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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VERNON and ELAINE ZOHFELD,)
)
Complainants,)
)
v.) PCB 05-0193
) (Citizen's Enforcement, Air)
BOB DRAKE, WABASH VALLEY SERVICE)
COMPANY, MICHAEL J. PFISTER,)
NOAH D. HORTON, and STEVE KINDER,)
)
Respondents.)

RESPONSE TO MOTIONS TO STAY PROCEEDINGS

NOW COME Complainants, VERNON and ELAINE ZOHFELD, through their undersigned attorney, and submit to this Board their Response to the Motions to Stay Proceedings filed by Respondents, stating as follows:

1. The Board may grant a stay under certain circumstances and considerations, and may deny a stay based on these considerations.
2. Five factors are relevant whether to grant a stay; "great weight" is not to be given any particular factor, including the alleged Fifth Amendment right, contrary to Respondents' argument. Jacksonville Sav. Bank v. Kovack, 326 Ill App 3d 1131, 1136; 762 N.E. 2d 1138, 1142 (4th Dist. 2002). ("...[T]he extent to which the defendant's Fifth Amendment rights are implicated is a significant factor for the ALJ to consider, but it is only one factor to be weighed against others." Keating v. Office of Thrift Supervision, 45 F.3d 322, 326 (9th Cir. 1994)).
3. The five factors the Board must consider include: (1) the Complainants' interest in an expeditious resolution of the administrative case, including consideration of how the delay would prejudice the Complainants; (2) the effect on the Respondents including

their Fifth Amendment rights; (3) the impact the stay would have on the Board's management of its own docket and resources; (4) third party interests in the proceedings; and (5) the public's interest in the pending cases. Jacksonville Sav. Bank, 326 Ill. App. 3d at 1142; Keating, 45 F.3d at 325.

4. "The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. 'In the absence of substantial prejudice to the rights of the parties involved, [simultaneous] parallel [civil and criminal] proceedings are unobjectionable under our jurisprudence.' " Keating, 45 F.3d at 324 (citations omitted) (quoting Securities & Exchange Comm'n v. Dresser Indus., 628 F.2d 1368, 1375 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980)).

5. Moreover, the mere suggestion that Fifth Amendment considerations may apply is not sufficient to require a stay of simultaneous administrative proceedings. "A defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege. Not only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding." Keating, 45 F.3d at 326 (citing Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)).

6. Contrary to Respondents' suggestion, "there is no absolute prohibition against simultaneous administrative disciplinary proceedings and related criminal proceedings." Goodwin v. McHenry County Sheriff's Office Merit Comm'n, 306 Ill. App. 3d 251, 258, 713 N.E.2d 818, 824 (2d Dist. 1999).

7. “[T]he pendency of criminal proceedings does not automatically assure fifth amendment protection; there must exist some nexus between the risk of criminal conviction and the information requested.” People v. Kafka and Sons Building and Supply Company, Inc., 252 Ill. App. 3d 115, 120, 625 N.E.2d 16, 20 (1st Dist. 1993). In Martin-Trigona v. Gouletas, 634 F.2d 354, 362 (7th Cir. 1980), the court rejected a stay of civil asset discovery proceedings because the criminal defendant did not provide any credible reason why his testimony would pose a risk of self incrimination, but instead raised self-incrimination only as a remote and speculative possibility.

8. Here, no basis exists for the stay requested by all Respondents.

9. First, it should be remembered that of the five persons named as Respondents in this matter, only two—Kinder and Horton—even qualify for fifth amendment considerations. Respondents Drake and Pfister are not named in the criminal information, and therefore have no fifth amendment concerns. Respondent Wabash Valley Service Company is not a natural person, but instead is a corporation, and therefore is entitled to no fifth amendment protections. U.S. v. White, 322 U.S. 694, 699 (1944) (“Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation.”). Respondents’ suggestion to the contrary is disingenuous.

10. Kinder and Horton fail to articulate any specific credible reason why proceeding with this matter might cause them any prejudice related to their fifth amendment privilege against self-incrimination. Instead, they make only general, vague and completely speculative objections that somehow during the course of this proceeding they may be required to raise their fifth amendment privileges. The other Respondents

make equally vague and generalized assertions that by exercising their fifth amendment rights, Kinder and Horton might interfere with certain undecided litigation tactics the other Respondents might want to utilize.

11. Simply put, despite the lengthy pleadings filed by and on behalf of all five Respondents, not one of them identifies any specific issue, or nexus, between this case and the criminal matter that could possibly implicate fifth amendment issues in any prejudicial way. Such speculative claims cannot form the basis for staying an entire proceeding.

12. No reason exists why Kinder and Horton cannot raise specific fifth amendment claims if and when, during the course of this proceeding, specific issues or questions are raised which they feel implicate those rights. At that time (if such a time ever comes about) the parties, the hearing officer, and this Board will be in a much better position to evaluate specific claims of potential prejudice, rather than the vague and speculative claims made here.

13. In point of fact, though, no nexus exists between the pending federal criminal action and this Board's proceeding, and so no real fifth amendment issue exists, either. As Respondents' own documentation shows, the federal criminal information filed against Kinder and Horton alleges that they used "a registered pesticide in a manner inconsistent with its labeling," in violation of 7 U.S.C. §§ 136j(a)(2)(b), 136l(b)(1)(B), and 136l(b)(4), and of 18 U.S.C. § 2. In contrast, the complaint before this Board makes no allegations of or concerning the pesticide labels, or whether the Respondents acted consistently or otherwise with respect to those labels. Similarly, the instant Complaint raises no allegations of violation of any federal laws or regulations. Instead, this

complaint alleges violations of Illinois air pollution laws; such violations simply have no nexus whatsoever with the label violations raised in the federal criminal case. It is highly likely that this entire case may proceed to final decision without ever once qualifying Kinder or Horton to assert fifth amendment privileges.

14. It bears noting—indeed, it bears emphasizing—that Respondents have made no similar motion in the pending Hamilton County civil case noted in their motions. Even though that civil case has already resulted in a substantial amount of document exchange, not once have any of these Respondents suggested to the circuit court that the civil lawsuit should be stayed until the criminal case is resolved. In fact, in their pleadings before this Board they expressly state that they do not want this case stayed during pendency of the civil action! Rather than bona fide concern over self-incrimination issues, then, it appears that Respondents simply do not want this Board to reach the merits of Complainants' complaint.

15. The factors for considering a stay provide Respondents no comfort. As Respondents themselves acknowledge, the facts surrounding the flagship event in Complainants' complaint (the May 5, 2000 overdraft) is now five years old! The delay championed by Respondents would soon create problems of proof and of stale evidence. Rather than staying this matter, this Board should expedite this case for as quick a resolution on the merits as possible!

16. Again, Respondents have voiced no specific, tangible prejudice to them or anyone else by proceeding with this case.

17. Respondents claim that the stay would pose no inconvenience to this Board. However, having a case such as this merely tread water with no advancement whatsoever

would hardly seem an effective or efficient use of this Board's resources, particularly since there is no good reason for doing so. Moreover, the legislative declaration for Title II of the Environmental Protection Act recognizes air pollution as "a menace to public health and welfare," causing numerous ill effects, and the purpose of both that Title and of this action is to "restore, maintain, and enhance the purity of the air of this State." 415 ILCS 5/8. That purpose can hardly be accomplished if the case is indefinitely stayed.

18. The Respondents baldly and without any factual or legal authority claim that no third parties have any interest in this case, and that the public has no interest, either. This is categorically false. Recently a local (southern Illinois) television station aired a report on Respondents' overdrift and Complainants' injuries. Counsel for Complainants has been in communication with both the Illinois Attorney General's Office and the Illinois Environmental Protection Agency, both of which indicated an interest in this case and its outcome. And much more importantly, every man, woman, and child in Illinois has a right to a healthful environment, and a statutory right to be free from poisonous emissions that cross property boundaries from any source, be it a spray truck or a factory. The entire State therefore has a strong interest in this case and its outcome, and in its expeditious resolution.

19. Respondents erroneously assert that this case involves only a discrete single instance of spraying poisonous chemicals into the atmosphere for dispersal on other properties. In fact, though, Respondents' own pleadings reveal that they are serial violators of this State's air pollution laws. The May 2000 incident was the second direct discharge onto Complainants' property, and the combined effect of those two incidents virtually destroyed Complainants' herd of thoroughbred race horses. Respondents'

actions have resulted in two administrative proceedings by the Illinois Department of Agriculture against Wabash Valley Service Company (in both cases Wabash Valley raised no defense), and has resulted in both a civil lawsuit and a criminal prosecution. In addition to the overdrafts that directly effected Complainants, the evidence will also show that Wabash Valley Service Company and other Respondents routinely overdraft other locations as well. Hence, the behavior sought to be controlled by this Board is not isolated or sporadic, and is a very real and continuing threat, both to the public and to the environment.

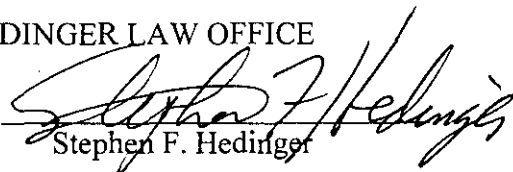
WHEREFORE Complainants, VERNON and ELAINE ZOHFELD, request that this Board DENY the motions for stay filed by Respondents, and direct the hearing officer to set this matter for an early and expeditious hearing.

Respectfully submitted,

Vernon and Elaine Zohfeld,
Complainants,
By their attorney,

HEDINGER LAW OFFICE

By


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PCB 05-193
(Enforcement, Air)

NOTICE OF FILING AND PROOF OF SERVICE

The undersigned certifies that an original and nine copies of the foregoing Response to Motions to Stay Proceedings and of this Notice of Filing and Proof of Service, were served upon the Clerk of the Illinois Pollution Control Board, and one copy to each of the following parties of record in this cause by enclosing same in an envelope addressed to:

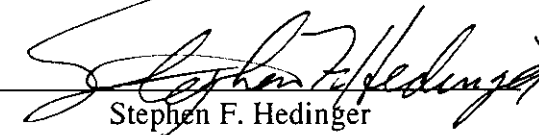
Dorothy Gunn, Clerk
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with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Springfield, Illinois before 5:30 p.m. on the 3rd day of August, 2005.


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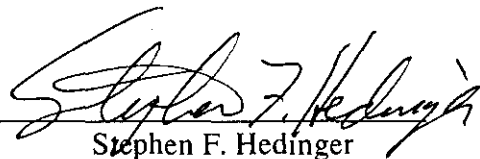
STATE OF ILLINOIS)
)
COUNTY OF SANGAMON) SS

AFFIDAVIT OF STEPHEN F. HEDINGER

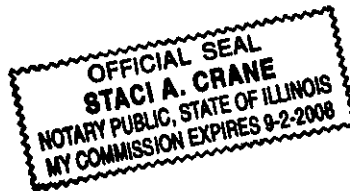
Affiant, Stephen F. Hedinger, first being duly sworn, deposes and states that, if called upon to testify in this matter, he would be competent to state upon personal knowledge as follows:

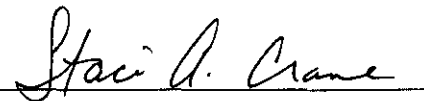
1. Affiant, duly licensed to practice law within the State of Illinois, is counsel for Complainants Vernon and Elaine Zohfeld in a matter pending before the Illinois Pollution Control Board as case PCB 05-0193. This affidavit supports Complainants' Response to Motions to Stay Proceedings filed in that case.
2. All factual assertions made in the Response to Motions to Stay Proceedings are true and correct, to the best of Affiant's knowledge and belief.

FURTHER AFFIANT SAYETH NOT.


Stephen F. Hedinger

Subscribed and sworn to before me, a Notary Public, this 3rd day of August, 2005.




Notary Public