

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

WATERKEEPER ALLIANCE, INC.,	*	
	*	
PLAINTIFF,	*	CIVIL ACTION NO. WMN-10-487
v.	*	
	*	
ALAN AND KRISTIN HUDSON FARM,	*	
<i>et al.</i> ,	*	
	*	
DEFENDANTS.	*	
* * * * * * * * * * * *		

MEMORANDUM AND ORDER

This Memorandum and Order addresses Plaintiff Waterkeeper Alliance, Inc.’s First Motion to Compel Production, ECF No. 49; Defendants Perdue Farms Inc. (“Perdue”) and Alan and Kristin Hudson Farm’s (“Hudson Farm”) Response in Opposition to Motion to Compel Production, ECF No. 50; Plaintiff’s Reply to Response to Motion to Compel Production, ECF No. 51; and Defendants’ Request for a Hearing, ECF No. 53. Having reviewed these filings, I have determined that a hearing is unnecessary. *See* Loc. R. 105.6. For the reasons stated herein, Plaintiff’s Motion is DENIED, without prejudice, subject to resubmission, if appropriate, once Defendants have complied with this Order. This Memorandum and Order disposes of ECF Nos. 49, 50, 51, and 53.

I. FACTS¹

Plaintiff brought this case under the citizen suit provisions of the Federal Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, against Hudson Farm and Perdue. Compl. ¶ 1, ECF No. 1. Hudson Farm is under contract with Perdue, a poultry “integrator,” to raise Perdue

¹ A detailed discussion of the facts is contained in Judge Nickerson’s Memorandum of July 21, 2010, ECF No. 26.

chickens. *Id.* ¶ 16. This case involves alleged illegal discharges of poultry manure from Hudson Farm into field ditches. *Id.* ¶¶ 31, 32. The field ditches empty into the Franklin branch of the Pocomoke River. *Id.* ¶ 32.

Plaintiff alleged that between October 2009 and December 2009 water sampled in a ditch flowing from Hudson Farm contained pollutants. *Id.* ¶¶ 33-35. On five separate occasions, sample analysis allegedly documented that the water contained the pollutants fecal coliform, E. coli, nitrogen, phosphorus, and ammonia. *Id.* According to Plaintiff, further investigation revealed stockpiles of what appeared to be uncovered poultry manure next to a drainage ditch in Hudson Farm's production area. Compl. Ex. A, ECF No. 1-2. Plaintiff believed that these stockpiles could be a source of the pollutants discharging from the site. *Id.* Based on these findings, on December 17, 2009, Plaintiff sent a Notice Letter to Defendants, alerting them to the pollutant discharges. *Id.* Plaintiff claims that following this Notice Letter the water was sampled by Defendants several more times between December 2009 and February 2010. Compl. ¶ 36. Each of these samples allegedly showed high levels of fecal coliform, E. coli, nitrogen, phosphorus, and ammonia, allegedly from Hudson Farm. *Id.*

II. PROCEDURAL HISTORY

On March 1, 2010, Plaintiff filed its original Complaint in the United States District Court for the District of Maryland. Compl. ¶ 1. Plaintiff alleged that Defendants discharged pollutants into United States waters without a permit in violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a). *Id.* ¶¶ 52-55. Plaintiff alleged in the alternative that Defendants discharged pollutants in violation of their National Pollutant Discharge Elimination System permit. *Id.* ¶¶ 56-60. Plaintiff requested a declaratory judgment, injunctive relief, remedial relief, the imposition of civil penalties, and the award of costs. *Id.* ¶¶ 61-68. On March 29, 2010,

Defendants Hudson Farm and Perdue each filed a motion to dismiss. ECF Nos. 14 & 15. On July 21, 2010, the Court granted in part and denied in part these motions. Order, ECF No. 27.

On April 4, 2011,² Plaintiff filed its First Motion to Compel Production. The express purpose of the Motion is to require Defendants to respond to a collection of more than fifteen document production requests, the cumulative effect of which was to require Defendants to produce all data and related information (“Sampling Data”) in their possession, which resulted from sampling waste, soil, and water at Hudson Farm.³ Pl.’s Mot. 1, 3-4. Plaintiff argues that

² As required by Local Rule 104.8, the Motion, Response and Reply were all served on the opposing party prior to filing with the Court. Accordingly, all three papers were filed with the Court on April 4, 2011.

³ Defendant Perdue answered Plaintiff’s Rule 34 requests asserting seventeen boilerplate objections of the type long disfavored by this Court, as well as allegedly more specific objections to each numbered document request. Many of the numbered responses also contained boilerplate objections, which violate Discovery Guideline 10.d, Discovery Guidelines for the United States District Court for the District of Maryland, D. Md. Loc. R. App. A (July 1, 2010), <http://www.mdd.uscourts.gov/localrules/localrulesfinal-july2010.pdf>, and a long line of cases from this Court that state that boilerplate, non-particularized objections to Rule 33 and 34 requests are improper and fail to state legitimate objections. *See Mancina v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008) (citing cases); *Hall v. Sullivan*, 231 F.R.D. 468, 474-75 (D. Md. 2005) (objections to Rule 34 discovery requests must be particularized); *Marens v. Carrabba’s Italian Grill, Inc.*, 196 F.R.D. 35, 38-39 (D. Md. 2000). More importantly, for purposes of this dispute, Defendant Perdue’s boilerplate objections included conclusory attorney-client and work product objections, which contravene Rule 26(b)(5)(A) and Discovery Guideline 10.d. *See, e.g.*, Pl.’s Mot. Ex. 1 at 1-16. For example, in its answer to Plaintiff’s Document Request No. 2, Defendant Perdue stated, *inter alia*, “Perdue incorporates the above-provided general objections as if more fully set forth herein and further objects to this request *to the extent that it seeks documents created or communications occurring in anticipation of litigation, subject to attorney-client privilege, or protected from discovery under the work product doctrine.*” *Id.* (emphasis added). The materials submitted as exhibits to the pending motion do not contain any privilege log prepared by Defendant Perdue, nor does Defendant Perdue claim in its memorandum in opposition to Plaintiff’s Motion that it prepared one. Rule 26(b)(5)(A) and Discovery Guideline 10.d specifically require privilege logs to support objections to providing requested discovery on the basis of privilege or work product. If a party expects to interpose an objection to a Rule 34 request on the basis of privilege or work product protection, it must particularize the objection, which includes identifying the existence of information, communications, or documents allegedly privileged or protected. Instead, Defendant Perdue’s response was vague regarding the existence of privileged or protected information. Such obvious incomplete and unresponsive “answers” violate Rule 26(b)(5)(A), and are deemed by

the Sampling Data are not protected attorney work product, as Defendants contend, because the data are purely factual in nature. Plaintiff maintains that it is seeking only discoverable, factual information, not any legal theories or mental impressions that would be protected attorney work product. *Id.* at 8. Plaintiff also argues that even if the Sampling Data are protected attorney work product, it is entitled to production of the Sampling Data under both the Rule 26(b)(3) “substantial need” and the Rule 26(b)(4)(D) “exceptional hardship” tests. *Id.* Plaintiff claims that because it was denied access to Hudson Farm during the time period in which Defendants took the Sampling Data and could not otherwise collect similar data due to variable environmental conditions, it has shown “substantial need” and “exceptional hardship” sufficient to require Defendants to produce the Sampling Data. *Id.* at 13. In addition, Plaintiff asks the Court to order the re-deposition of Perdue’s Mr. Jeff Smith if this motion is granted, since Mr. Smith refused to answer “factual questions related to the sampling” during his first deposition. *Id.* at 15.

Defendants argue that they provided Plaintiff with all of their data generated before the date of the Notice Letter and that any other Sampling Data in their possession constitute “classic work product,” which is protected from disclosure. Defs.’ Resp. 1. Insisting that Plaintiff seeks

Rule 37(a)(4) to be a failure to respond at all. *See* Fed. R. Civ. P. 37(a)(4) (“[A]n evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond.”). Plaintiff did not attach as an exhibit the Rule 34 responses of Defendant Hudson Farm. From the memoranda filed, it appears that they did identify the existence of some Sampling Data that they produced (following the exchange of papers required by Local Rule 104.8). However, it appears that Defendant Hudson Farm did not state whether there was any additional Sampling Data for which privilege or protection was asserted. Rule 37(a)(4) is specifically designed to prevent such evasive and incomplete responses, and they are deemed to be a failure to answer at all. A failure to properly respond or object to a Rule 33 or 34 request ordinarily waives any objection that might have been made, unless excused by the Court. *Hall*, 231 F.R.D. at 474 (“[O]bjections to document production requests must be stated with particularity in a timely answer, and that failure to do so may constitute a waiver of grounds not properly raised, including privilege and work product immunity, unless the court excuses this failure for good cause shown.”).

more than mere “facts,” Defendants contend that producing Sampling Data would give Plaintiff insight into defense counsel’s mental impressions and trial strategies, which are protected under the work product doctrine. *Id.* at 5. Defendants go as far as to argue that “whether counsel for Perdue thought to test or sample anything” is protected attorney work product. *Id.* at 2. Defendants also argue that the Sampling Data are protected under Rule 26(b)(4)(D) as consulting expert information. *Id.* at 12-14. With regard to Plaintiff’s argument that it has shown “substantial need” for production, Defendants argue that Plaintiff did not “diligently and zealously seek access to the information” but rather “seeks to piggyback on Defendants’ efforts and expense.” *Id.* at 9-12. As such, Plaintiff has not demonstrated “substantial need” to warrant the production of Defendants’ “sensitive work product.” *Id.* Finally, Defendants reject Plaintiff’s request to re-depose Mr. Smith, arguing that any refusal to answer questions was warranted. *Id.* at 2.

Plaintiff, in its Reply, notes that on March 25, 2011, Hudson Farm provided samples from January 26, 2010, January 27, 2010, and February 1, 2010. Pl.’s Reply 1 n.1. According to Plaintiff, Hudson Farm has not confirmed whether this is all of the sampling that was done. *Id.* Notwithstanding, Plaintiff reiterates its argument that the Sampling Data are factual information not protected under the work product doctrine. *Id.* at 6. Plaintiff also rejects Defendants’ notion that the Sampling Data are protected as consulting expert information because Plaintiff only wishes to ascertain facts—not opinions—from the data. *Id.* at 14-16. Moreover, Plaintiff contends that it has demonstrated “substantial need” because the data directly relate to a “central issue” in the case, and Plaintiff could not obtain the data through any other method. *Id.* at 12-14.

III. ANALYSIS

As an initial matter, Defendants raise an issue regarding the timeliness of Plaintiff's Motion. However, in response to Plaintiff's document request related to Sampling Data, Defendant Perdue filed a deficient response that contained boilerplate objections on the basis of work product protection and refused even to acknowledge whether there were any Sampling Data at all after December 17, 2009. *See* Pl.'s Mot. Ex. 1. Further, as of the date of the filing of the pending motion, Defendants had yet to provide Plaintiff with any privilege log at all as required by Fed. R. Civ. P. 26(b)(5)(A) and Discovery Guideline 10.d. Pl.'s Reply 3 n.3. Because Defendants did not provide the required information to substantiate their work product claim for the Sampling Data after December 17, 2009 (indeed, not even saying whether any exist), Defendants do not exactly have the moral high ground to criticize the timeliness of Plaintiff's Motion. Additionally, Defendants have not identified any prejudice or hardship that they sustained as a result of the timing of Plaintiff's Motion. Therefore, Plaintiff's Motion will not be rejected as untimely.

Attorney work product protection is, of course, a qualified immunity from discovery, not an absolute bar to discovery, such as an evidentiary privilege provides. EDNA S. EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 1027 (5th ed. 1007). Should a party fail to particularize its claim of attorney work product as required by Fed. R. Civ. P. 26(b)(5)(A), that protection may be waived. And as noted at footnote 3, *supra*, boilerplate objections—such as made here—are improper and fail to state valid objections. *See Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 573 (D. Md. 2010) (“Objections to discovery requests must be specific, non-boilerplate, and supported by particularized facts where necessary to demonstrate the basis for the objection.”) (citing *Hall v. Sullivan*, 231 F.R.D. 468, 470 (D. Md.

2005); *Thompson v. Dep't of Hous. & Urban Dev.*, 199 F.R.D. 168, 173 (D. Md. 2001); *Marens v. Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35, 38-39 (D. Md. 2000)). This Court discussed the implications of a party failing to properly particularize the basis of an assertion of privilege or work product protection under the Rules in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 254 n.2 (D. Md. 2008):

[W]hen a party refuses to produce documents during discovery on the basis that they are privileged or protected, it has a duty to particularize that claim. Fed. R. Civ. P. 26(b)(5), Discovery Guideline [10.d]; *Caruso v. Coleman Co.*, CIV. A. No. 93-CV-6733, 1995 WL 384602, at *1, (E.D. Pa. June 22, 1995); *Bowne of New York City v. AmBase Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y. 1993); *In re Pfohl Bros. Landfill Litig.*, 175 F.R.D. 13, 20 (W.D.N.Y. 1997); *United States v. Kovel*, 296 F.2d 918, 923 (2d Cir. 1961). While a privilege log that complies with Discovery Guideline [10.d] is an acceptable way to do so initially, once the claims of privilege/protection have been challenged by the requesting party, the producing party must then establish an evidentiary basis to support the privilege/protection claim. Failure to do so results in a forfeiture of the privilege/protection claimed. *Bowne*, 150 F.R.D. at 474 (holding that if the party claiming privilege fails to provide sufficient detail to demonstrate all legal requirements to make out the privilege, the claim must be rejected); *Fox v. California Sierra Fin. Servs.*, 120 F.R.D. 520, 524 (N.D. Cal. 1988) (finding that a party claiming privilege as basis for withholding discovery must properly identify each document and the basis for the privilege claimed); *In re Pfohl Bros.*, 175 F.R.D. at 20 (holding “[m]ere conclusory or *ipse dixit* assertions of privilege” fail to satisfy the burden of demonstrating the applicability of a privilege).

See also Mezu, 269 F.R.D. at 573-74 (by failing to support its objections with particularized facts, party waived its improperly-raised objections). In this case, Defendants have yet to provide a privilege log that complies with Fed. R. Civ. P. 26(b)(5)(A) and Discovery Guideline 10.d, let alone an evidentiary basis to support their claim of attorney work product. On the record before it, the Court would be amply justified in ruling that Defendants have failed to properly assert a work product protection claim, and on that basis alone, order the production of the Sampling Data the Plaintiff seeks. I will not do so, however, in this instance, because claims of privilege and work product are best resolved on the merits, if possible. Defendants are

cautioned, however, that a failure to comply with this Court's order could result in more serious consequences in the future.

Nor do Defendants help their position by arguing that they are not even required to disclose whether they conducted sampling of Hudson Farm after December 17, 2009. In doing so, Defendants stake their claim on *Lefkoe v. Jos. A. Banks Clothiers*, No. 06-1892, 2008 WL 7275126 (D. Md. May 13, 2008). *Lefkoe* is a curious case for Defendants to rely on, as it undermines, rather than supports, their position. In *Lefkoe*, a securities fraud class action, the defendants sought to compel an answer to an interrogatory asking the plaintiff to identify each of the nineteen confidential witnesses identified in the complaint, as well as to match these persons up with a list of fifty-eight former employee "witnesses" who has been disclosed by the plaintiff pursuant to Rule 26(c)(1). *Id.* at *10. The plaintiff resisted, on the basis that what the defendants sought was work product protected and would reveal the "plaintiff's counsel's mental impressions about those witnesses [*i.e.*, that these witnesses were more important or possessed more valuable information than others]"—allegedly classic opinion work product. *Id.* Judge Nickerson concluded that the names of the nineteen confidential witnesses already had been included among the fifty-eight witnesses whose identities already had been disclosed; therefore, any work product inherent in production of a list of a subset of the fifty-eight "would be minimal." *Id.* Accordingly, he granted the defendants' motion, despite the work product implication of having done so.⁴

⁴ The reasoning in *Smith v. Diamond Offshore Drilling, Inc.*, 168 F.R.D. 582 (S.D. Tex. 1996), which dealt with an analogous situation, is also persuasive. In *Smith*, the plaintiff was seeking the discovery of surveillance evidence taken by an agent of the defendant in an effort to disprove the plaintiff's alleged injuries. *Id.* at 586. The defendant argued that "requiring it to divulge whether or not surveillance evidence exists requires it to reveal its strategy and thought processes to the Plaintiff; therefore, the fact of the existence or non-existence of surveillance is protected under the work product doctrine." *Id.* at 587. The court disagreed:

Defendants do not acknowledge this discussion in *Lefkoe*, instead focusing on a brief discussion by the Court regarding an interrogatory served by the defendants, which asked the plaintiff to identify information regarding their counsel's communications with any persons other than the defendants regarding the incidents alleged in the amended complaint. *Lefkoe*, 2008 WL 7275126, at *12. The plaintiff objected, in part, on the basis of work product. *Id.* Judge Nickerson ruled that the identity of persons interviewed in anticipation of litigation is generally protected as work product. *Id.* (citing authority). In doing so, he rejected the defendants' argument that the plaintiff was obligated by then Discovery Guideline 9.c.ii to identify each person interviewed in a privilege log. *Id.* Judge Nickerson quickly and properly disposed of this argument by noting that to do so would disclose the allegedly privileged or protected information, which neither the Discovery Guidelines nor Rule 26(b)(5)(A)(ii) required.

Defendants cite this ruling as if it helps them. It does not. What Defendants overlook is that the plaintiff in *Lefkoe* acknowledged that, in fact, there were persons who had been interviewed before the amended complaint was filed, such that the Court was aware of the

It may well be that the decision about if, when, or how surveillance of a plaintiff should be conducted does reveal something about how the defendant's attorney investigates and prepares a case for trial. However, not every action that reveals, to some minimal degree, an attorney's general strategy or approach to a case amounts to protected opinion work product. For example, the manner in which an attorney phrases his answers to interrogatories may reveal, to some degree, the attorney's strategy in defending against the plaintiff's claims. Nonetheless, the attorney could not refuse to answer the interrogatories on the grounds of the work product doctrine. Thus, while requiring the Defendant to disclose whether or not surveillance evidence exists may reveal the general strategy of the Defendant's attorney, "[i]t is simply too great a stretch to say, however, that opinion work product is also revealed." *Wegner [v. Cliff Viessman, Inc.]*, 153 F.R.D. 154, 159 (N.D. Iowa 1994).

Id. (citations omitted). Here, Defendants' disclosure of whether it conducted any sampling will not disclose, by any stretch of the imagination, the litigation strategy or mental impressions of counsel.

existence of the general nature of the specific information which allegedly was protected. Here, Defendants have failed even to acknowledge the existence of the Sampling Data Plaintiff seeks. More importantly, however, Defendants overlook the fact that in *Lefkoe*, the plaintiff acknowledged that persons had been interviewed, but refused to identify their names because to do so necessarily would have disclosed the information protected by the work product doctrine, which neither the Discovery Guideline nor the Rule it was based on—Rule 26(b)(5)A(ii)—requires. Such is not the case here. Listing in a privilege log the dates on which Sampling Data were collected in no way discloses the contents of the data collected. Accordingly, Defendants are not relieved of the obligations of providing a proper privilege log listing the date(s) on which any Sampling Data were collected, without disclosing the nature and content of the sample. To hold otherwise would allow Defendants to disregard entirely their obligations under Rule 26(b)(5)(A) and Discovery Guideline 10.d and, importantly, would make it virtually impossible for Plaintiff to challenge the propriety of Defendants’ work product claims. Further, Defendants’ demurrer regarding whether the requested Sampling Data even exist deprives Plaintiff of the opportunity to argue, and the Court to resolve, whether the Defendants’ assertion of work product, if upheld, nonetheless should yield to Plaintiff’s assertions that it is entitled to the Sampling Data because it has substantial need for the material to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means. Fed. R. Civ. P. 26(b)(3)(A)(i)-(ii).

As noted by this Court in *Victor Stanley*, 250 F.R.D. at 265-67, properly prepared privilege logs serve another important function; they facilitate the Court’s ability to resolve disputes regarding the propriety of privilege/protection claims without having to resort to *in camera* review of extrinsic evidence. The current posture of this case is a clear example of how

the failure to provide a proper privilege log at the outset magnifies the burden and expense to the parties and hampers the Court's ability to resolve the dispute, all of which also adversely affects the pretrial schedule.

Without a privilege log to identify the specific Sampling Data for which Defendants assert work product and absent particularized evidentiary support from Defendants to demonstrate by affidavit or equivalent information that the elements of a work product claim have been met, Plaintiff is forced to make generalized arguments regarding (a) whether the Sampling Data exist; (b) whether they are protected from disclosure under Rule 26(b)(3); and (c) whether Plaintiff can establish substantial need and inability to obtain substantially equivalent data.

In response to Plaintiff's motion, Defendants make only *ipse dixit* arguments by counsel—which is not evidentiary fact to support the elements of a work product claim or to rebut Plaintiff's substantial need argument. The Court, in turn, is deprived of the benefit of specific facts as to the extent of the allegedly protected data—or whether it even exists—as well as the factual information needed to make the Rule 26(b)(3)(A)(ii) determinations. This will not suffice.

IV. CONCLUSION

Accordingly, within fourteen (14) days, Defendants will serve Plaintiff with a privilege log fully compliant with Rule 26(b)(5)(A) and Discovery Guideline 10.d, which at a minimum includes: (a) individually by date and general description, each data sample responsive to Plaintiff's Rule 34 requests; and (b) the specific evidentiary basis to support the elements of a work product claim for each data sample disclosed, as well as the factual basis to support Defendants' arguments that Rule 26(b)(3)(A)(ii) is inapplicable to warrant disclosure, even if

work product protection initially is established. Affidavits, declarations, deposition testimony or the equivalent will be necessary for this showing. Additionally, Defendants will provide the evidentiary basis to support their Rule 26(b)(4)(D) claims.

Within eleven (11) days of being served with the information detailed above, Plaintiff will provide Defendants with a detailed response setting forth its objections to the work product protection claimed and supporting any claim Plaintiff may have that Rule 26(b)(3)(A)(ii) warrants disclosure, in the event that work product protection is established, as well as Plaintiff's response to Defendants' Rule 26(b)(4)(D) claims.

Within fourteen (14) days following service of Plaintiff's response, counsel will meet face to face and confer regarding their differences. If unable to resolve their differences, Plaintiff may, within twenty-one (21) days of the meet and confer, file a motion to compel, which shall not exceed twenty-five (25) pages in length,⁵ exclusive of exhibits. Within fourteen (14) days, Defendants will jointly file an opposition memorandum, which will not exceed thirty (30) pages in length, exclusive of exhibits. Thereafter, within eleven (11) days, Plaintiff may file a reply memorandum, not to exceed ten (10) pages, exclusive of exhibits.

Dated: June 1, 2011

_____/s/_____
Paul W. Grimm
United States Magistrate Judge

mpk

⁵ The pages should be double-spaced with 12-point font.