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

PLAINTIFF'S FIRST MOTION TO COMPEL PRODUCTION AND SUPPORTING MEMORANDUM OF LAW

Plaintiff, Waterkeeper Alliance, Inc. ("Plaintiff"), pursuant to Rule 37(a)(3) of the Federal Rules of Civil Procedure and Local Rule 104.8, requests that the Court enter an order compelling Defendant Alan and Kristin Hudson Farm ("Hudson Farm") and Defendant Perdue Farms ("Perdue") to produce all data and related information in their possession resulting from sampling waste, soil and water ("sampling data") at Hudson Farm in response to Plaintiff's First and Second Requests for Production of Documents ("Requests for Production"). In support of this Motion, Plaintiff states as follows:

MEMORANDUM OF LAW

I. INTRODUCTION

In this case, Plaintiff alleges that Perdue and Hudson Farm violated the Clean Water Act by discharging pollutants, including bacteria and nutrients, from a poultry operation and its associated animal waste into waters of the United States. Data

generated from sampling the area of contamination, including the waste generated at the facility, the soil on which it was disposed of, and the waters located on and leaving the facility, is highly relevant and important to the resolution of the issues in this matter. Defendants deny that the have discharged pollutants into waters of the United States despite the existence of Plaintiff's sampling data showing the discharge of dangerously high levels of fecal coliform, E. coli, nitrogen, phosphorous, and ammonia from the Hudson Farm Concentrated Animal Feeding Operation ("CAFO"). Defendant Hudson Farm acknowledges that it is in possession of sampling data and related information that it collected from the Hudson Farm and it has refused to produce to Plaintiff in response to Requests for Production. Defendant Perdue refuses to even confirm whether it has taken samples at the farm. Defendants claim the information is protected by the "attorney work product" privilege despite the fact the information is purely factual in nature and is otherwise subject to production under the "substantial need" and "exceptional circumstances" tests for production under Federal Rules of Civil Procedure 26(b)(3) and 26(b)(4)(B).

The question at issue in this Motion is whether Defendants should be compelled to produce this highly relevant environmental sampling data from the facility at issue in this case. Plaintiff contends that the sampling data in possession of Defendants are not protected "attorney work product" and, even if it were, the information should be produced as it bears on issues central to this case, could not have been collected by Plaintiff, and is not otherwise available to Plaintiff. As demonstrated below, Defendants are without basis for withholding the sampling information from Plaintiff. Accordingly,

Plaintiff requests that this Court order Defendants to promptly produce all sampling data and related information to Plaintiff in response to its Requests for Production.

II. PLAINTIFF'S DISCOVERY REQUESTS AND DEFENDANTS' RESPONSES AND OBJECTIONS.

Plaintiff filed its original Complaint in United States District Court for the District of Maryland on March 1, 2010. Hudson Farm and Perdue filed motions to dismiss on March 29, 2010, which were denied in part and granted in part on July 21, 2010. The current Final Scheduling Order was issued by the Court on January 25, 2011 and requires Defendants to submit their expert disclosures by March 29, 2011, requires Plaintiff to submit rebuttal expert disclosures by April 29, 2011, and sets a discovery deadline of May 9, 2011.

Plaintiff served its first set of Requests for Production of Documents on Defendants Hudson Farm and Perdue on October 15, 2010. Plaintiff served its Second Request for Production of Documents on Defendants Hudson Farm and Perdue on November 4, 2010. The following Requests for Production cover the sampling data in the possession of Defendants at issue in this Motion:

- Hudson Farm Request 9/Perdue Request 10 – All documents or communications containing, concerning, referring or relating to any photographs, motion pictures, models, physical evidence, maps, drawings, diagrams, measurements, surveys or other descriptions concerning the facility, made within the past ten (10) years.

- Perdue Request 11 – All documents or communications concerning, referring or relating to any instance where Perdue's employees, agents, and or contractors entered, visited, and/or inspected Hudson Farm.

- Perdue Request 12 – All documents or communications concerning, referring or relating to any outcomes that resulted from any entry, visitation, and/or inspection by Perdue's employees, agents, and/or contractors of Hudson Farm.

- Hudson Request 11/Perdue Request 18 – All documents or communications concerning, referring or relating to Hudson Farm's Nutrient Management Plan

("NMP"), the use, storage and disposal of poultry waste, the use, storage, and disposal of biosolids, and the movement or grazing of cattle and sheep on Hudson Farm's property.

- Hudson Request 15 – All documents or communications concerning, referring or relating to Hudson Farm's procedures concerning, regarding or relating to the acquisition, collection, management, storage, spreading, cleaning out, and disposal of poultry waste, biosolids, or any other substance that contains common agricultural pollutants, including but not limited to fecal coliform, E. coli bacteria, nitrogen, phosphorus, ammonia, and nitrates at Hudson Farm's facility.

- Hudson Request 16 – All documents or communications concerning, referring or relating to the production, storage, spreading, and disposal of all poultry waste at Hudson Farm's facility for each month from December 17, 2004 to the present, including but not limited to the quantity of poultry waste that has been generated on Hudson Farm, the quantity of poultry waste stored in the storage shed, the capacity of the storage shed, the quantity of poultry waste that has been spread on Hudson Farm's fields consistent with the nutrient management plan, and the quantity of poultry waste that has been transported to any offsite location.

- Hudson Request 21 – All documents or communications concerning, referring or relating to sampling or analysis of fertilization materials from any source, including, but not limited to, poultry waste and biosolids generated, stored, spread, or otherwise disposed of at the Facility.

- Hudson Request 24/Perdue Request 19 – All documents or communications concerning, referring or relating the production, storage, or discharge of any common agricultural pollutants at Hudson Farm's facility, including by not limited to fecal coliform, E. coli bacteria, nitrogen, phosphorus, ammonia, nitrates.

- Perdue Request 20 – All documents or communications concerning, referring or relating to environmental sample data from Hudson Farm collected, stored, received or otherwise obtained by Perdue.

- Perdue Request 21 – All documents or communications concerning, referring or relating to any reports, surveys, studies or investigations or summary of the results of any report, survey, study or investigation concerning, referring or relating to common agricultural pollutants from Perdue's poultry producers, including, but not limited to, fecal coliform, E. coli bacteria, nitrogen, phosphorus, ammonia, and nitrates.

- Perdue Request 22 – All documents or communications concerning, referring or relating to any investigation, inquiry, administrative proceeding or state or federal court action relating to Perdue and its oversight of its poultry producers, or common agricultural pollutants from Perdue's poultry producers, including by not

limited to fecal coliform, E. coli bacteria, nitrogen, phosphorus, ammonia, and nitrates.

- Hudson Second Request 1/Perdue Second Request 1 – All documents produced in response to requests from the EPA, including those produced in response to Section 308 Information Requests from EPA.

Defendant Hudson Farms has acknowledged that it possesses sampling data and related information collected at Hudson Farm. Perdue has not acknowledged directly whether or not they have sample results taken at Hudson Farm, however, Plaintiff is aware that at least some samples have been taken at the Hudson Farm.[1] Neither Defendant has provided these to Plaintiff and the existence of additional samples results is not clear from their responses to the Requests for Production. In its Responses to the Requests for Production, Defendant Perdue simply makes a general objection to the production of information prepared in anticipation of litigation or protected under the work product doctrine and either incorporates or restates that objection in its Response. *See e.g.* Exhibit 1 at 3-4. Regardless, as demonstrated below, both Defendants have claimed that any sampling data and related information is protected by the work product privilege.

Hudson Sampling

In accordance with Federal Rule 37(a)(2)(b), Plaintiff made good faith efforts to resolve this matter without involvement of the Court but Defendants refuse to provide the requested sampling data and related information. On November 30, 2010, Plaintiff sent a letter to Defendant Hudson Farm's attorney noting that when Plaintiff visited the site on September 22, 2010 Defendant Hudson Farm's attorney had agreed to provide all

[1] Plaintiff has obtained a pair of publicly available pile sample results from EPA apparently taken by Jeff Smith from Perdue at the Hudson Farm, but has no indication whether these are the only relevant samples taken by Perdue.

sampling done at the facility and had indicated he would allow Plaintiff to obtain the data directly from the lab. *See* Exhibit 2. Further, Plaintiff inquired whether Hudson Farm still intended to provide access to the group that performed the sampling or planned to produce the data and noted that Plaintiff made the same inquiry of Defendant Hudson Farm's attorney on November 16, 2010 and had not received a response. *Id.*

On January 17, 2011, Defendant Hudson Farm's attorney stated that "Hudson Farm has no present plans to any additional documents in this case, including the samples to which you allude in your letter, which, as we have previously made clear in our discovery responses, we believe is attorney work product." *See* Exhibit 3. On February 3, 2011, Plaintiff again wrote the Defendant Hudson Farms requesting sampling results, including but not limited to water samples that are believed to have been taken in ditches at or around the farm, in an attempt to meet and confer to resolve the issue. *See* Exhibit 4. On February 10, 2011, Defendant Hudson Farm's attorney noted the previous requests and stated that the sample results were taken in anticipation of litigation and protected from discovery. *See* Exhibit 5. He further stated that he had reviewed Plaintiff's discovery requests and did not see any references to "water samples." *Id.*

The parties met and conferred on February 14, 2011, with follow-up discussions of relevant case law over the following two-weeks, and were unable to reach agreement. On February 17, 2011, Plaintiff responded that sampling data requests were not covered by work product privilege and, in any event, should be produced because the request was necessary and justified. *See* Exhibit 6. Despite these efforts, the parties did not reach agreement.

Perdue Sampling

On February 25, 2011, Plaintiff sought to meet and confer with Perdue on the production of sampling data and provided legal authority for the Plaintiff's position that the sampling data it seeks is not covered by the work product privilege as it is purely factual material. See *S. Scrap Material Co. v. Fleming*, No. 01-2554, 2003 U.S. Dist. LEXIS 10815, at *58–65 (E.D. La. June 18, 2003). *See* Exhibit 7. Plaintiff also took the position that the information should be provided without regard to the work product privilege claim because of Plaintiff's lack of access to the Hudson Farm during the relevant periods pursuant to *United States v. Armstrong,* 517 U.S. 456, 474 (1996). *Id.*

On February 28, 2011, Defendant Perdue's attorney responded by arguing that the sampling data was work product analogous to witness interviews conducted by counsel in the case of *Lefkoe vs. Jos. A. Bank Clothiers*, WMN-06-1892, 2008 WL 7275126, at *11 (D. Md. May 13, 2008). Perdue's attorney further stated that he did not agree that Plaintiff's counsel had been denied access to Hudson Farm. On February 28, 2011, Plaintiff responded that the case cited by Perdue was inapplicable as Plaintiff in this case is seeking purely factual information, namely sampling data and the number of samples taken, whereas the cited case dealt only with direct conversations that the investigating attorneys had with witnesses. *See* Exhibit 8. Plaintiff further noted that, while it was allowed to access the farm, it was not allowed to do its own private investigation including taking samples and more importantly, that such sampling could not be substituted for the sampling at issue because it would have been taken during the relevant time period. *Id.* Plaintiff and Defendant Perdue will meet and confer on the issues rasied in this Motion prior to filing with the Court.

Perdue Employee Visits and Investigation

A related issue arose during the deposition of Jeff Smith, Perdue's Director of Corporate Environmental Science. Mr. Smith visited the Hudson Farm five or six times during the period of alleged discharges as directed by his boss, Steven Schwalb, Vice President of Environmental Sustainability. Smith Dep. at 54–55, attached at Exhibit 9. Other than admitting the fact that Mr. Smith had visited the farm, counsel for Perdue instructed Mr. Smith not to answer almost every question associated with Mr. Smith's visits to the Hudson Farm. See Smith Dep. at 54–62. This included several questions aimed at getting to factual details regarding these visits including: whether or not any samples were taken, how many samples were taken, and what the witness observed at the Hudson Farm on these visits. *Id.*

III. THE INFORMATION SOUGHT IS DISCOVERABLE

Defendants' should not be allowed to withhold sampling data and related factual information responsive to Plaintiff's Requests for Production. Plaintiff is seeking to discover purely factual information and, thus, the attorney work product doctrine does not apply. Further, even if the work product doctrine applies, Plaintiff meets the substantial need and exceptional circumstances tests for the discovery of work product privileged material under Federal Rule 26(b)(3) and 26(b)(4)(D).

A. The Sampling Data and Related Information are Facts and are not Attorney Work Product

In requesting the production of environmental sampling data and related information, Plaintiff is not seeking to discover the mental impression, legal theories or legal strategies of Defendants' counsel. Neither is Plaintiff seeking to discover any expert opinions about the meaning of the sampling data and information through these Requests for Production. Rather, Plaintiff is only seeking to discover facts relating to

environmental sampling conducted by Defendants at and around Hudson Farm. These facts 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.

Attorney work product privilege does not protect the *factual* information in the possession of the Defendants from disclosure in response to Requests for Production. As the U.S. Supreme Court stated in the case of *Hickman v. Taylor*, 329 U.S. 495, 507 (1947), "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."

Federal Rule 26(a)(3) protects only against "disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." According to the Tenth Circuit Court of Appeals, "because the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within work product." *Feldman v. Pioneer Petroleum, Inc.*, 87 F.R.D. 86, 89 (W.D. Okla. 1980). *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 265 (10th Cir. 1995).

Thus, it is well established that "[t]he work product doctrine protects against disclosure of materials that a party, her attorney, or her representative prepares in anticipation of litigation, *see* *Maine v. United States Dep't of Interior*, 298 F.3d 60, 66 (1st Cir.2002), although it does not typically extend to the underlying **facts** contained

within those materials, *see, e.g.,* *Resolution Trust Corp. v. Dabney,* 73 F.3d 262, 266 (10th Cir. 1995); *Fleet Nat'l Bank v. Tonneson & Co.,* 150 F.R.D. 10, 15 n. 6 (D. Mass. 1993) (Karol, M.J.); Restatement, *supra,* § 87 cmt. g, at 641 (1998); 8 Wright, Miller & Marcus § 2023, at 331 & n. 20 (collecting cases); *cf.* *Upjohn Co. v. United States,* 449 U.S. 383, 395–-96 (1981) (noting the similar limitation on the attorney-client privilege)." *In re Grand Jury Subpoena*, 220 F.R.D. 130, 141 (D. Mass 2004). Litigants are entitled to pursue discovery of factual information gathered in investigations related to litigation as opposed to counsel's interpretation of the facts, which would generally be protected by the work product privilege. *See e.g. E.E.O.C. v. McCormick & Schmick's Seafood Restaurants, Inc.*, No. WMN-08-CV-984, slip op., 2010 WL 2572809 (D. Md. June 22, 2010) (holding that factual information gathered in an investigation related to litigation could be obtained through discovery mechanisms other than a Federal Rule 30(b)(6) deposition of counsel).

Here Plaintiff is only seeking factual information related to Defendants environmental sampling program and this information is not protected by the work product privilege. This issue was squarely addressed in the case of *Southern Scrap Material Co. v. Fleming*, No. 01-2554, 2003 U.S. Dist. LEXIS 10815, at *59–64 (E.D. La. June 18, 2003) where the District Court granted a Motion to Compel production of investigative materials including air, water, soil, and dust samples taken from Plaintiff's facilities throughout Louisiana on the grounds that the information was factual information not protected by the work product doctrine. In so holding, the Court stated that:

> Insofar as the documents sought recount factual information relevant to the claims against Southern Scrap in the underlying litigation, whether it is

> simply unannotated raw data, test results, maps indicating where samples were taken from, or a graphic display of test sample results, these factual matters are fully discoverable. This type of underlying factual information does not fall within the work-product doctrine. Moreover, this factual information goes to the very heart of defendants' affirmative defenses in the [case]…"

Id. at 64. A similar issue was addressed in the case of *Horan v. Sun* where the Court noted that "environmental test results contain relevant, non-privileged facts." *Horan v. Sun*, 152 F.R.D. 437, 439 (D. R.I. 1993) (Granting Motion to Compel party to respond to an interrogatory seeking the environmental assessment and testing results, test specifications, the person conducting the test and their qualifications, the testing location, quality assurance for the testing). In addition to being purely factual information, the environmental sampling data and related information at issue in the Motion are also relevant to Defendants' affirmative defenses.

Accordingly, the sampling data and related information Plaintiff is seeking from Defendants in this Motion are relevant and are not privileged information under the work product doctrine. Defendants have no basis for withholding production of this information and should be ordered to provide it to Plaintiff in response to its First and Second Requests for Production.

B. The Sampling Data and Related Information are Discoverable Pursuant to Federal Rules 26(b)(3) and 26(b)(4)(D).

Even if the sampling data and related information sought by Plaintiff in its Requests for Production were privileged under the work product doctrine, Defendants should be compelled to produce it to Plaintiff pursuant to Federal Rules of Civil Procedure 26(b)(3) and 26(b)(4)(D). Federal Rule 26(b)(4)(D) provides that:

> Ordinarily, 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 (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), **those materials may be discovered if**: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) **the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means**.

FED. R. Civ. P. 26(b)(3) (emphasis added).

Under Federal Rule 26(b)(3), "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by another party or its representative...." Fed. R. Civ. Proc. 26(b)(3). However, this is a qualified immunity and such materials may be discovered if another party shows that it has "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." *Id.* Opinion work product generally remains immune from discovery unless the requesting party demonstrates "substantial need" and "undue hardship." *See* *Hickman v. Taylor,* 329 U.S. 495, 510 (1947) ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney."); *Upjohn Co. v. United States,* 449 U.S. 383, 401–402 (1981) ("As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need ... [A]far stronger showing of necessity and unavailability by other means would be required than is needed to justify ordinary work product.")." *Levitron Mfg. Co., Inc. v. Universal Sec. Instruments, Inc.*, 606 F.3d 1353, 1365 (4th Cir. 2010).

Federal Rule 26(b)(4)(B) applies to facts or opinions held by non-testifying experts and provides that:

> Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to

> prepare for trial and who is not expected to be called as a witness at trial. But a **party may do so only**: (i) as provided in Rule 35(b); or (ii) **on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means**.

Fed. R. Civ. P. 26(b)(4)(D) (emphasis added). This provision applies to information held by experts that are not expected to testify at trial. "Exceptional circumstances may be shown when (1) the condition observed by the expert is no longer observable . . . ." *Hollinger Int'l., Inc. v. Hollinger, Inc*., 230 F.R.D. 508, 522 (N.D. Ill. 2005) (citing *Ludwig v. Pilkington N. Am., Inc.*, No. 03 C 1086, 2003 WL 22242224, at *3 (N.D. Ill. September 29, 2003)).

Plaintiff is entitled to production of the sampling data and related information it is seeking in its Requests for Production under both Federal Rule 26(b)(3) "substantial need" and 26(b)(4)(D) "exceptional hardship" tests. Plaintiff was not asked to be present during the sampling events undertaken by Defendants and did not have access to Hudson Farm to conduct independent sampling. Plaintiff was unaware of the sampling, did not have independent access to Hudson Farm and was unable to observe and document the environmental conditions present during the relevant time period. Accordingly, Defendants are in possession of the only sampling data available that represent the environmental conditions at those times and at those locations on Hudson Farm. These sample results cannot be reproduced because of changing conditions in the environment through weather and other natural processes, as well through the human activity at Hudson Farm. Because the samples are highly relevant to the issues in this case and are, in fact, the only evidence available regarding environmental conditions at the locations and times of the sampling events, Plaintiff has demonstrated a substantial need and the

existence of exceptional circumstances sufficient to warrant the Defendants being ordered to produce this information.

IV. LOCAL RULE 150(9) CERTIFICATION

Between the initial correspondence on February 23, 2011 and the date this Motion is filed with the Court, counsel for Plaintiff conferred with the counsel for Hudson and Perdue in a good faith effort to resolve the issues raised in this motion, but was unable to reach agreement.

V. CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court issue an order directing Defendants to produce all sampling data and related information responsive to Plaintiff's First and Second Requests for Production. In addition, during the deposition of Perdue's Mr. Jeff Smith, counsel for Perdue instructed Mr. Smith to not answer several purely factual questions related to the sampling done by Perdue at the Hudson Farm. In response to Mr. Smith's refusal to answer these questions, Plaintiff reserved the right to re-depose Mr. Smith should its motion to compel be granted. Plaintiff hereby requests that this Court order the re-deposition of Mr. Smith and that Defendant Perdue bear the costs of that re-deposition.

Dated: March 7, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, a true an accurate copy of the foregoing was served on the attorneys of record for Defendants via email as follows:

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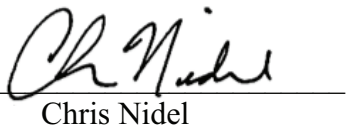

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