

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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OCT 24 2005

STATE OF ILLINOIS
Pollution Control Board

VERNON and ELAINE ZOHFELD,)
)
 Complainants,)
)
 v.)
)
 BOB DRAKE, WABASH VALLEY SERVICE)
 COMPANY, MICHAEL J. PFISTER,)
 NOAH D. HORTON, and STEVE KINDER,)
)
 Respondents.)

PCB 05-193
(Citizen's Enforcement, Air)

MOTION TO STRIKE

NOW COME Complainants, VERNON and ELAINE ZOHFELD, through their undersigned attorney, and move this Board to strike the Reply to Complainants' Response to Motion to Stay Proceedings filed by and on behalf of Respondents WABASH VALLEY SERVICE COMPANY, MICHAEL J. PFISTER, NOAH D. HORTON, and STEVE KINDER (hereinafter "WABASH VALLEY RESPONDENTS"). In support of this motion, Complainants state as follow:

1. Before this Board are motions to stay this proceeding filed separately by the Wabash Valley Respondents and by Respondent Drake. These motions all request a stay of this proceeding in light of criminal proceedings pending in the United States District Court for the Southern District of Illinois which might affect two of the Respondents.

2. Following the filing of Respondents' motions to stay, Complainants filed their response. Thereafter both the Wabash Valley Respondents and Respondent Drake requested leave to file a reply, upon the claimed premise that Complainants' response

contained misrepresentations of law or fact, and mischaracterizations of written materials in this case.

3. Respondent Drake never filed a reply, and accordingly his assertions of mischaracterizations and misrepresentations were clearly false.

4. The Wabash Valley Respondents did file a reply, but they fail to have identified any misrepresentations or mischaracterizations. In fact, the allegations of misrepresentations and mischaracterizations were merely a ploy to obtain the hearing officer's leave to file a reply (which otherwise is not allowed pursuant to this Board's procedural rules), which clearly justifies striking the reply.

5. At paragraphs 7-11 of their reply, the Wabash Valley Respondents claim that Complainants mischaracterize the law by suggesting that no case states that "great weight" is to be given to any particular factor in determining whether to grant a stay such as this. However, not a single case cited by the Wabash Valley Respondents ever states that "great weight" is to be given to the factor they identify. The fact is that, as specifically argued in Complainants' response brief, there are five factors, and not a mere single factor which a court must consider in deciding whether to grant such a stay. Incredibly, in fact, despite suggesting that Complainants have mischaracterized the law, the Wabash Valley Respondents themselves cite a case (also relied upon in Complainants' response) in which the requested stay was denied in spite of the fact that an actual indictment had been handed down! There simply was no "mischaracterization."

6. Paragraphs 9-11 of the Wabash Valley Respondents' reply argue that "substantial overlap" exists between the civil and criminal cases. However, that observation has nothing to do with the point being addressed in Complainants' response,

but instead is a red herring inserted solely for the purpose of obtaining leave to get one last argument before this Board (an argument that should have been included in Respondents' original motion.) The Wabash Valley Respondents also falsely claim that Complainants mischaracterize the pleadings by stating that no nexus exists between the allegations of the criminal information and the complaint in this case. The fact is, though, that whereas Complainants in this case seek relief under the Illinois air pollution statute and regulations for trans-boundary air pollution, the federal criminal case concerns requirements set forth on a pesticide label, and the Respondents' failure to have complied with those. These are two completely different laws, two completely different regulatory schemes, two completely different legislative intents, and two completely different sets of prima facie case elements. Among many other things, for instance, the federal criminal proceedings must include proof of the contents of the pesticide label, but that issue is completely irrelevant to the basic elements of Complainants' case before this Board; conversely, whereas Complainants will prove to this Board that Respondents' acts or omissions caused transboundary dispersal of pollutants, the criminal case can proceed to conviction without any such proof. Complainants have clearly not misrepresented anything about these regulatory schemes. At best, the Wabash Valley Respondents' reply points at three arguments concerning factual similarities between the core events giving rise to both actions, but that by no means represents any "mischaracterization" of those factual assertions by Complainants. Simply put, the Wabash Valley Respondents have fabricated mischaracterizations in order to present to this Board further arguments that should have been included in their motion.

7. The Wabash Valley Respondents also, in paragraph 16 of their reply, claim that Complainants were “disingenuous” in arguing to this Board that a stay of these proceedings would cause prejudice by further delaying the hearing of this matter, which is already five years old. Apparently the Wabash Valley Respondents were surprised to discover that the actions giving rise to Complainants’ action occurred in the year 2000, but there is no need for such surprise, since that was not only part of Complainants’ complaint in this case, but in fact is a part of the very argument cited by the Wabash Valley Respondents as being “disingenuous”! The very sentence cited by the Wabash Valley Respondents notes that the case is five years old, and further delay would exacerbate stale proof. There is simply no justification for the Wabash Valley Respondents’ claim that the Complainants have demanded that the Board ““expedite this case for a quick resolution on the merits as possible”” (Wabash Valley Respondents’ Reply, at 5, quoting Complainants’ response at 15). The Complainants have not asked this Board for any relief relative to the Wabash Valley Respondents’ motion. The burden is on them, not Complainants, to establish that a stay would be proper, and there is virtually nothing inappropriate about reminding this Board that further delay may cause further problems.

8. Paragraphs 17 and 18 of the Wabash Valley Respondents’ reply complain about arguments made by Complainants concerning the public interest in this matter and in an expeditious resolution of this case. According to the Wabash Valley Respondents, they have the right to address these matters because these were “new facts” not previously cited in this case. Once again, though, the Wabash Valley Respondents conveniently forget that the burden was on them with respect to their motion to stay.

They provided virtually no factual support for their bald assertion that there is no public interest in this case, and that assertion defies both logic and fact. There is now no justification for the Wabash Valley Respondents abusing this Board's grant of leave to file a reply in order to make assertions that should have been made in their motion.

9. Finally, the Wabash Valley Respondents, having attached to their motion to stay the Complainants' civil complaint filed in the Hamilton County Circuit Court, now backtrack and request that this Board not consider the information included in that complaint. Complainants pointed out, in their response, that earlier incidents of similar air pollution events have been associated with these Respondents, as is stated in that civil complaint. The Wabash Valley Respondents inappropriately utilize the avenue of the reply, which was supposed to address only mischaracterizations and misrepresentations, to attack the factual information they themselves provided to this Board.

10. The reply should be stricken. No basis exists for the Respondents to have filed it in the first place. The reasons the Wabash Valley Respondents cited as their need to file a reply have proven false, and this Board's procedural rules do not allow for the filing of this document.

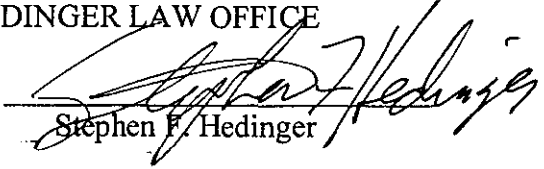
WHEREFORE, Complainants, VERNON and ELAINE ZOHFELD, request that this Board strike the "Reply to Complainants' Response to Motion to Stay Proceedings" filed by Respondents WABASH VALLEY SERVICE COMPANY, MICHAEL J. PFISTER, NOAH D. HORTON, and STEVE KINDER, and deny the motions to stay this case, and direct the hearing officer to promptly set this matter for discovery and pertinent litigation activities.

Respectfully submitted,

Vernon and Elaine Zohfeld,
Complainants,
By their attorney,

HEDINGER LAW OFFICE

By


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NOTICE OF FILING AND PROOF OF SERVICE

The undersigned certifies that an original and nine copies of the foregoing Motion to Strike 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:

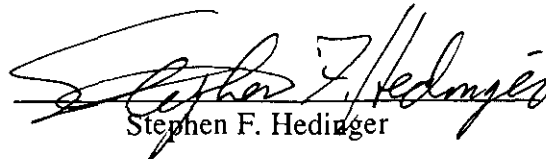
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with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Springfield, Illinois before 5:30 p.m. on the 21st day of October, 2005.


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