

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VERNON and ELAINE ZOHFELD,	)	
	)	
Complainants,	)	
	)	
vs.	)	PCB No. 05-193
	)	(Citizen's Enforcement, Air)
BOB DRAKE, WABASH VALLEY	)	
SERVICE COMPANY, MICHAEL J.	)	
PFISTER, NOAH D. HORTON, and	)	
STEVE KINDER,	)	
	)	
Respondents.	)	

**NOTICE OF FILING**

TO: Ms. Dorothy M. Gunn	Carol Webb, Esq.
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	1021 North Grand Avenue East
Suite 11-500	Post Office Box 19274
Chicago, Illinois 60601	Springfield, Illinois 62794-9274
<b>(VIA ELECTRONIC MAIL)</b>	<b>(VIA ELECTRONIC MAIL)</b>

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board a **RESPONSE TO COMPLAINANTS' MOTION TO STRIKE RESPONDENTS' REPLY TO COMPLAINANTS' RESPONSE TO MOTION TO STAY PROCEEDINGS** on behalf of Respondents, Wabash Valley Service Company, Michael J. Pfister, Noah D. Horton and Steve Kinder, a copy of which is herewith served upon you.

Respectfully submitted,

WABASH VALLEY SERVICE COMPANY,  
MICHAEL J. PFISTER, NOAH D. HORTON,  
and STEVE KINDER,  
Respondents,

Dated: November 7, 2005

By: /s/ Thomas G. Safley  
One of Their Attorneys

Thomas G. Safley  
Gale W. Newton  
HODGE DWYER ZEMAN  
3150 Roland Avenue  
Post Office Box 5776  
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**CERTIFICATE OF SERVICE**

I, Thomas G. Safley, the undersigned, certify that I have served the attached  
RESPONSE TO COMPLAINANTS' MOTION TO STRIKE RESPONDENTS' REPLY  
TO COMPLAINANTS' RESPONSE TO MOTION TO STAY PROCEEDINGS upon:

Ms. Dorothy M. Gunn  
Clerk of the Board  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

Carol Webb, Esq.  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Post Office Box 19274  
Springfield, Illinois 62794-9274

via electronic mail on November 7, 2005; and upon:

Stephen F. Hedinger, Esq.  
Hedinger Law Office  
2601 South Fifth Street  
Springfield, Illinois 62703

Thomas H. Bryan, Esq.  
Fine & Hatfield, P.C.  
520 N.W. Second Street  
Post Office Box 779  
Evansville, Indiana 47705-0779

by depositing said documents in the United States Mail in Springfield, Illinois, postage  
prepaid, on November 7, 2005.

/s/ Thomas G. Safley  
Thomas G. Safley

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	)	
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**RESPONSE TO COMPLAINANTS' MOTION  
TO STRIKE RESPONDENTS' REPLY TO  
COMPLAINANTS' RESPONSE TO MOTION TO STAY PROCEEDINGS**

NOW COME Respondents, WABASH VALLEY SERVICE COMPANY, MICHAEL J. PFISTER, NOAH D. HORTON, and STEVE KINDER (hereinafter "Respondents"), by and through their attorneys, HODGE DWYER ZEMAN, and pursuant to Section 101.500(d) of the Illinois Pollution Control Board's ("Board") procedural rules, 35 Ill. Admin. Code § 101.500(d), submit this Response to Complainants' Motion To Strike Respondent's Reply To Complainant's Response To Motion To Stay Proceedings.

1. Pursuant to the Board's Order dated September 8, 2005, on September 22, 2005, Respondents filed a Reply to Complainants' Response to Respondents' Verified Motion to Stay Proceedings (the "Reply").

2. On October 21, 2005, Complainants filed a Motion to Strike the Reply ("Motion to Strike") purportedly because Respondents failed "to have identified any misrepresentations or mischaracterizations" in the Reply. Motion to Strike at 2.

3. For the reasons set forth below, the Board should deny Complainants' Motion to Strike.

**INCOMPLETE OR INACCURATE REPRESENTATION OF  
CASE LAW AND INCORRECT APPLICATION OF CASE LAW**

4. In their Response to Respondents' Verified Motion to Stay Proceedings ("Response"), Complainants argue that when deciding a Motion to Stay, "great weight is not to be given to any particular factor, including a Fifth Amendment right, contrary to Respondents' argument." Response at ¶2. (Citing to Jacksonville Sav. Bank v. Kovack, 326 Ill. App. 3d 1131, 1136, 762 N.E.2d 1138, 1142 (4th Dist. 2002)).

5. However, in the next paragraph following that cited by Complainants, the Jacksonville Sav. Bank court states: "[c]ourts have indicated that an announced charge against a defendant weighs heavily in the defendant's favor in deciding whether to stay civil proceedings." Jacksonville Sav. Bank at 1137 (citing Sterling National Bank v. A-1 Hotels International, Inc., 175 F. Supp. 2d 573, 2001 U.S. Dist. LEXIS 5678, \*2 (S.D.N.Y. 2001) (citing cases)).

6. The defendant in the Jacksonville Sav. Bank matter "had not yet been charged with a crime, and the record [did] not show that a criminal charge was pending." Id. at 1137.

7. In contrast, in the current matter, the Information is an announced charge that should be weighed heavily in the Respondents' favor in deciding whether to stay the civil proceedings pending before the Board.

8. Since the very case that Complainants cite for the proposition that “‘great weight’ is not to be given to any particular factor, including a Fifth Amendment right” (Response at ¶2) in fact states that “[c]ourts have indicated that an announced charge against a defendant weighs heavily in the defendant's favor in deciding whether to stay civil proceedings,” (Jacksonville Sav. Bank at 1137) the Complainants have inaccurately represented case law regarding the weight to be given to a defendant’s Fifth Amendment rights when a criminal charge has been formally announced against a defendant.

9. Further, since the Complainants inaccurately represent the state of the case law regarding the weight to be given to a defendant’s Fifth Amendment rights when a criminal charge has been formally announced against such a defendant, the Complainants incorrectly apply case law with respect to the Respondents in the matter at hand where the criminal charge against the Respondents has been formally announced.

### **MISCHARACTERIZATIONS**

10. First, in the Response, Complainants state that Respondents’ “own documentation shows” that no nexus exists between the Complaint, which is based on violations of air pollution laws, and the Information which is based on the use of “a registered pesticide in a manner inconsistent with its labeling.” Response at 13.

11. In actuality, the Complaint and the Information involve the same alleged incident that (1) occurred on May 8, 2000; (2) in Hamilton County, Illinois; (3) involved application of agrichemicals; and (4) alleged drifting or blowing of the agrichemicals.

12. “Nexus” means “a connection or link, often a causal one.” Black’s Law Dictionary, 1070 Eighth Edition.

13. The Complaint and the Information are inextricably connected and linked because they both refer to the exact same set of underlying facts, and for the Complainants to claim in the Response that there is no nexus between the Complaint and the Information is a mischaracterization.

14. Second, in the Response, Complainants lament that “the facts surrounding the flagship event in the Complainants’ complaint (the May 5, 2000 overdraft) is [sic] now five years old!” Response at 15. Complainants also state that granting the stay would cause delay that would soon create problems of proof and stale evidence. Id. Finally, Complainants state that “this Board should expedite this case for as quick a resolution on the merits as possible!” Id.

15. However, Complainants filed their Complaint with the Board five years and one day after the alleged activities occurred. The Complaint was only saved from being filed after the end of the statute of limitations by a technical rule that does not allow a statute of limitations to end on a weekend.

16. In the Motion to Strike, the Complainants state that there is “virtually nothing inappropriate about reminding this Board that further delay may cause further problems.” Motion to Strike at 7. (Emphasis added.)

17. While Complainants argue that there is “virtually nothing inappropriate” about waiting the full five years to file the Complaint, then claiming that the granting of a stay would soon create problems of proof and stale evidence, Complainants arguments are, nonetheless, a mischaracterization that attempts to place the blame for any problems

that may occur due to the five-year delay in filing the Complaint on the Respondents when the delay was the act of the Complainants.

18. In the Motion to Strike, the Complainants take issue with several other statements made in the Reply. In the interest of brevity, the Respondents stand by all statements made in the Reply and incorporate those statements herein by reference.

19. Notwithstanding the claims made in the Motion to Strike, the Respondents identified several misrepresentations and mischaracterizations in the Reply, as discussed herein, that needed to be addressed by the Reply in order to prevent material prejudice to the Respondents.

WHEREFORE, for the above and foregoing reasons, Respondents WABASH VALLEY SERVICE COMPANY, MICHAEL J. PFISTER, NOAH D. HORTON, and STEVE KINDER, respectfully request that the Illinois Pollution Control Board deny the Complainants' Motion to Strike.

Respectfully submitted,

WABASH VALLEY SERVICE  
COMPANY, MICHAEL J. PFISTER,  
NOAH D. HORTON, and STEVE KINDER  
Respondents,

Dated: November 7, 2005

By: /s/ Thomas G. Safley

One of Their Attorneys

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