

ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 22-79
)
CURLESS FLYING SERVICE, INC., an)
Illinois corporation, and FARM AIR, INC.,)
an Illinois Corporation,)
)
Respondents.)

RESPONSE TO COMPLAINANT’S MOTION FOR SUMMARY JUDGMENT

NOW COME, Respondents, CURLESS FLYING SERVICE, INC. (“Curless”), and FARM AIR, INC. (“Farm Air”), by and through their attorney DYLAN P. GRADY, from BROWN, HAY + STEPHENS, LLP, and for their response to Complainant’s Motion for Summary Judgment state as follows:

I. INTRODUCTION

On May 23, 2022, the State filed a Complaint with the Board alleging that Curless and Farm Air caused air pollution during its aerial application of a chemical mixture onto an agricultural field on August 7, 2019. On January 16, 2025, the State moved for summary judgment. However, because the State cannot meet its burden of showing that there are no genuine issues of material fact and that it is legally entitled to judgment, this Court should deny the State’s Motion. Additionally, because the State is attempting to improperly move for summary judgment as to issues which were not included in its Complaint, this Court should strike those arguments.

II. RESPONSE TO COMPLAINANT'S STATEMENT OF FACTS¹

1. Respondent Curless Flying Service, Inc. ("Curless") is an Illinois corporation that provides aerial pesticide application ("or crop dusting") services to farms within the State of Illinois. Ans. at 3.

RESPONSE: This fact is undisputed and material.

2. Respondent Farm Air, Inc. ("Farm Air") is an Illinois corporation that provides and maintains aircraft used on farms. Ans. at 4.

RESPONSE: This fact is undisputed and material.

3. Respondent Curless employs pilots to conduct aerial pesticide applications. Ex. 2 Ewing Dep. 51:5 (October 29, 2024).

RESPONSE: This fact is undisputed and material.

4. After an application is completed, Respondent Curless creates a map ("as-applied map") showing where product was actually applied in a green area and red lines showing the track the plane flew without spraying. Ex. 4 Curless Dep. 53:18-54:1; 56:19-58:18 (September 13, 2024); Ex. 5 as applied map.

RESPONSE: This fact is undisputed and material.

5. The as-applied map shows the path of the plane both when the sprayer was on and when it was off. *Id.*

RESPONSE: This fact is undisputed and material.

6. While conducting aerial pesticide applications, circumstances can arise that require stopping, delaying, or changing plans for an aerial application. These circumstances include if people are too close to a field, if the wind is blowing in the wrong direction toward houses, or obstacles in the field of which the pilot of previously unaware. Ex. 2 Ewing Dep. 68:5-69:6; 70:15-10.

RESPONSE: This fact is undisputed and material.

7. Pilots can determine the direction of wind by using a device on the plane called a "smoker" that is used to "put out smoke and that tells you what the wind is doing." Ex. 2 Ewing Dep. 73:1-3.

RESPONSE: This fact is undisputed and material.

¹Respondents have separated the State's statement of facts into numbered paragraphs in order to Respond.

8. However, there are occasions when the wind may be doing something different lower to the ground than it is higher up where the pilot is flying when testing the smoker. Ex. 2 Ewing Dep. 74:13-18.

RESPONSE: This fact is undisputed but immaterial. The State has not identified any evidence that the wind lower to the ground was different than the pilot experienced in the air.

9. Other safety practices and guidelines include inspecting areas around the application site to confirm no people are around and altering the application flight pattern if circumstances require. Ex. 2 Ewing Dep. 70:15-19; 84:9; 95:1-21; 96:14-97:3; Ex. 4 Curless Dep 95:4-10.

10. RESPONSE: This fact is undisputed and material.

11. On August 5, 2019, Respondent Curless conducted an aerial pesticide application with Respondent Farm Air's plane on a field known as "Moo Maw." Ans. at 5 and 7; Complaint Exhibit A – Application Report.

RESPONSE: This fact is undisputed and material.

12. The application included a combination of the insecticide Sulturus (cyfluthrin and cyano), fungicide Avaris (azoxystrobin and propiconazole), and the fertilizer Coron. *Id.*

RESPONSE: This fact is undisputed and material.

13. The Moo Maw field is a 94-acre field located in De Witt County, Illinois. Complaint Exhibit A – Application Report.

RESPONSE: This fact is undisputed and material.

14. The Sulturus label prohibits applying the product, a restricted use pesticide, in a way that will contact workers or other persons, either directly or through drift. Ex. 1 at 4.

RESPONSE: This fact is undisputed and material.

15. The Sultrus label also provides that the product causes moderate eye irritation and is harmful if swallowed or inhaled. Ex. 1 at 2.

RESPONSE: This fact is undisputed and material.

16. The Avaris label prohibits application in a manner that will result in exposure to humans or animals. Ex. 1 at 34.

RESPONSE: This fact is undisputed and material.

17. The Avaris label also provides that the product causes substantial but temporary eye injury, is harmful if swallows, and warns users to avoid contact with eyes, skin, and clothing. Ex. 1 at 27.

RESPONSE: This fact is undisputed and material.

18. The Coron label prohibits applying the product in such a manner as to directly expose workers or other persons. Ex. 1 at 62.

RESPONSE: This fact is undisputed and material.

19. The Coron label provides that the product causes serious eye irritation and may be harmful in contact with skin and if inhaled. Ex. 1 at 62.

RESPONSE: This fact is undisputed and material.

20. On that same date, August 5, 2019, farmworkers were working in a field located approximately one quarter mile (approximately 1,320 feet) west of the Moo Maw field. Ex. 2 Ewing Dep. 105:23-106:6; 168:15-169:4.

RESPONSE: This fact is undisputed and material.

21. This is the same location the pilot circled on the map where he had viewed the farmworkers. Ex. 2 Ewing Dep. 139:21-23; Ex. 3.

RESPONSE: This fact is undisputed and material.

22. The pilot conducting the aerial application at the Moo Maw field on August 5, 2019 saw farmworkers with “some orange on” in a field to the west of the Moo Maw field before he got to the Moo Maw field. Ex. 2 Ewing Dep. 105:23-106:6; 168:15-169:4.

RESPONSE: This fact is undisputed and material.

23. Following this observation, the pilot began the application in the Moo Maw field. Ex. 2 Ewing Dep. Page 106:4-7; 170:7.

RESPONSE: This fact is undisputed and material; however, the citation is inaccurate.

24. The pilot flew the plane in lateral passes, west to east and east to west over the Moo Maw field, and longitudinal passes, north to south and south to north, over the Maxwell field located immediately southeast of the Moo Maw field. Ex. 2 Ewing Dep. page 156:19; 165:14; Ex. 5 as-applied map.

RESPONSE: This fact is undisputed and material.

25. The pilot made approximately 18 passes in the lateral direction over the Moo Maw field. Ex. 2 Ewing Dep. Page 154:15-22; Ex. 5 as-applied map.

RESPONSE: This fact is undisputed and material.

26. The flight pattern of the plane based on the as-applied map shows the red lines indicating the sprayer was off where the plane was making turns over adjacent fields, including over the field in which the farmworkers were observed, and green over the area in which product was applied, including over a country road. Ex. 4 Curless Dep. 66:15-68:15; 76:24-80:5; 151:15-22; Ex. 5 as-applied map.

RESPONSE: This fact is undisputed and material.

27. Specifically, the red lines show a pass to the very north of the field in which farmworkers were observed, two passes near the area the pilot circled on Exhibit 3, and several additional passes just below those, where the pilot was turning the plane around to continue with the application on the field approximately one quarter of a mile east of the field with the farmworkers. Ex. 5 as-applied map.

RESPONSE: This fact is undisputed and material.

28. At the completion of the application, the pilot made markings on a map, circling where a vehicle was located to the south of the Maxwell Field where he didn't want to spray. Ex. 2 Ewing Dep. 135:11-22; Ex. 3.

RESPONSE: This fact is undisputed and material.

29. On August 5, 2019, farmworkers observed a plane flying over the field they were in. Ex. 6 Maria Zuniga Dep 19:3-22; 30:12; 63:9-10 (July 3, 2024); Ex. 7 Ramon Hernandez Jr. Dep. 57:8-9; 73:17-20 (August 23, 2024); Ex. 8 Jesus Zuiniga Jr. Dep. 20:23-21:7; 27:1-5 (June 5, 2024); Ex. 9 Jesus Zuniga Sr. Dep. 22:13 (June 7, 2024); Ex. 12 Mario Gonzalez Dep. 54:1-3(August 19, 2024); Ex. 13 Luis Sifuentes Dep. 10:8-12; 14:16-20; 18:4-10 (November 6, 2024); Ex. 15 Alberto Montalvo Jr. Dep. 65:11-14, 16-17 (May 30, 2024); Ex. 17 Hada Garcia Dep. 26:4-6, 16-20 (September 20, 2024); Ex. 18 David Omar Careon Jr. Dep. 52:21-53:19 (September 26, 2024); Ex. 20 Anahi Perez Dep. 53:19-24; 54:25-55:16; 64:15-65 at 1; Ex. 21 Consuelo Perez Dep. 43:17-20 (August 30, 2024).

RESPONSE: Objection. Plaintiff failed to attach complete transcripts which violates Ill. R. Evid 106, Rule of Completeness. As a result, Defendants have attached full transcripts where available.

Disputed, in part. Ramon Hernandez Jr. did not see the airplane and his testimony lacks the required foundation. Ex. 7 Ramon Hernandez Jr. Dep. 62:1-14.

30. On August 5, 2019, at least 9 farmworkers felt spray at the time they saw the airplane. Ex. 7 Ramon Hernandez Jr. Dep. 57:21-23; Ex. 8 Jesus Zuiniga Jr. Dep. 21:7-19; 29:13-

15; Ex. 12 Mario Gonzalez Dep. 55:12-13, 20; 56:6-7; Ex. 13 Luis Sifuentes Dep. 14:16-20; Ex. 14 Miguel Cavazos Sifuentes Dep. 56:6-7; 62:4-5; 67:16-69:6 (August 20, 2024); Ex. 15 Alberto Montalvo Jr. Dep. 31:14, 16-18 (May 30, 2024); Ex. 17 Hada Garcia Dep. 26:23 (September 20, 2024); Ex. 18 David Omar Careon Jr. Dep. 50:5-6; Ex. 20 Anahi Perez Dep. 65:4-9.

RESPONSE: Objection. The farmworkers lack the foundation to determine what they felt was “spray” from the airplane. As a result, this is an improper opinion and is precluded by Ill. R. Evid. 701.

31. On August 5, 2019, at least 9 farmworkers experienced a smell at the time they saw the airplane. Ex. 7 Ramon Hernandez Jr. Dep. 12:20-21; Ex. 8 Jesus Zuiniga Jr. Dep. 30:8; Ex. 10 Yadira Elena Sierra Zuniga Dep. 74:23-75:4 (June 13, 2024); Ex. 12 Mario Gonzalez Dep. 57:13-19; Ex. 13 Luis Sifuentes Dep. 25:23-26:6; Ex. 14 Miguel Cavazos Sifuentes Dep. 56:6-7; 62:4-5; 67:16-69:6 (August 20, 2024); Ex. 15 Alberto Montalvo Jr. Dep. 70:9; Ex. 17 Hada Garcia Dep. 33:20-22; Ex. 18 David Omar Careon Jr. Dep. 50:9; Ex. 20 Anahi Perez Dep. 65:21-24; 66:14-15.

RESPONSE: Disputed, but material. Yadira Zuniga was not present at the time of the incident and did not witness the incident or see a plane. Ex. 10 Yadira Elena Sierra Zuniga Dep. 66:13-17, 74:6-13. Additionally, other workers reported that they did not experience a smell or a spray. See Ex. 19, Adrian Perez Dep. 54:13-20.

32. Farmworkers reported various symptoms on August 5, 2019 and shortly thereafter including the following:

- a. Dizzy, nauseous, itchy and painful throat from being in the truck with workers who had been in the field when the plane flew over. Ex. 6 Maria Zuniga Dep. 33:1-4, 18.

RESPONSE: Objection. Although the workers can testify regarding their symptoms, testimony regarding the cause of their symptoms is improper lay witness testimony precluded by Ill. R. Evid. 701. This fact is undisputed and immaterial, as cited material indicates that the contact was not caused by Respondents.

- b. Breathing failing, heavy chest, nausea, watery eyes, and itchy face the night after August 5. Ex. 7 Ramon Hernandez Jr. Dep. 15:21-24.

RESPONSE: Objection. Although the workers can testify regarding their symptoms, testimony regarding the cause of their symptoms is improper lay witness testimony precluded by Ill. R. Evid. 701. Undisputed and material.

- c. Tingling and numbness and harder to breathe. Ex. 8 Jesus Zuniga Jr. Dep. 21:17-19.

RESPONSE: Objection. Although the workers can testify regarding their symptoms, testimony regarding the cause of their symptoms is improper lay witness testimony precluded by Ill. R. Evid. 701. Undisputed and material.

- d. Normally when he worked in the fields he could touch his face and mouth and nothing happened but that day when he touched his mouth and face his lips got numb. Ex. 9 Jesus Zuniga Sr. Dep. 28:3-7.

RESPONSE: Objection. Although the workers can testify regarding their symptoms, testimony regarding the cause of their symptoms is improper lay witness testimony precluded by Ill. R. Evid. 701. Disputed, but immaterial. This witness stated that he was not sprayed by the plane on that date. Ex. 9 Jesus Zuniga Sr. Dep. 26:14-19.

- e. Headache, nausea, dizziness, abdominal pain, diarrhea, and loss of appetite. Ex. 10 Yadira Elena Sierra Zuniga Dep. 53:5-6, 10-11.

RESPONSE: Objection. Although the workers can testify regarding their symptoms, testimony regarding the cause of their symptoms is improper lay witness testimony precluded by Ill. R. Evid. 701. Disputed, but material. The witness stated that she was not present at the time of the incident and was not sprayed. 66:13-17, 74:6-13.

- f. Dryness of his tongue and mouth, a headache, and tightness of breath with his throat closing in after exiting the field. Ex. 11 Jose Zuniga Dep. 47:23; 50:2-7 (May 22, 2024).

RESPONSE: Objection. Although the workers can testify regarding their symptoms, testimony regarding the cause of their symptoms is improper lay witness testimony precluded by Ill. R. Evid. 701. Disputed, but material. The witness stated that he did not know he was sprayed. Ex. 11 Jose Zuniga Dep. 49:16-20. He only assumed that he was sprayed because he later experienced symptoms. *Id.* at 47:10-20.

- g. Eye irritation, coughing, and chest pain and tightness at the time when they were sprayed. Ex. 12 Mario Gonzalez Dep. 86:21-23; 87:4-8.

RESPONSE: Objection. Although the workers can testify regarding their symptoms, testimony regarding the cause of their symptoms is improper lay witness testimony precluded by Ill. R. Evid. 701. Undisputed and material.

- h. Itching all over himself, his arms, his throat hurt, his eyes, his nose, and his throat was closing up. Ex. 13 Luis Sifuentes Dep. 27:17-21.

RESPONSE: Objection. Although the workers can testify regarding their symptoms, testimony regarding the cause of their symptoms is improper lay witness testimony precluded by Ill. R. Evid. 701. Undisputed and material.

- i. Felt disoriented and had a headache. Ex. 15 Alberto Montalvo Jr. Dep. 82:19.

RESPONSE: Objection. Although the workers can testify regarding their symptoms, testimony regarding the cause of their symptoms is improper lay witness testimony precluded by Ill. R. Evid. 701. Undisputed and material.

j. Nausea, dizziness, and burning eyes. Ex. 17 Hada Garcia Dep. 36:15; 41:6.

RESPONSE: Objection. Although the workers can testify regarding their symptoms, testimony regarding the cause of their symptoms is improper lay witness testimony precluded by Ill. R. Evid. 701. Undisputed and material.

k. His eyes were burning, he felt a little itchy, a headache, and he threw up when he got back to the hotel. Ex. 18 David Omar Carreon Jr. Dep. 66:6-8.

RESPONSE: Objection. Although the workers can testify regarding their symptoms, testimony regarding the cause of their symptoms is improper lay witness testimony precluded by Ill. R. Evid. 701. Disputed, but material. The medical records dispute his report of the symptoms. See Ex. 18 David Omar Carreon Jr. Dep 84:8-92:14.

l. Observed her brother unresponsive with his eyes rolling back into his head. Ex. 20 Anahi Perez Dep. 17:14-24.

RESPONSE: Objection. Although the workers can testify regarding their symptoms, testimony regarding the cause of their symptoms is improper lay witness testimony precluded by Ill. R. Evid. 701. Disputed, but material. In his deposition, Adrian Perez admitted that he did not smell anything from the plane and did not get sprayed by anything. Ex. 19, Adrian Perez Dep., at 54:11-20.

m. She stopped breathing and felt unwell after she had been told to leave the field fast because a plane was spraying. Ex. 21 Consuelo Perez Dep. 44:6-8; 46:17-18.

RESPONSE: Objection. Although the workers can testify regarding their symptoms, testimony regarding the cause of their symptoms is improper lay witness testimony precluded by Ill. R. Evid. 701. Disputed, but material. There was no evidence that she stopped breathing, rather than having an asthma attack. Ex. 21 Consuelo Perez Dep. 47:3-48:13; 57:15-58:12.

33. Ambulances were called for a couple of the farmworkers. Ex. 11 Jose Zuniga Dep. 75:12-14; Ex. 14 Miguel Cavazos Sifuentes Dep. 74:20-75:4; Ex. 19 Adrian Perez Dep. 66:18-19 (July 25, 2024); Ex. 20 Anahi Perez Dep. 81:7-16; Ex. 21 Consuelo Perez Dep. 55:23.

RESPONSE: Undisputed and material.

34. Other farmworkers went to a hospital in their own transportation. Ex. 6 Maria Zuniga Dep. 39:20; Ex. 7 Ramon Hernandez Jr. Dep. 15:17-18; Ex. 8 Jesus Zuniga Jr. Dep. 52:13-14; Ex. 9 Jesus Zuniga Sr. Dep. 38:12; Ex. 13 Luis Sifuentes Dep. 27:17-18; Ex. 5 Alberto Montalvo Jr. Dep. 82:19-20; Ex. 16 Alberto Montalvo Sr. Dep. 118:16; Ex. 17 Hada Garcia Dep. 40:22-41:1; Ex. 18 David Omar Carreon Jr. Dep. 72:4-9; Ex. 20 Anahi Perez Dep. 83:6.

RESPONSE: Undisputed and material.

35. Some of the farmworkers received a high-pressure shower after they reported they were sprayed. Ex. 8 Jesus Zuniga Jr. Dep. 53:17-20.

RESPONSE: Objection. The cited material does not support this fact.

III. RESPONDENTS' STATEMENT OF ADDITIONAL MATERIAL FACTS²

36. In order to complete the applications, Curless leases several types of aircraft of various sizes. (Ex. 4 at 36:17-21, 38:21-40:4).

37. In order to complete the aerial applications, Curless leases several types of aircraft of various sizes. It does not own any aircrafts. (Ex. 4 at 36:17-21, 38:21-40:4; <https://registry.faa.gov/aircraftinquiry/Search/NameResult>).

38. At the time, neither Curless nor Farm Air owned any helicopters. (Ex. 4 at 39:18-40:2; <https://registry.faa.gov/aircraftinquiry/Search/NameResult>).

39. During the application, Mr. Ewing was flying a yellow and blue Air Tractor aircraft. (Resp. Ex. I, Photo of Air Tractor; Ex. 2 at 63:9–23).

40. Although there were some workers in a nearby field, Mr. Ewing's application spray would only have been carried in the opposite direction of the worker's location(s), based on the wind speed and direction. (Resp. Ex. J, Dennis Gardisser Expert Report; Ex. 2 at 105–106:7).

41. Two pesticides were used in the Corteva field the workers were located in: Miravis Neo, which contains azoxystrobin, and Trivapro, which contains azoxystrobin and propiconazole. (Resp. Ex. M, Davis's Email from Oct. 24).

42. During the IDOA investigation, Brandon Gillen, a Pioneer/Corteva employee, confirmed that only 14 of the approximately 90 field workers went to the hospital after they reported feeling the mist. (Resp. Ex. L, Special Assignment Report, at 1).

² Respondents citations are to exhibits already in the record and attached to Respondents' Motion for Summary Judgment and are not reattached to this response.

43. Jacob Wantlant, a Corteva supervisor who was in the field with the workers, stated that he did not believe a plane sprayed the workers, but that he had the workers leave the field after seeing the plane, under Corteva's policy. (Ex. L at 1).

44. Pete Dunn, another Corteva supervisor, stated that he witnessed the entire application and was able to see when the spray was turned on and off. (Ex. C at 1-2). Dunn reported that he did not see the plane's boom turn on while it was over the work crew. (*Id.*).

45. Fedencio Salinas, crew supervisor, reported to the IDOA that he smelled something strange when the plane flew over the workers, but he did not go to the hospital, and did not see any spray on the workers. (Ex. L at 2).

46. On August 8, 2019, three days after the application by Mr. Ewing, IDOA collected Salinas's hat and submitted it to their lab for pesticide residue analysis. (Ex. L at 2).

47. No other clothing was preserved or tested; nor were samples or testing performed in the field where the migrant workers were located. (See, e.g., Ex. L; Resp. Ex. U, Collection Log).

48. The hats worn by the workers at the Corteva field were typically worn every day, and the workers would take them home. (Ex. 21, Dep. of Consuelo Perez, at 30-31).

49. During the relevant time, Salinas was also working at other seed corn locations, which could have used the same pesticides. (Resp. Ex. O, Davis's Email from Nov. 22).

50. Adrian Perez, a worker who went to the hospital with complaints of vomiting, admitted the airplane did not spray anything on him and he does not believe he was sprayed by any pesticide. (Ex. 19, Dep. of Adrian Perez, 54:11-55:20).

51. As part of the investigation, the IDOA also obtained several videos from the workers, which depicted either a helicopter or a blue-and-white aircraft. None of the videos depict

the yellow air-tractor flown by Mr. Ewing. (Resp. Ex. P, Moss's Email from Sept. 18; Group Ex. Q, Videos).

52. Based on the interviews conducted of the workers and witnesses, the Illinois Department of Agriculture noted that: "Preponderance of evidence so far is that the workers were not sprayed on and the case will hinge on the lab test." (Ex. L at 2).

53. On August 9, 2019, the IDOA prepared a Residue Sample Result Report in its Pesticide Laboratory. The "Analysis Requested" requested testing for Azoxystrobin and Propiconazole (ingredients contained in Avaris 2SX) and Cyfluthrin (an ingredient contained in Sultrus). The results of the analysis show that the Azoxystrobin and Propiconazole were detected but not quantified (DNQ). Further, the results showed a finding of "ND" (not detected) is listed for Cyfluthrin. (Resp. Ex. R, Analysis Report).

54. On October 27, 2020, the IDOA issued a Notice of Fine to Curless alleging pesticide misuse. (Resp. Ex. S, Notice of Fine).

55. Curless and Mr. Ewing requested a hearing before the CMS Bureau of Administrative Hearings. (Resp. Ex. K, IDOA Dismissal Order).

56. After reviewing the facts and evidence gathered in related litigation, the IDOA concluded that it did not have a preponderance of evidence to assess a monetary penalty against Curless and Mr. Ewing. (Ex. T).

57. As a result, the IDOA dismissed the claims against Curless. (Ex. T).

58. Respondents retained an expert, Dennis R. Gardisser, Ph.D., to review the facts related to this matter. Mr. Gardisser is an expert in agricultural chemical application, pesticide applications, aerial applications, ground applications, pesticide labels, instructions for use, label interpretations, label instructions impact upon licensed end-user applicators, scope of labeling,

label warnings, precautions, and label meanings for applicators who meet industry and regulatory standards. (Ex. J).

59. Mr. Garisser holds the opinion that, based on the application log which identifies winds from 247 degrees at 8 mph, spray Mr. Ewing's agricultural application would have carried in the opposite direction of the migrant workers. (Ex. J at 6-7).

60. Additionally, no material was analyzed which had the tank mixture from Mr. Ewing's application. As a result, the facts and evidence do not support an allegation that any pesticide was released over the workers. (*Id.*).

IV. MOTION TO STRIKE

As an initial matter, this Board should strike the State's arguments that the discharge of the products unreasonably interfered with the enjoyment of human life, as this theory was raised for the first time in the Motion for Summary Judgment.

"When ruling on a motion for summary judgment, the trial court looks to the pleadings to determine the issues in controversy; if a plaintiff desires to place issues in controversy that were not named in the complaint, the proper course of action is to move to amend the complaint, rather than in a response to a motion for summary judgment." *Abramson v. Marderosian*, 2018 IL App (1st) 180081, ¶ 55, *citing Filliung v. Adams*, 387 Ill.App.3d 40, 51 (1st Dist. 2008). If the plaintiff does not move to amend a complaint to include new issues in controversy, then it cannot move for summary judgment on those issues. *Filliung*, 387 Ill.App.3d at 51.

The Act defines "air pollution" as "the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property." 415 ILCS 5/3.115. Based on this definition, the Illinois Supreme

Court has recognized that there are two categories of “air pollution.” *See Incinerator, Inc. v. Pollution Control Bd.*, 59 Ill.2d 290, 295 (1974). The first category is the “presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property.” *Id.* The second category is “the presence of such contaminants in such amounts, characteristics and duration as to unreasonably interfere with the enjoyment of life or property.” *Id.*

In its Complaint, the State alleged: “The discharge of the fungicide Avaris, the insecticide Sultrus, and the fertilizer Coron into the atmosphere so as to be injurious to human life and health caused ‘air pollution’ as that term is defined in Section 3.115 of the Act, 415 ILCS 5/3.115 (2020).” (Compl., at ¶ 31). This statement only implicates the first type of air pollution. As a result, it is improper for the State to move for summary judgment on the second type of air pollution, as it was not included in its Complaint. *See Abramson*, 2018 IL App (1st) 180081, ¶ 55; *Filliung*, 387 Ill.App.3d at 51. Therefore, this Board should strike this argument.

V. ARGUMENT

In support of its Motion for Summary Judgment, the State advances four arguments. First, the State argues that the act of flying over the field resulted in a significant threat of air pollution. Second, the State argues that the aerial application caused injuries. Third, the State argues that the violation was unreasonable, due to the proximity of the farmworkers. Finally, the State argues that this Board should impose a penalty of \$100,000.00. However, as discussed below, the State’s evidence and arguments do not support summary judgment. As a result, the State’s motion should be denied.

A. This Board should reject the notion that the mere threat of harm, without any evidentiary support, is sufficient to show a violation.

The Act prohibits people from committing acts which “[c]ause or threaten or allow the

discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act.” 415 ILCS 5/9(a). The term “threat” in this context “refers... to the existence of a hazard, and is intended to permit the Board to act before the pollution actually takes place.” *City of Des Plaines v. Metropolitan Sanitary Dist. of Greater Chicago*, 60 Ill.App.3d 995, 1000 (1st Dist. 1978).

The petitioner also bears the burden of proving this element by a preponderance of the evidence. 415 ILCS 5/31(e); *Rodney B. Nelson, M.D. v. Kane County Forest Pres., et al.*, PCB 94-244, 1996 WL 419472 (July 18, 1996), slip op. at 5. To do this, the State must allege facts which “would show a ‘very definite danger’ of pollution.” *Metropolitan Sanitary Dist.*, 60 Ill.App.3d at 1000 (finding that the plaintiff did not meet its burden, where it did not present evidence that the pollution was likely to occur). This can be shown, for example, by presenting evidence that there were prior instances of pollution or other facts that tend to support the “definite danger” of the pollution. *Id.* Speculation alone is not sufficient to meet this burden. *See Rocke v. Illinois Pollution Control Board*, 78 Ill.App.3d 476, 479 (1st Dist. 1979). For example, in *Rocke*, the Court held that the petitioners did not meet their burden of proof because there was “no prior conduct [which] was alleged to have occurred upon which any threatened violations could be inferred.” *Id.* The mere possibility that pollution might occur was not sufficient. *Id.*

Here, the evidence shows that before his flight, the pilot would have completed a “reconnaissance circle” around the field in order to ascertain information about the wind patters and other relevant information. (Ex. A, Dep. of Joseph Curless, at 93:2-13). The planes are also equipped with GPS equipment, which records and collects every aspect of the aircraft’s flight, including the altitude, precise location of the aircraft, and whether the aircraft’s sprayer was on or

off at each GPS location. (Ex. A at 56:19-58:19; Ex. 2, Dep. of Ewing, at 151:12-182:22; Ex. C, Flight Map Diagram). The GPS data from Mr. Ewing's flight reflects that the product was delivered only to Kopp Farms 94-acre soybean field. (Ex. D). Based on the wind speed and direction, the spray would have been carried in the opposite direction of the workers. (Ex. J, Dennis Gardisser Expert Report).

As the State concedes, the data demonstrates that the applicator was not turned at any point during his flight over the workers. (Ex. C; St. Mot. at 6). The State suggests that the threat of harm to the workers, even without actual injury, would be sufficient to meet its burden. The State contends that the “[a]ir pollution occurred the moment the pilot continued the flight pattern over the farmworkers at least twice...” (St. Mot. at 11). Despite the admission that the sprayers were off during that portion of the flight, the State maintains that the “pathway of the plane alone” was sufficient to meet their burden of showing that there was a threat of discharge. (*Id.* at 11). The State's argument must be rejected because it is based on speculation and is unsupported by any reliable evidence.

First, there is no evidence that the GPS data was inaccurate or that the applicators were malfunctioning. Additionally, the State has presented no evidence that the wind direction would have allowed the spray to drift toward the workers. The State's argument is based entirely on speculation—either that the sprayers *could* have malfunctioned or that the air patterns *could* have allowed the spray to travel over the workers. This is precisely the type of argument that was rejected by the *Metropolitan Sanitary Dist.* and *Rocke* courts. Without some reliable evidence to support its argument, the State cannot meet its burden of proving that there is a “definite danger” of pollution, as required by this element.

The State's argument is flawed because it seems to imply that any business that operates

with pollutants would violate the act simply by existing. Certainly, this type of speculation is not the result that the legislature intended when it prohibited the “threat” of air pollution. *See, e.g., Illinois State Toll Highway Authority v. Karn*, 9 Ill.App.3d 784, 790 (2d Dist. 1973) (noting that a similar argument that actions “might cause” air pollution was invalid because it would result in “the construction of virtually all new roads [being] barred” due to the potential for harm). As a result, this Court should reject the State’s argument.

B. The State cannot demonstrate that the harm was caused by the Respondents.

Next, the State argues that it can demonstrate harm because several farmworkers reported symptoms including eye irritation, dizziness, nausea, and difficulty breathing. However, the State cannot demonstrate that the harm was caused by either Farm Air or Curless.

As it relates to causation, Illinois Appellate Courts have vacated rulings by the Board where evidence concerning the cause and source of emissions is unavailable. *See Lonza, Inc. v. Illinois Pollution Control Bd.*, 21 Ill.App.3d 468, 475 (3d Dist. 1974). For example, in *Lonza*, the Environmental Protection Agency filed a complaint against two companies with adjacent plants and alleged that either alone or in combination with other sources, they were causing pollution in the form of odor contaminants. *Id.* at 469. When assessing the sufficiency of the evidence, the Court first noted that the burden shall be on the complainant to show that the respondent caused or threatened to cause the pollution, and that the respondent may respond by presenting evidence in support of other theories. *Id.* at 472. The Court noted that several of the citizen witnesses could not identify which plant the odors came from, and the technical representatives of the Agency were unable to report and corroborate either the existence of the odor or its source. *Id.* at 473-75. The Court also pointed out that the plant manager for Lonza admitted that the plant had, on a handful of occasions, caused a fishy odor due to a malfunction. *Id.* at 474-75. Despite this admission, the

Court did not find that there was sufficient evidence to identify the cause, particularly when considering the other evidence. *Id.* at 475. As a result, the Court vacated the ruling of the Board against Lonza. *Id.*

1. *Farm Air*

The State alleges that the Respondents caused the emission of the fungicide Avaris, the insecticide Sultrus, and the fertilizer Coron. Notably, the State combines its allegations against Curless and Farm air. However, just as in *Lonza*, the State's claim must fail there is no evidence that Farm Air had any involvement in the incident besides performing maintenance on the aircraft, and there is no evidence that Curless caused any emission into Corteva Field.

As it relates to Farm Air, there is no evidence that it had any involvement beyond preparing the aircraft. The two companies are separate entities, and Farm Air's role is solely to maintain the aircraft that Curless uses. There is no evidence that any alleged emissions were caused by a fault in the aircraft's maintenance or that the aircraft's systems were not working properly. As a result, Farm Air did not cause any alleged emissions. Unlike in *Lonza*, which involved two companies that each could have caused the pollution, there is no evidence that Farm Air contributed to this incident at all. Therefore, the State has not met its burden at this stage of proceedings and its motion for summary judgment should be denied.

2. *Curless*

Additionally, as it relates to Curless, there is no reliable evidence that the workers were exposed to those chemicals as a result of Curless's actions. The only evidence that the State can offer in support of its theory is based on testimony from the workers, but that is contradicted by the evidence they submitted to the IDOA. The workers submitted several videos to the IDOA for review. All but one of the videos taken by the workers show a helicopter above the fields. (Group

Ex. Q, Field Worker Videos). The only video that shows a non-helicopter aircraft features a blue and white aircraft. (Group Ex. H, Field Worker video 855). This is significant because Curless does not own or operate any helicopters. (Ex. 4 at 39:18-40:2). Additionally, Mr. Ewing was operating a yellow Air-Tractor during this application. (Ex. I). This demonstrates that the aircraft which the workers attributed to their pesticide exposure was not the same aircraft that was operated by Mr. Ewing.

Moreover, despite the IDOA's initial conclusion that Mr. Ewing was at fault, the lab reports also do not support that theory. The IDOA's lab analysis requested the testing of two substances. The first substance Avaris, which contains the ingredients Azoxystrobin/Propiconazole. (Complaint Exhibit A – Application Report; Ex. R). The second substance was Sultrus, which contains the ingredient Cyfluthrin. (Complaint Exhibit A – Application Report; Ex. R). The third product that Mr. Ewing sprayed, Coron, was not included in the testing. (Complaint Exhibit A – Application Report; Ex. R).

The results of the analysis show that the Avaris ingredients were detected but not quantified (DNQ). (Ex. R). However, the Sultrus ingredient was not detected. (*Id.*). This result is significant, as that was one of the main ingredients in the application made by Curless. (Complaint Exhibit A – Application Report; Ex. R). The testing only indicated the presence of one of the three products applied by Curless. Since these products were contained in the same mixture, the results should have revealed the presence of both of the substances that the IDOA tested for, not just one of them. It defies reason to suggest that somehow only one of the substances in the mixture would be detected.

The IDOA received an explanation for this during their investigation. In an email dated October 24, 2019, from Rick Davis to Suzanne Moss of IDOA, it is noted that: “Two of the active

ingredients found on the sample were also used by Corteva. Attached is a list of products used by Corteva in the corn fields.” (Ex. O). The email then notes that Corteva uses Miravis Neo, which contains Azoxystrobin, and Trivapro, which contains Azoxystrobin and Propiconazole. (*Id.*). Corteva does not use products containing cyfluthrin in its fields. (*Id.*). In another email, Davis also noted that the man who wore the sampled hat was “moonlighting at other seed corn locations and that pesticide residues could have come from those locations.” (Ex. P; Ex. 21 at 30-31). These records suggest that the substances found on the sampled material could have also originated from either the Corteva field itself, or another field.

Finally, although the workers can testify regarding their symptoms, they cannot testify as to the cause of their symptoms. Courts have consistently held that “a lay witness may not offer testimony pertaining to a specific medical diagnosis unless he or she is properly qualified as an expert to give such testimony.” *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, ¶ 48. See also Ill. R. Evid. 701. Yet that is precisely what the State aims to do here. It seeks to admit evidence that the farmworkers were suffering from pesticide exposure, without any medical records or expert testimony to support their conclusions.

One of the most egregious examples of why this approach is flawed comes from Jose Zuniga. Mr. Zuniga did not believe he was sprayed, but later assumed that he was because he was experiencing some sort of symptoms. Ex. 11, Jose Zuniga Dep., 47:10-20; 49:16-20. Additionally, in his deposition, Adrian Perez admitted that he did not smell anything from the plane and did not get sprayed by anything. Ex. 19, Adrian Perez Dep., at 54:11-20. Finally, some of the witnesses ascribe certain physical symptoms to the aerial sprays despite having never seen a doctor to confirm their suspicions. *See* Ex. 10, Yadira Elena Sierra Zuniga Dep., 65:1-3.

These examples demonstrate why the State’s evidence is inadequate. Lay persons do not

have the training and experience necessary to determine the cause of their symptoms. Without a medical diagnosis to confirm the causation, the testimony from the workers regarding causation is unreliable and improper.

Just as in *Lonza*, the workers' testimony should be weighed against the objective evidence. When doing so, the workers' testimony is undermined by the reports of other witnesses, and by their own video footage. Additionally, it is not supported by the GPS, wind patterns, lack of positive test results indicating the presence of the mixture used by Curless, and the plausible alternate source for the chemicals that did test positive. Based on this objective evidence, the State cannot demonstrate that Curless caused the air pollution at issue. As a result, this Board should deny the State's Motion for Summary Judgment as to this issue, as well.

C. Assuming *arguendo* that the Board finds that Curless caused the injury, its actions were not unreasonable.

The State further argues that the violations were unreasonable based on the presence of farmworkers in proximity to the field where the aerial application was being conducted. The State suggests that alternate flight patterns, or a change in the date or time of the application could have minimized the risk of harm.

To determine the reasonableness of the emissions, discharges, or deposits, the Board reviews a number of factors, including: (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people; (ii) the social and economic value of the pollution source; (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and (v) any subsequent compliance. 415 ILCS 5/33(c). The word "unreasonable" has been defined by the courts as "a

substantial interference with the enjoyment of life and property.” *Processing & Books, Inc. v. Pollution Control Bd.*, 64 Ill.2d 68, 77 (1976).

There is no evidence that the emissions caused permanent injury, which is a mitigating factor. *See Marblehead Lime Co. v. Pollution Control Bd.*, 43 Ill. App.3d 116, 123 (1st Dist. 1976); Ex. 6 Maria Zuniga Dep. 57:12-60:7; Ex. 7 Ramon Hernandez Jr. Dep. 16:1-23; Ex. 12 Mario Gonzalez Dep. 86:14-87:9; Ex. 13 Luis Sifuentes Dep. 34:5-11; Ex. 15 Alberto Montalvo Jr. Dep. 85:8-12; Ex. 17 Hada Garcia Dep. 31:17-43:2; Ex. 18 David Omar Carreon Jr. Dep. 80:9-83:6; Ex. 10 Yadira Elena Sierra Zuniga Dep. 53:12-56:20. Regarding the social and economic value, the aerial application of these agricultural products serves a necessary purpose. As the Supreme Court has recognized: “Over the past century, the use of pesticides to control weeds and minimize crop damage caused by insects, disease, and animals has become increasingly more important for American agriculture.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 990 (1984). Additionally, Curless tried to mitigate the harm based on the pilot’s reconnaissance circle to identify potential hazards, and by using equipment to track when the sprayers were on, the wind conditions, and other factors. *See Marblehead*, 43 Ill.App.3d at 123 (noting that the use of technology to mitigate the air pollution was a mitigating factor). Additionally, as the State points out, this was a single incident rather than an ongoing issue.

Regarding the feasibility of reducing or eliminating the emissions, it is true that changing the time/date of the application may have reduced the risk, but, as previously noted, based on the wind speed and direction, the spray would have been carried in the opposite direction of the workers. (Ex. J, Dennis Gardisser Expert Report). Therefore, a change in flight patterns would not have assuaged the State’s concerns.

D. The State's request for a \$100,000 penalty is unreasonable.

Section 2(b) of the Act states that the purpose of the Act is "... to establish a unified, state-wide program... to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." The main reason for imposing civil penalties is to provide a method to aid in the enforcement of the Act, and punitive considerations should be secondary to that goal. *Aluminum Coil Anodizing Corp. v. Pollution Control Bd.*, 40 Ill.App.3d 785, 792 (1976)

The Court should also take into consideration the amount of money Respondents have spent litigating this violation to date. *See Hillside Stone Corp. v. Illinois Pollution Control Bd.*, 43 Ill.App.3d 158, 163 (1st Dist. 1976) (finding that the fine was excessive after taking into consideration other fines and expenditures). Respondents have already spent a considerable amount of time defending against related actions in Federal court, and in administrative hearings against the Illinois Department of Agriculture. *See Garcia v. Pioneer Hi-Bred Int'l, Inc.*, 20-cv-3322 (dismissed after settlement agreement); *Dept of Agriculture v. Curless Flying Serv.*, AGR-EP-20-120 (Dismissed on motion of the petitioner due to the IDOA's conclusion that it did not have a preponderance of evidence to assess a monetary penalty against Curless).

In light of the totality of the aforementioned evidence and mitigating factors, the State's request is excessive and arbitrary. As a result, this Board should reject the State's request.

VI. CONCLUSION

WHEREFORE, Respondents CURLESS FLYING SERVICE, INC., and FARM AIR, INC., move this honorable Court to deny the State's motion for summary judgment, and for any other and further relief as the Court may deem proper.

Respectfully submitted,

Curless Flying Service, Inc., and Farm Air, Inc.,
Respondents

/s/ Dylan P. Grady _____

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 13, 2026, a copy of the foregoing instrument was e-filed and served via email to the following:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Dylan P. Grady

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