

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

WATERKEEPER ALLIANCE, INC.

Plaintiff,

v.

ALAN AND KRISTIN HUDSON FARM,  
*et al.*

Defendants

Civil Action No. WMN-10-487

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S  
FIRST MOTION TO COMPEL PRODUCTION**

Defendants Perdue Farms Incorporated ("Perdue") and Alan and Kristin Hudson Farm (the "Hudsons" or "Hudson Farm") (collectively "Defendants"), by their undersigned counsel, submit this Opposition to Plaintiff's First Motion to Compel Production.

**INTRODUCTION**

This case is a citizen suit for penalties and injunctive relief brought by the Waterkeeper Alliance, Inc. ("Plaintiff") under the citizen suit provisions of the federal Clean Water Act ("CWA"). Plaintiff's present motion seeks Defendants' work product, in the form of environmental sampling data generated from samples collected at Hudson Farm.

Plaintiff has misrepresented the scant facts supporting its motion. First, to be absolutely clear, Defendants *have* provided Plaintiff with all sampling data and test results generated prior to December 17, 2009, the date of its "Notice of Intent to Sue" letter. Any test results or sampling data generated after that date constitutes classic work product, and is protected from disclosure. Second, Plaintiff incorrectly states that Defendants have "discharged pollutants into waters of the United States." That conclusion is based on the also incorrect conclusion that

"Plaintiff's sampling data show[s] the discharge of dangerously high levels of fecal coliform, E. coli, nitrogen, phosphorous, and ammonia from the Hudson Farm Concentrated Animal Feeding Operation ("CAFO")." (Pl.'s Mtn. at 2.) Plaintiff's data demonstrate no such thing; they establish nothing more than the presence of pollutants in a pool of water, which has many potential sources aside from the Hudson CAFO. Moreover, that pool of water has no connection to waters of the United States.

Specifically, Plaintiff seeks from Defendant Hudson Farm test results from water samples taken on January 26, 2010. Plaintiff cannot show substantial need for those data, however, because Plaintiff has possession of testing data generated by MDE, which tested the water at precisely the same locations, and at precisely the same times.

Plaintiff also wants to know whether Defendant Perdue did any sampling or testing of anything after December 17, 2009. Plaintiff seeks to find out whether counsel for Perdue thought to test or sample anything, and, if so, what counsel wanted sampled, when he wanted it, where he wanted it, and how he wanted it sampled and/or tested.

Plaintiff also complains that Jeff Smith was not allowed to answer questions at his deposition pertaining to sampling. (Id. at 8.) Any efforts undertaken by Jeff Smith, related to sampling or not, with respect to the Hudson Farm were at the direction of counsel, and in anticipation of litigation, as discussed *infra*.

By way of background, it has been well over a year since Plaintiff's notice letter, and a year since this case was filed. Plaintiff's present motion does an adequate job of describing – with a tone of indignation – how it has tried to convince Defendants to hand over protected work product, in the form of environmental sampling results. However, the most significant fact underlying Plaintiff's present motion, which it fails to disclose, is that Plaintiff has never sought

access to Hudson Farm to conduct environmental sampling of its own; on the only occasion when Plaintiff sought access, for other purposes, the requested access was given. Plaintiff has not sought the Court's assistance, nor undertaken any additional efforts to gain entry for sampling. In essence, Plaintiff has done *nothing* but delay, and now – at the eleventh hour – claims to have a substantial need for Defendants' work product.

Plaintiff's motion is woefully inadequate, lacking in substance and legal foundation. While Plaintiff asserts that withheld sampling data is "highly relevant," it does not say why: it makes no specific allegation about when Defendants sampled or what Defendants sampled, nor provides any information justifying its alleged substantial need for Defendants' work product. Plaintiff claims "lack of access to the Hudson Farm during the relevant periods," but does not bother to identify when those were.<sup>1</sup> This motion is a transparent attempt to poach Defendants' work product, and to take improper advantage of Defendants' careful case preparation utilizing consulting experts. That is exactly what Federal Rules 26(b)(3) and 26(b)(4) – and supporting case law – are designed to protect against.

### DISCUSSION

Plaintiff's motion describes its discovery requests at length. For the purposes of this motion, Defendants will assume that the alleged sampling results are covered by those requests. Plaintiff claims that the sampling results are not work product, and that even if they are protected, Plaintiff has a substantial need and is entitled to them. Plaintiff is wrong on both counts. First, sampling results generated at the direction of counsel, in anticipation of litigation, constitute protected work product under Federal Rule 26(b)(3), or are protected under Federal

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<sup>1</sup> Defendants are surprised by Plaintiff's lack of foundation, and cannot help wondering whether Plaintiff is planning to introduce new evidence and arguments in its reply brief, in order to deny Defendants the opportunity to fully assess and respond to Plaintiff's allegations. Should that be the case, Defendants reserve the right to file a limited surreply to address such issues.

Rule 26(b)(4)(D) as consulting expert information. Second, Plaintiff is not entitled to take unfair advantage of Defendants' effort and expense.

**I. Plaintiff's Motion to Compel Should Be Denied Pursuant to Local Rule 104.8(a)**

As an initial matter, Plaintiff has delayed far beyond the time limit allowed by Local Rule 104.8(a) to seek to compel production. Pursuant to Local Rule 104.8(a), "[i]f a party who has propounded...requests for production is dissatisfied with the response to them and has been unable to resolve informally (by oral or written communications) any disputes with the responding party, that party shall serve a motion to compel within thirty (30) days of the party's receipt of the response." Plaintiff served the requests that it relies upon on October 15, 2010, and November 4, 2010. Defendant Perdue replied to Plaintiff's first set of requests on November 17, 2010, and asserted the work product protection in response to Request No. 20 for "[a]ll documents or communications concerning, referring or relating to environmental sample data from Hudson Farm collected, stored, received or otherwise obtained by Perdue." (Pl.'s Mtn. at 4; Ex. 1 to Pl.'s Mtn. at 11.) If there remained any ambiguity as to whether Defendants considered sampling results to constitute work product, that ambiguity was cleared up by Mr. Ritchie's letter dated January 17, 2011, which explicitly asserted the work product protection with respect to sampling information. Plaintiff filed its motion to compel on March 7, 2011, nearly four months after Defendant Perdue served responses to Plaintiff's first set of requests, and two and one-half months after Defendant Hudson Farm did so.

**II. Sampling Data Generated At the Direction of Counsel, In Anticipation of Litigation, Unequivocally Constitutes Work Product Under Rule 26(b)(3).**

Plaintiff's motion cuts to the heart of the work product protection, as it not only seeks to force the disclosure of fact work product, but also threatens to reveal the mental impressions of

Defendants' litigation counsel. The work product doctrine was first recognized in *Hickman v. Taylor*, where the Supreme Court stated:

It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. *Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.* That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interest.

329 U.S. 495, 510-11 (emphasis added). "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Id.* The principles articulated by *Hickman* were codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, which states that "a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative..." As recognized by the universe of authority discussed herein, engaging investigators and consulting experts – and testing facts, theories and allegations – is essential to proper and thorough case preparation.<sup>2</sup> Defendants should be protected from unfair and unjustified intrusion into this process.

A. Sampling Information Reflects the Mental Impressions of Defense Counsel, and Constitutes More than Mere "Facts."

Despite Plaintiff's assertions to the contrary, information pertaining to sampling conducted post December 17, 2009 constitutes more than just "facts." In *Lefkoe v. Jos. A. Banks Clothiers*, 2008 WL 7275126 at \*12 (D. Md. May 13, 2008), this court rejected an attempt to uncover facts regarding counsel's investigation in anticipation of litigation, because they revealed counsel's mental impressions. *Lefkoe* held that "[t]he identity of persons interviewed in

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<sup>2</sup> In *United States v. Nobles*, the Court extended the doctrine to "protect material prepared by agents for the attorney as well as those prepared by the attorney himself." 422 U.S. 225, 238-39 (1975).

anticipation of litigation generally is protected under the work-product doctrine," and cited authority discussing "clearly protected work-product information, such as the particulars of any and all contacts with Plaintiff's attorneys or investigators including dates of interviews, locations of interviews, and the substance of all communications." *Id.* (internal citations omitted).

Disclosure of analogous "factual" sampling information would inevitably teach opposing counsel what locations, sampling methods, pollutants and other information defense counsel considers essential, and how it is preparing for trial. As demonstrated by *Lefkoe*, factual information such as the identity of witnesses interviewed, like the dates of interviews, the location of interviews, and the dates, locations and substance of sampling results, are married to litigation counsel's case strategy and preparation. Plaintiff's theory that "facts" are "facts" – all of them equally discoverable – is a gross simplification that misconstrues a complicated set of legal principles. In *In re MTI* – cited by *Lefkoe* – the court stated:

...[T]he identity of witnesses interviewed by opposing counsel is protected. The rationale behind this distinction is that if the identity of interviewed witnesses is disclosed, opposing counsel can infer which witnesses counsel considers important, revealing mental impressions and trial strategy. Such evaluations, impressions, and strategy are at the heart of the work product rule. The identity of witnesses is subject to qualified protection and thus opposing counsel may obtain disclosure based upon the requisite showing of need and undue hardship.

2002 WL 32344347, at \*3 (C.D. Cal. June 13, 2002) (citing *United States v. Dist. Council of New York City & Vicinity of United Broth. of Carpenters & Joiners of Am.*, 1992 WL 208284, at \*10 (S.D.N.Y. Aug. 18, 1992) ("How a party, its counsel and agents choose to prepare their case, the efforts they undertake, and the people they interview is not factual information to which an adversary is entitled.")).

Indeed, courts have recognized that scientific testing information *itself* – not just opinions about those data – constitutes protected work product. In *Kimberly-Clark Worldwide v. First*

*Quality Baby Products*, 2010 U.S. Dist. LEXIS 134113 (M.D. Pa. Nov. 3, 2010), the defendant sought the production of all testing data on which plaintiff relied to support its claims of patent infringement. Referring explicitly to testing data, the opinion states:

The [testing data and materials] in question are protected as attorney work product prepared in anticipation of litigation...In addition, the submitted privilege logs show that testing data was prepared during a time when litigation was contemplated. In fact, First Quality filed its original declaratory judgment action a mere eight months after KC received its first product analysis results. In light of these facts, we conclude that the information in question was prepared in anticipation of litigation. Thus, the attorney work product privilege applies to the materials.

*Id.* at 13-14 (internal citations omitted). The court also stated that plaintiff "will be deemed to waive attorney work product protection if it relies upon and discloses the testing data at issue in support of its infringement contentions." *Id.* This case articulates that sampling information generated in anticipation of litigation constitutes work product, and the privilege is waived only if the information is used as evidence, or for an adversarial purpose. Likewise, in *Banks v. United States*, the government moved to compel the production of documents containing a consulting expert's information including results of soil sample testing. 90 Fed.Cl. 707 (Fed. Cl. 2009). "The purpose for which the tests were conducted and the time at which the tests were conducted in relation to the date of trial are important to the resolution of defendant's Motion to Compel under Rules 26(b)(3)(A) and 26(b)(4)(B)."<sup>3</sup> *Id.* at 710. The court properly treated those sampling results as protected work product, and denied the government's motion to compel.

As in *Kimberly-Clark* and *Banks*, sampling information presently at issue should be afforded the standard work product protection. Under *Lefkoe*, sampling information generated in anticipation of litigation threatens to reveal defense counsel's mental impressions, and should be afforded a near absolute protection. Again, the sampling data and related information, as

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<sup>3</sup> The court in *Banks* was actually applying and construing the Rules of the United States Court of Federal Claims. Those rules are modeled after the Federal Rules of Civil Procedure.

Plaintiff points out, would include "how the sampling was conducted, who conducted the sampling, what media were sampled, how the media were sampled, observation from the time of the sampling, and the results of the sampling." (Pl.'s Mtn. at 9.)

Likewise, the details surrounding Mr. Smith's visits to Hudson Farm at counsel's direction are protected under the work product doctrine as applied in *Lefkoe*. Such "facts" are different from the facts underlying Plaintiff's complaint. Again, for that very reason, Defendants have turned over sampling data generated before December 17, 2009, despite Plaintiff's misleading assertion that it is simply seeking information related to "Defendants' environmental sampling program." Defendants have supplied Plaintiff with responsive sampling data, and any sampling information withheld was not part of any "program" but was generated in anticipation of litigation.

Plaintiff misconstrues the relevant authority, or cites cases that are inapposite or distinguishable. For example, Plaintiff relies on *Southern Scrap Material Co. v. Fleming*, in arguing that environmental test results are pure factual data, and are not protected work product. 2003 U.S. Dist. LEXIS 10815, \*58-65 (E.D. La. June 18, 2003). *Southern Scrap* was a civil RICO case brought by a scrap company against a group of attorneys that had organized toxic tort lawsuits against it. There, the plaintiff's allegations necessarily depended on whether the underlying lawsuits had any merit, and therefore purely factual data supporting or undermining that merit was discoverable. The court's holding was limited to "documents sought [that] recount factual information relevant to the claims against Southern Scrap in the underlying litigation..." *Id.* at 64. That information went to the heart of the defendants' affirmative defenses in the RICO case. To the contrary, in the instant case, any sampling information was generated in conjunction with the *present* litigation; such information is not a compilation of factual

information relevant to claims and defenses in an underlying case. In other words, the information is not, itself, the basis for a claim or defense.

Plaintiff also relies on *Horan v. Sun*, in arguing that "environmental test results contain relevant, non-privileged facts." 152 F.R.D. 437, 439 (D. R.I. 1993). Again, Plaintiff has missed the point of the case. *Horan* involved a sublessee of a service station who sued the lessee to recover for injuries sustained as a result of soil contamination at the service station. First, the withholding party apparently proffered no substantive argument regarding why its sampling results should not be produced. Second, as in *Southern Scrap*, the test results at issue were the basis for the claim. *Horan* would be analogous to a situation in which Plaintiff Waterkeeper Alliance refused to produce sampling results that form the basis for its notice letter and complaint. Again, the present situation involves alleged sampling information, generated at the direction of defense counsel, in anticipation of *present* – not underlying – litigation. The cases relied on by Plaintiff present entirely different factual scenarios, are inapplicable, and Defendants' sampling information is not simply a discoverable set of "facts," but is highly sensitive work product.

B. Plaintiff Has Not Demonstrated A Substantial Need for Defendants' Fact Work Product.

Environmental sampling information constitutes, at the very least, factual work product. Rule 26(b)(3) requires that a party seeking opposing counsel's work product demonstrate "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Plaintiff bases its claim of substantial need on the assertion that it was denied access to Hudson Farm, and could not conduct independent sampling; as discussed below, Plaintiff's claim lacks any credibility, and it has not demonstrated

a substantial need for sampling information, including any details surrounding efforts undertaken by Jeff Smith.<sup>4</sup>

Under the "substantial need" exception to the work product doctrine, courts "tend to require an explanation of why or how alternative sources for obtaining the equivalent information do not exist before the work-product protection will be lifted." Edna S. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 938 (5th ed. 2007). Indeed, counsel has an obligation to seek access to and compile information in support of its case, not just passively, but by actively exploring various strategies and avenues for acquiring and compiling relevant information. In *Martin v. Bally's Park Place Hotel & Casino*, a case involving an allegedly defective commercial dishwasher, the court affirmed an OSHA Commission ruling that a plaintiff had failed to show substantial need to obtain work product:

The Commission found that, even assuming OSHA had "substantial need" of the report, the agency had failed to establish that it could not obtain "substantially equivalent" materials without "undue hardship." In this regard, the Commission made several factual findings. It found that since there was no evidence that Bally's precluded OSHA from conducting its own test on the dishwasher, OSHA could in fact have done so. The Commission rejected OSHA's claim that it could not have tested the dishwasher because Bally's had removed it from regular service, noting that OSHA could have requested Bally's to retrieve the dishwasher for this purpose. It is undisputed that OSHA did not explore this possibility with Bally's.

983 F.2d 1252, 1256 (3d Cir.1993).

Plaintiff's counsel's attempt to paint Waterkeeper Alliance as a helpless victim, denied access to Hudson Farm and unable to obtain sampling information, is simply untrue. As

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<sup>4</sup> Plaintiff demands that the Court order the re-deposition of Mr. Smith at Defendants' expense. This demand is both inexplicable and unintelligible. Plaintiff does not identify the questions it wants Mr. Smith to answer, nor does Plaintiff explain why, even if this Court were to order a subsequent deposition of Mr. Smith, there would be any duplication of costs such that Defendants should bear Plaintiff's expenses, where Mr. Smith's deposition took less than the 7 hours provided by rule, and the few questions he was asked and instructed not to answer on the basis of attorney-client privilege and work product protection took up less than five minutes of the deposition. Plaintiff's demands are baseless, and for the many reasons discussed *supra*, Defendants oppose them.

explained, *supra*, it has been well over a year since Plaintiff's notice letter, and a year since this case was filed. Plaintiff has not sought access to Hudson Farm to conduct environmental sampling. In the one instance when Plaintiff sought permission to access the farm, for other purposes, permission was granted. Moreover, even if it had been denied access, it has not sought the Court's assistance, nor undertaken any additional efforts to gain access. In essence, Plaintiff has done *nothing*.

Plaintiff also asserts that "sample results cannot be reproduced because of changing conditions in the environment through weather and other natural processes," but the mere passage of time is not adequate to establish substantial need, particularly in the face of counsel's negligence. An analogy can be drawn between counsel who fails to interview a witness, and counsel who fails to seek access to property for inspection or testing: "[s]ubstantial need may or may not exist because of memory [or information] loss by virtue of the passage of time. *The party seeking discovery in such a situation, however, had best be prepared to show that the delay was not caused by avoidable negligence in failing to proceed with dispatch.*" Epstein, *supra* at 929 (emphasis added).

Counsel cannot sit back, refuse to seek the opportunity to sample, and then cry "substantial need" for the fruit of the diligent efforts of opposing counsel. See, *Garcia v. City of El Centro*, 214 F.R.D. 587 (S.D.Ca. 2003) ("[W]hen a party argues that substantial need exists because of the passage of time, the party seeking discovery must make a showing that the passage of time was not caused by avoidable negligence on their part...Plaintiff carries the burden of showing that substantial need exists for the witness interviews to be produced in discovery."); *McDougall v. Dunn*, 468 F.2d 468, 475 (4th Cir. 1972) (discussing *Goosman v. A. Duie Pyle, Inc.* 336 F.2d 151 (4th Cir. 1964), and explaining that the *Goosman* plaintiff was

entitled to the discovery of the defendant's work product, generated by the defendant's insurance carrier, because "[t]he plaintiff himself was helpless to reconstruct the events leading up to the accident or to secure contemporaneous statements from the other occupants of the car." (emphasis added).

Plaintiffs' citation of *United States v. Armstrong*, 517 U.S. 456, 474 (1996) is confusing. *Armstrong* is a criminal case, and while the pinpoint cite contains a discussion of work product, it has nothing to do with time periods, or counsel's negligent failure to obtain evidence on its own.

Plaintiff was under an obligation to diligently and zealously seek access to relevant information, and it did not. Plaintiff now seeks to piggyback on Defendants' efforts and expense, and obtain sensitive work product generated in anticipation of litigation. Plaintiff has simply not met its burden of demonstrating substantial need.

**III. Sampling Data and Information Generated By Consulting Experts Is Protected Under Federal Rule 26(b)(4)(D) Absent a Showing of Exceptional Circumstances.**

Defendants' sampling results are also protected under Rule 26(b)(4)(D) as consulting expert information. This protection tends to overlap with the work product protection. The 1970 advisory notes to Rule 26(b) state that "a party may discover facts known or opinions held by such an expert only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." That principle is now embodied in Rule 26(b)(4)(D). The "exceptional circumstances" requirement sets a high bar. As stated by Judge Chasanow:

Commentators have found, however, that "allowing routine discovery as to [non-testifying experts] would tend to deter thorough preparation of the case and reward those whose adversaries were most enterprising." 8A Wright, Miller & Marcus, Federal Practice and Procedure § 2032, at 94 (3d ed. 2010). Rule 26(b)(4) (B) is "designed to promote fairness by precluding unreasonable access to an opposing party's diligent trial

preparation." *Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir.1984). The party "seeking discovery from nontestifying retained experts faces a heavy burden." 8A Wright, Miller & Marcus, § 2032, at 105.

*Faller v. Faller*, 2010 WL 3834865 \*14 (D. Md. Sept. 28, 2010). *Faller* articulates that each party has opportunity to retain its own experts, and consulting expert information should be handled "in light of the unfairness doctrine; thus, courts should be cautious in allowing one party to poach the expertise and work of the other party, which has invested financially in developing that work." *Id.* at 16. The *Faller* court ultimately ordered the production of a property appraisal conducted by a consulting expert, primarily because "there is only one report that matters because the information that Plaintiffs ultimately seek is the effect that...report had upon Defendant[s]...reasoning in selling a piece of property owned by a company of which he was a fiduciary." *Id.* Therefore, as discussed with respect to Plaintiff's *Southern Scrap* and *Horan* cases, distinguished above, the consulting expert appraisal was *itself* at issue, which properly constituted an "exceptional" circumstance. Otherwise, *Faller* is clear that courts afford consulting expert information an exceedingly high level of protection.

Plaintiff cites *Hollinger Int'l, Inc. v. Hollinger, Inc.*, 230 F.R.D. 508, 522 (N.D.Ill. 2005), in stating that "[e]xceptional circumstances may be shown when (1) the condition observed by the expert is no longer observable..."). *Hollinger* actually stands for the principle that parties are responsible for conducting their own investigation, and hiring their own experts, and the court held in favor of the work product and consulting expert protections. The court found that "Defendants have not demonstrated exceptional circumstances justifying the disclosure of the Cook Report. Cook is not the only source of opinions regarding executive compensation. Defendants have the factual information underlying the disclosed portion of Cook's analysis and may retain their own experts to conduct their own analyses." *Id.* *Hollinger* actually supports

Defendants' position. Moreover, Plaintiff's failure to identify, let alone limit its request to, the specific condition "no longer observable" begs the question of whether it is no longer observable.

### CONCLUSION

Defendants request that the Court recognize Plaintiff's motion for what it is – a transparent attempt to poach Defendants' work product, resulting from a lack of effort and preparation on Plaintiff's part – and deny Plaintiff's motion to compel.

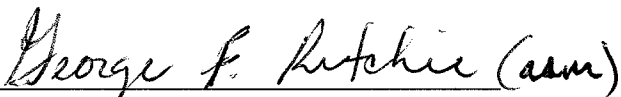
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21st day of March, 2011, the foregoing was served on the following via e-mail:

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*Counsel for Defendant Hudson Farm*

A handwritten signature in black ink that reads "Michael Schatzow". The signature is written in a cursive style with a large, sweeping initial "M".

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Michael Schatzow