found in Lake Tenkiller.

(c) Volume of Phosphorus Contribution. Need expert to review data on amount of poultry waste that is produced and land applied in the IRW and an opinion that a substantial amount of Phosphorus in Tenkiller is from land applied chicken waste.

(d) Eutrophication and Low D.O. and THMs. Expert Welch and/or Cooke to testify that low D.O. is a result of Phosphorus loading in lakes and THMs are a result of high phosphorus, algae and reaction of chlorine to lake water.

(2) Proof of Injury.

(a) Biologist Expert. Expert (Tony Gendusa – CDM?) to testify as to affects of low D.O. and violation of W.Q. Standards, as to diversity and abundance of lake fish and wildlife.

(b) Toxicologist. HSWMR (Teaf) to testify concerning data of THM formation potential, DEQ reporting data, and other samples/analysis to show, with a risk assessment for THMs associated with drinking water from the public water supplies.

Attorney-Client
Privileged Work Product

C. **Sediment Injury (Toxicity)**

(1) Proof of Release and Transport: [Use same evidence as used for bacterial and eutrophication.]

(2) Proof of Injury

(a) Use expert (Olson) – violations of sediment standards in areas of data collected by CDM. Add biologist expert testimony of effects on biota resulting from sediment criteria exceedances.

(b) Use biologist expert (CDM) to discuss sediment survey and toxicity testing results.

D. **Water Quality Injury**

(1) Proof of Release and Transport: [Use same evidence as above.]

(2) Use CDM (Olson) to testify that current sampling and analysis data show poultry waste is violating Oklahoma W.Q. Standards.

(3) Use DEQ to describe IRW segments on non-attainment (303(d)) list.

DRAFT