

ILLINOIS POLLUTION CONTROL BOARD  
February 2, 2006

VERNON and ELAINE ZOHFELD, )  
)  
Complainants, )  
)  
v. ) PCB 05-193  
) (Citizens Enforcement - Air)  
BOB DRAKE, WABASH VALLEY )  
SERVICE COMPANY, MICHAEL J. )  
PFISTER, NOAH D. HORTON, and STEVE )  
KINDER, )  
)  
Respondents. )

ORDER OF THE BOARD (by A.S. Moore):

Bob Drake (Drake), Wabash Valley Service Company (Wabash Valley), Michael J. Pfister (Pfister), Noah D. Horton (Horton), and Steve Kinder (Kinder) (collectively, respondents) seek a stay of this citizens air enforcement case filed May 26, 2005 by Vernon and Elaine Zohfeld (complainants). In their complaint (Comp.), complainants allege that respondents violated Section 9(a) of the Environmental Protection Act (Act) (415 ILCS 5/9(a) (2004)) and Section 201.141 of the Board's regulations (35 Ill. Adm. Code 201.141) by causing or allowing agrichemical spray to drift over complainants' adjacent property in Hamilton County. Comp. at 4.

The issue before the Board is whether this action should be stayed until completion of a related criminal action involving a May 8, 2000 occurrence complained of here and involving some but not all of the respondents in this matter.

Today the Board first denies complainants' motion to strike respondents' reply to the response to the motion for stay. The Board then denies respondents' motion seeking a stay of this proceeding.

Below, the Board first sets forth the procedural history of this case and the allegations contained in the complaint. The Board next summarizes the parties' arguments on the respondents' motion for stay before analyzing them and deciding the motion.

**PROCEDURAL HISTORY**

On May 26, 2005, complainants filed a citizen's complaint alleging that respondents caused or allowed agrichemical spray applied to Drake's field to drift to the complainants' adjacent property, causing or tending to cause air pollution in violation of Section 9(a) of the Act (415 ILCS 5/9(a) (2004)) and section 201.141 of the Board's air quality regulations. 35 Ill. Adm. Code 201.141. Comp. at 4. Complainants sought relief including civil penalties of

\$50,000 for each violation of the Act and regulations, an order to cease and desist from any further violation of the Act and regulations, and an award of costs and reasonable attorney fees. Comp. at 5. In a July 7, 2005 order, the Board accepted the complaint for hearing but noted that “[t]he Board lacks the statutory authority to award attorney fees and other litigation expenses in citizen enforcement actions.” Zohfeld v. Drake, et al., PCB 05-193, slip op. at 2 (July 7, 2005), citing ESG Watts, Inc. v. PCB, 676 N.E.2d 299 (3rd Dist. 1997); People v. State Oil Co., PCB 97-103 (Aug. 19, 1999). Consequently, the Board struck that relief from the complaint as frivolous. See 415 ILCS 5/31(d)(1) (2004); 35 Ill. Adm. Code 101.202 (defining “frivolous”); 35 Ill. Adm. Code 103.212(a).

On July 8, 2005, Drake filed a Motion to Stay Proceedings and Answer and Affirmative Defense in lieu of Motion to Stay Proceedings. Drake also filed a status report pursuant to 35 Ill. Adm. Code 101.514. Also on July 8, 2005, Pfister filed a joinder in motion to stay proceedings filed by Wabash Valley, Horton, and Kinder. On that same date, Pfister also filed a joinder in motion for extension of time filed by Wabash Valley, Horton, and Kinder.

On July 12, 2005, Wabash Valley, Horton, and Kinder filed a verified motion to stay proceedings and status report. See 35 Ill. Adm. Code 101.514. On that same date, Wabash Valley, Horton, and Kinder filed a motion for extension of time in which to answer or otherwise respond to the complaint.

In an order dated July 27, 2005, Board Hearing Officer Carol Webb granted complainants’ request for an extension to August 3, 2005, of the deadline to file a response to the respondents’ motion to stay proceedings. On the same date, the hearing officer granted the respondents’ request for an extension of the deadline to answer the complaint and reserved setting an extended deadline until the Board rules on respondents’ motion to stay proceedings.

On August 5, 2005, complainants filed their response to motion to stay proceedings. On August 15, 2005, Wabash Valley, Pfister, Horton, and Kinder filed a motion for leave to file a reply to complainants’ response to motion to stay proceedings. On August 23, 2005, Drake also filed a motion for leave to file a reply to complainants’ response to motion to stay proceedings. In an order dated September 8, 2005, the hearing officer permitted respondents to file a reply by September 23, 2005. On September 22, 2005, respondents Wabash Valley, Pfister, Horton, and Kinder filed their reply to the complainants’ response to the motion to stay proceedings.

### **Motion to Strike**

Pursuant to Section 101.500(e) of the Board’s procedural rules, respondents in a September 8, 2005 hearing officer order obtained leave without complainants’ objection to file a reply to complainant’s response to the motion for stay by September 23, 2005. On October 24, 2005, complainants filed a motion raising various grounds to strike the respondents’ reply to the complainants’ response to the motion to stay proceedings. On November 7, 2005, respondents Wabash Valley, Pfister, Horton, and Kinder filed their response to complainants’ motion to strike respondents’ reply to complainants’ response to motion to stay proceedings. The Board finds that the reply assists its understanding of the issues involved in this motion and denies the motion to strike.

### **THE COMPLAINT'S ALLEGATIONS**

According to the complaint in this case, the complainants owned and operated a business in Hamilton County that bred and raised thoroughbred horses. Comp. at 1. The complaint also states that Drake owns a 44-acre tract of agricultural land adjacent to complainants' residence and horse farm; Wabash Valley is an agricultural cooperative that sells agrichemicals, including chemical pesticides and herbicides, and applies them to agricultural fields; and Pfister, Norton, and Kinder work for Wabash Valley. Comp. at 2.

The complaint also alleges that, on or about May 8, 2000, Wabash Valley, Pfister, Horton, and Kinder sprayed agrichemicals including Butyrac-200, RoundUp Ultra, Bicep II Magnum, Aatrex, and Celatom MP-79 on and around Drake's property. Comp. at 2-3. Complainants further allege that respondents Wabash Valley, Pfister, Horton, and Kinder performed this spraying "at Drake's express request and with his knowledge, support, and involvement, and in his presence." Comp. at 2. The complainants claim that respondents Wabash Valley, Pfister, Horton, and Kinder sprayed in a manner that ensured the agrichemicals would "drift and cloud onto and across the adjacent property owned and occupied by the Zohfelds." Comp. at 3. The complaint describes this movement of agrichemicals away from a designated field as "spray drift" or "over drift." Comp. at 2. Complainants claim that their property has been subjected to spray drift on many occasions both before and after the alleged May 8, 2000 incident. Comp. at 4. They further claim that respondents have caused the complainants' property to experience spray drift "virtually every spring." *Id.*

As a result of spray drift on May 8, 2000, complainants allege that Elaine Zohfeld came into contact with agrichemicals "by absorption through the skin, . . . ingestion of blackberries that were covered with the pollutants, and by aspiration." Comp. at 3. Complainants argue that this contact caused "serious and permanent injuries" to Elaine Zohfeld's health. *Id.*

Complainants also allege that, on May 8, 2000, the Zohfelds' horses came into contact with agrichemicals "by absorption through the skin, by ingestion of grass and plants that were overdrafted, and by aspiration." Comp. at 3. Complainants allege that this contact caused "severe and permanent injuries to all of the horses." *Id.* Specifically, they allege that two horses died and that the "entire herd has been rendered incapable of performing as racing or breeding stock." *Id.* As a result of the alleged spray drift, complainants claim that the affairs of their equine breeding business have ended. *Id.*

Complainants further allege that, on May 8, 2000, numerous beneficial plants came into contact with agrichemicals and experienced contamination. Comp. at 3. Complainants state that Elaine Zohfeld and the Zohfelds' horses ingested these plants, resulting in "severe and permanent injuries and damages" to both her and the horses. *Id.*

Complainants further allege that they have "suffered a loss of enjoyment of their property by being exposed to these agrichemical air pollutants." Comp. at 3. The complaint expresses the fear that complainants' property will experience spray drift whenever Drake sprays his field. *Id.* Complainants claim that, when they are at their home and hear spraying on Drake's field, they

move their horses into a barn and close their windows until the spraying ends. *Id.* They claim that this “seriously disrupts their enjoyment of their property.” *Id.* Complainants further argue that that they have had to relocate their horses’ grazing area to reduce the risk of exposure to spray drift. *Id.* Finally, complainants argue that they have not planted new garden plants or trees because of a fear that they will be polluted or made unfit for eating. *Id.*

In the single count of the complaint, complainants allege that respondents violated section 9(a) of the Act (415 ILCS 5/9(a) (2004)) and section 201.141 of the Board’s air regulations (35 Ill. Adm. Code 201.141) by causing or allowing agrichemicals to drift and cloud from Drake’s property onto the adjacent property owned by the Zohfelds, which caused or tended to cause air pollution as that term is defined in section 3.02 of the Act (415 ILCS 5/3.02 (2004)).

## **RESPONDENTS’ MOTIONS FOR STAY**

### **Drake Motion to Stay**

On July 8, 2005, Drake filed a motion to stay proceedings (Drake Mot.). Drake states that “the Complainants have fostered a number of actions as a result of the alleged injuries and damages claimed from the application of agricultural products:” a criminal action against one or more of the respondents other than Drake; a Department of Agriculture action against one or more respondents other than Drake; and a civil action. Drake Mot. at 1-2. Drake states that the complainants first filed their civil action in Hamilton County before they voluntarily dismissed it and re-filed it in White County. Drake Mot. at 2. On a motion alleging *forum non conveniens*, the court transferred the case to Hamilton County. *Id.* Drake states that the Illinois Appellate Court approved that transfer in September 2004 and that the case remains in Hamilton County with continuing discovery on a third amended complaint. *Id.*

At the time of filing his motion for stay, Drake understood that the remaining respondents also intended to seek a stay of this proceeding because the pending criminal matter potentially made witnesses unavailable. Drake Mot. at 2. If those witnesses are not available, argues Drake, then he will lack “the means and witnesses to properly defend this matter.” *Id.* Drake further argues that complainants can fully adjudicate their complaints after conclusion of the related civil case. Until discovery is complete, however, Drake states that he cannot properly defend this action. *Id.* Finally, Drake argues that he will be particularly unable to defend himself in the event that the Board stays the action against the other respondents without staying the complete case. *Id.* “It would be patently unfair to permit this action to proceed on fewer than all named respondents.” Drake states that counsel for the remaining respondents is tendering to the Board documents referred to in his motion. *Id.*

As required by the Board’s procedural rules (35 Ill. Adm. Code 101.514(a)), Drake filed a status report with his motion for stay. In that report, Drake stated that no other party had appeared but anticipated that the remaining respondents would file appearances at or near the July 8, 2005 date on which he filed his motion for stay and status report.

**Wabash Valley, Horton, and Kinder Motion to Stay**

On July 12, 2005, Wabash Valley, Horton, and Kinder filed a verified motion to stay proceedings (Joint Mot.) pending the conclusion of a related criminal action against them. Wabash Valley, Horton, and Kinder state that, almost four years before filing a complaint with the Board, the complainants filed a civil complaint with the Circuit Court of the Second Judicial District in White County, Illinois. Joint. Mot. at 3, citing Vernon and Elaine Zohfeld v. Bob Drake, Wabash Valley Service Co., Michael J. Pfister, and Noah D. Horton, No. 2001-L-21 (May 20, 2001) (2nd Cir. 2001). Wabash Valley, Horton, and Kinder argue that this civil complaint also alleges spray drift onto the complainants' property on or about May 8, 2000. Joint Mot. at 3; *see* Vernon and Elaine Zohfeld v. Bob Drake, et al., No. 2001-L-21 (May 20, 2001) (2nd Cir. 2001) (including allegations relating to May 8, 2000 overspray in Counts IV, V, and VI). Wabash Valley, Horton, and Kinder further argue that, on April 26, 2005, the United State Attorney's Office filed a criminal information<sup>1</sup> alleging that Wabash Valley, Glen S. Kinder, and Horton on or about May 8, 2000 "did use a registered pesticide in a manner inconsistent with its labeling." Joint Mot. at 3-4, citing United States v. Wabash Valley Service Co., Glen S. Kinder, and Noah David Horton, No. 05-40029-JPG (S.D. Ill.).

Wabash Valley, Horton, and Kinder argue that "[a] party may claim the fifth amendment [to the United State Constitution (U.S. Const., amend. V)] privilege in a pending civil matter to protect from involuntarily disclosing information which may implicate him criminally." Joint Mot. at 4, citing People ex rel. Hartigan v. Kafka & Sons Building & Supply Co., 252 Ill. App. 3d 115, 119 (1st Dist. 1993). While Wabash Valley, Horton, and Kinder acknowledge that a stay of a civil proceeding is not generally appropriate before a criminal investigation has ripened into a formal charge, they stress that "[c]ourts have indicated that an announced [criminal] charge against a defendant weighs heavily in the defendant's favor in deciding whether to stay civil proceedings." Joint. Mot at 5, citing Jacksonville Sav. Bank v. Kovack, 326 Ill. App. 3d 1131, 1137 (4th Dist. 2002). Where a criminal action is simultaneously pending with a civil action, courts may stay the civil proceeding based on the fifth amendment until the resolution of the criminal matter." Joint Mot. at 4, citing Kafka & Sons Bldg. & Supply Co., 252 Ill. App. 3d at 119. Wabash Valley, Horton, and Kinder further argue that, when considering whether to stay civil proceedings during a parallel criminal proceeding, the Board should consider

"the extent to which the defendant's fifth amendment rights are implicated.' In addition, the decisionmaker should generally consider the following factors: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on the defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interest of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal

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<sup>1</sup> "Information" means "[a]n accusation exhibited against a person for some criminal offense, without an indictment. An accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath." *Black's Law Dictionary* (6th ed. 1990).

litigation.” Joint Mot. at 4, citing Keating v. Office of Thrift Supervision, 45 F.3d 322, 324-25 (9th Cir. 1995).

Addressing these factors, Wabash Valley, Horton, and Kinder note that they have been formally charged in a criminal matter that stems from the same May 8, 2000 occurrence that underlies this matter before the Board. Joint Mot. at 5; see United States v. Wabash Valley Service Co., Glen S. Kinder, and Noah David Horton, No. 05-40029-JPG (S.D. Ill.). Wabash Valley, Horton, and Kinder further argue that any delay resulting from a stay would not prejudice the complainants. Joint Mot. at 5. The three respondents note that, although the circuit court complaint may result in payment of money damages to the complainants, the Board action would provide only civil penalties payable to the state and an order to cease and desist from an alleged violation that is not ongoing. Joint Mot. at 5-6.

Wabash Valley, Horton, and Kinder next argue that a stay would allow them to “maintain their rights against self-incrimination.” Joint Mot. at 6. They further argue that denying a stay would place an onerous burden on them. “[S]hould they invoke their rights against self-incrimination in this matter to protect themselves from the use of such testimony in the criminal case, the fact finder in this matter could be ‘entitled to draw negative inferences against those who assert fifth amendment rights against self-incrimination.’” *Id.*, citing People v. \$1,124,905 United States Currency, 177 Ill. 2d 314, 362 (1997).

Next, Wabash Valley, Horton, and Kinder claim that granting a stay would not result in inconvenience to the Board. Joint Mot. at 6. They note that the Board has not yet established a schedule for this case. Furthermore, they argue that a stay would use Board resources efficiently because “some of the facts at issue could be decided during the criminal case.” *Id.* Addressing the fourth numbered factor, Wabash Valley, Horton, and Kinder state that “no persons who are not parties to the Complaint have expressed interest in the civil matters involved in the Complaint.” *Id.* They further argue that the public has not voiced interest in these matters. *Id.*

Wabash Valley, Horton, and Kinder raise additional issues in support of their request for a stay. First, they note that Drake and Pfister are respondents in this matter but are not named as defendants in the federal criminal information. Joint Mot. at 6; see U.S.A. v. Wabash Valley Service Co., Glen S. Kinder, and Noah David Horton, No. 05-40029-JPG (S.D. Ill.). Wabash Valley, Horton, and Kinder state that, because they intend to assert their fifth amendment rights in this matter, Drake and Pfister would suffer prejudice because they could not obtain information with regard to defenses or a cross-complaint. Joint Mot. at 6. Second, Wabash Valley, Horton, and Kinder indicate that Drake’s counsel and Pfister both agree to the issuance of a stay. *Id.* Also, the three respondents argue that, because the complaint alleges a single incident that occurred more than five years ago, granting a stay would not harm the public or the environment. *Id.* Finally, Wabash Valley, Horton, and Kinder state that they do not seek a stay of this matter pending resolution of the civil matter, if in fact that matter is still pending at the conclusion of the criminal case. Joint Mot. at 5.

As required by the Board procedural rules, Wabash Valley, Horton, and Kinder submitted a status report with their motion to stay proceedings. See 35 Ill. Adm. Code 101.514. In that

report, they note that “[n]o discovery, scheduling conference, or other activity has occurred” in this matter.

### **Pfister’s Joinder in Motion to Stay Filed by Wabash Valley, Horton, and Kinder**

On July 8, 2005, Pfister filed joinder (Joinder) in the motion to stay proceedings filed by Wabash Valley, Horton, and Kinder. Pfister noted that a criminal information filed in the United States District Court for the Southern District of Illinois relates to the same occurrence as this matter. Joinder at 1; *see* United States v. Wabash Valley Service Co., Glen S. Kinder, and Noah David Horton, No. 05-40029-JPG (S.D. Ill.). Pfister further noted that, while he is named as a respondent in this matter, he is not named as a defendant in the information. Joinder at 1.

Pfister states that, on or about July 8, 2005, Wabash Valley, Horton, and Kinder filed a motion to stay proceedings. Joinder at 2; *see* Joint Mot. at 1. Pfister further notes that Wabash Valley, Horton, and Kinder “intend to maintain their fifth amendment rights against self-incrimination.” Joinder at 2. Pfister argues that this would prevent him from obtaining information from his co-respondents regarding defenses or any potential cross-complaint. He states that he would suffer prejudice if the Board does not grant a stay and accordingly joins in the motion to stay filed by Wabash Valley, Horton, and Kinder. *Id.*

### **COMPLAINANTS’ RESPONSE TO MOTIONS TO STAY**

On August 5, 2005, complainants filed a response to motions to stay proceedings (Resp.). Complainants first argue that the Board is not generally required to stay a civil proceeding pending the outcome of criminal proceedings. Resp. at 2, citing Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (citation omitted) and Goodwin v. McHenry County Sheriff’s Office Merit Comm’n., 713 N.E.2d 818, 824 (2nd Dist. 1999). Complainants further argue that “the mere suggestion that Fifth Amendment considerations may apply is not sufficient to require a stay of simultaneous administrative proceedings.” Resp. at 2, citing Keating, 45 F.3d at 326 (citation omitted). Complainants dispute respondents’ claim that fifth amendment rights are entitled to “great weight” in the Board’s consideration of the motion for stay. Complainants argue that five factors are relevant and that fifth amendment considerations are “only one factor to be weighed against others.” Resp. at 1, citing Jacksonville Sav. Bank v. Kovack, 762 N.E.2d 1138, 1142 (4th Dist. 2002) and Keating, 45 F.3d at 326.

Complainants next argue that respondents cannot raise the risk of self-incrimination “only as a remote and speculative possibility.” Resp. at 3, citing Martin-Trigona v. Gouletas, 634 F.2d 354,362 (7th Cir. 1980). Complainants claim that, because the respondents have traced no nexus between the risk of conviction in the pending federal criminal action and this proceeding, this motion for a stay presents no genuine fifth amendment issue. Resp. at 4.

Complainants claim that only Kinder and Horton among the five respondents may even invoke the fifth amendment: Drake and Pfister are not named as defendants in the federal criminal information, and Wabash Valley as a corporation enjoys no privilege against self-incrimination. Resp. at 3, citing U.S. v. White, 322 U.S. 694, 699 (1944). Complainants further argue that Kinder and Horton have not specified how this Board proceeding might compromise

that privilege. Resp. at 3. Complainants also claim that the other three respondents make only “equally vague and generalized assertions” that, by exercising their fifth amendment rights, Kinder and Horton may jeopardize the other three respondents’ cases before the Board. Resp. at 4. Complainants state that Kinder and Horton may in the course of this proceeding raise specific claims involving the fifth amendment. *Id.* At any time they may raise such claims, argue complainants, “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.” *Id.*

Complainants note that 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)(G), 1361(b)(1)(B), and 1361(b)(4), and of 18 U.S.C. § 2.” Resp. at 4. Complainants argue that the complaint in this proceeding does not allege a violation of federal law or regulations and makes no allegations with regard to pesticide labels. *Id.* Complainants thus conclude that the alleged violations of Illinois air pollution laws before the Board “have no nexus whatsoever with the label violations raised in the federal criminal case.” Resp. at 5. Complainants further argue the pending civil case has resulted in the exchange of a large number of documents. Claiming that the respondents have not filed a similar motion to stay that case, complainants suggest the respondents are not genuinely concerned with fifth amendment protections and instead merely wish to avoid having the Board reach the merits of the complaint. *Id.*

After addressing the extent to which the respondents’ fifth amendment rights are implicated in this proceeding, complainants turn to the five factors they argue the Board must weigh in determining the motion for stay. On the first issue of their interest in expeditious resolution, complainants stress that the alleged incident of spray drift occurred more than five years ago on or about May 5, 2000. Resp. at 5. Complainants argue that granting a stay would result in prejudice because it would “soon create problems of proof and stale evidence.” *Id.* With regard to the second issue of the effect of a stay on the respondents, complainants claim that “[r]espondents have voice no specific, tangible prejudice to them or anyone else by proceeding with this case.” *Id.*

Addressing the third issue, complainants argue that a stay would have a detrimental effect on the Board’s management of its docket and resources. Complainants claim that, particularly without a clear basis on which to grant a stay, it is inefficient and ineffective to allow a case to “merely tread water.” Resp. at 5. Complainants further suggest that delay is inconsistent with the Act’s purpose of addressing air pollution in the state. *Id.*, citing 415 ILCS 5/8 (2004). Turning to the fourth issue, complainants strenuously disagree with respondents’ claim that neither third parties nor the public has demonstrated an interest in this proceeding. Resp. at 6. Complainants claim that the Agency, the Illinois Attorney General’s office, and a southern Illinois television station all have indicated an interest in its outcome. *Id.* Finally, addressing the fifth issue of the public’s interest in the case, complainants argue that the public’s environmental rights give rise to a “strong interest in this case and its outcome, and its expeditious resolution.” Also, complainants characterize respondents as “serial violators” whose spraying operations constitute an ongoing threat to the public and the environment. Resp. at 6-7.



## **RESPONDENTS' REPLY TO COMPLAINANTS' RESPONSE**

Pursuant to the hearing officer's September 8, 2005 order granting leave to file a reply by September 23, 2005, respondents Wabash Valley, Pfister, Horton, and Kinder on September 22, 2005, filed a reply to complainants' response to motion to stay proceedings (Reply).

Respondents first argue that complainants "did not completely or accurately represent the state of the case law regarding simultaneous criminal and civil proceedings involving the same subject matter and therefore incorrectly applied the case law . . . ." Reply at 2. With regard to factors weighed by the Board in deciding a motion for stay, respondents dispute complainants' statement that "'great weight' is not to be given any particular factor, including the alleged Fifth Amendment right." Reply at 2, citing Resp. at 1 and Jacksonville Savings Bank, 762 N.E.2d at 1142.

Respondents argue that the case law places considerable weight on the fifth amendment factor in this matter. Respondents claim that Jacksonville Savings Bank continues its analysis of this issue by stating "an *announced charge* against a defendant *weighs heavily in the defendant's favor* in deciding whether to stay civil proceedings." Reply at 2, citing Jacksonville Savings Bank, 762 N.E.2d at 1142 (emphasis in original). Respondents further claim that, "[w]hen there is *substantial overlap of the issues involved in the civil and criminal proceedings*, 'the risk of impairing a party's Fifth Amendment rights is rather severe.'" Reply at 3, citing Hollinger Int'l., Inc. v. Hollinger, Inc., 2005 U.S. Dist LEXIS 14437 (N.D. Ill. 2005) (emphasis in original). Because that "substantial overlap" exists between the criminal matter and Board proceedings, argue respondents, the Board should grant the stay. Reply at 3.

Respondents next argue that complainants "grossly mischaracterized statements made in the Motion to Stay." Reply at 2. Respondents dispute complainants' claim that no nexus exists between the Board complaint alleging air pollution and the criminal information alleging pesticide use inconsistent with its labeling. Respondents claim that the two complaints substantially overlap because both allege that an incident occurring on or about May 8, 2000, and involving application of agrichemicals resulted in drifting or blowing of those chemicals. Reply at 4. Respondents thus argue that the two proceedings "are based on the same subject matter." *Id.*

Respondents further claim the complainants have mischaracterized the risk that they will experience problems with proof and stale evidence. Respondents state that "[c]omplainants filed their complaint with the Board five years and one day after the alleged activities occurred." Reply at 5. Respondents argue that it is disingenuous after a delay of this length to ask the Board to expedite its handling of the case. *Id.*, citing Resp. at 5.

Finally, respondents argue that complainants "asserted new facts that are not of record in this proceeding." Reply at 2. First, in response to complainant's claim that a local television station's report demonstrated interest in the case, respondent state that they provided no verifying information. Reply at 5, citing Resp. at 6. Second, in response to complainants' claim that the Agency and the Illinois Attorney General's Office had indicated interest, respondents argue that there is no indication that the Attorney General has initiated action against them. Reply at 5,

citing Resp. at 6. Third, in response to complainants' claim that here had been a previous incident of spray drift, respondents argue that no such incident is alleged in the complaint "and would, in any case, be irrelevant and barred from consideration by the applicable statute of limitations." Reply at 5, citing Resp. at 6-7.

### **MOTION TO STRIKE**

On October 24, 2005, complainants filed a motion to strike the reply to complainants' response to motion to stay proceedings (Mot. Strike) filed by Wabash Valley, Pfister, Horton, and Kinder. Generally, complainants argue that respondents' "allegation 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." Mot. Strike at 2. "Respondents have fabricated mischaracterizations in order to present to the Board further arguments that should have been included in their motion." Mot. Strike at 3.

First, complainants note respondents' claim that they have mischaracterized the case 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." Mot. Strike at 2; *see* Reply at 3. Complainants suggest, by arguing that respondents do not cite a case assigning great weight to the "announced charge" factor on which they rely, that respondents themselves mischaracterize the case law. Mot. Strike at 2; *see* Reply at 3. Complainants further argue that their response specifically refers to five factors that the Board must consider in deciding the motion for stay. Mot. Strike at 2; Resp. at 1-2.

Second, complainants dispute the respondents' arguments that there is substantial overlap between the civil and criminal cases. They describe this claim as 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)." Mot. Strike at 3. Complainants continue by arguing that they have correctly characterized the pleadings by stating that no nexus exists between the civil and criminal cases. *Id.* Complainants argue that the cases involve "two completely different laws, two completely different regulatory schemes, two completely different legislative intents, and two completely different sets of *prima facie* case elements." *Id.* Complainants further argue that the criminal case may result in a conviction on issues including the contents of the pesticide label without proving the spray drift on which the Board case is based. *Id.* While complainants acknowledge that respondents make "three arguments concerning factual similarities between the core events giving rise to both actions," they claim that this does not render any of their own arguments mischaracterizations. *Id.*

Complainants also dispute respondents' claim that it is disingenuous to argue that a stay in a case that originated in 2000 would result in prejudice. Complainants stress that they noted that the case is five years old in their complaint and in their response to the motion for stay. Mot. Strike at 4; *see* Comp. at 2; Resp. at Resp. at 5. Complainants argue that there is "virtually nothing inappropriate about reminding this Board that further delay may cause further problems," including stale proof. Mot. Strike at 4.

Third, complainants dispute respondents' arguments regarding the existence of public interest in staying this case. Complainants argue that respondents in their motion for stay "provided virtually no factual support for their bald assertion that there is no public interest in the case." Mot. Strike at 5; *see* Mot. at 6. Complainants argue that respondents bear the burden of justifying a stay and that their failure to satisfactorily address these issues does not allow them to raise these issues as new facts in their reply. Mot. Strike at 4-5.

Complainants also dispute respondents' claim that this matter does not involve any discharge occurring before May 2000. Mot. Strike at 5; Resp. at 6-7; Reply at 5. Complainants argue that respondents attached to their motion to stay the Hamilton County civil complaint that specifically alleges overdraft occurring in 1998. Mot. Strike at 5. Complainants suggest that it is inappropriate for respondents to request in a reply that the Board not consider information that they supplied. *Id.*

### **RESPONSE TO COMPLAINANTS' MOTION TO STRIKE**

On November 7, 2005, respondents Wabash Valley, Pfister, Horton, and Kinder filed their response to complainants' motion to strike respondents' reply to complainants' response to motion to stay proceedings (Resp. Strike).

Respondents first renew their argument that "[c]omplainants 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 as defendant." Resp. Strike at 3. Respondents again dispute complainants' statement that "'great weight' is not to be given any particular factor, including the alleged Fifth Amendment right." Resp. Strike at 2, citing Resp. at 1 and Jacksonville Savings Bank, 762 N.E.2d at 1142. Respondents again argue that Jacksonville Savings Bank continues its analysis of this issue by stating "an *announced charge* against a defendant *weighs heavily in the defendant's favor* in deciding whether to stay civil proceedings." Resp. Strike at 2, citing Jacksonville Savings Bank, 762 N.E.2d at 1142 (emphasis in original).

Next, respondents again dispute as a mischaracterization complainants' claim that no nexus exists between this proceeding and the criminal information. Resp. Strike at 3-4. Respondents claim that the two complaints substantially overlap and are "inextricably connected" because both allege that an incident occurring on or about May 8, 2000 and involving application of agrichemicals resulted in drifting or blowing of those chemicals. Resp. Strike at 4.

Respondents renew their claim that the complainants have mischaracterized the risk that they will experience problems with proof and stale evidence. Respondents again state that "[c]omplainants filed their complaint with the Board five years and one day after the alleged activities occurred." Mot. Strike at 4. Respondents suggest that, if complainants foresee the risk of problems, the that risk is now attributable to their "five-year delay in filing the Complaint on the Respondents." Resp. Strike at 5.

Finally, respondents note that complainants “take issue with several other statements made in the Reply.” Resp. Strike at 5. Respondents simply “stand by all statements made in the Reply and incorporate those statements.” *Id.*

### **DISCUSSION**

The fifth amendment to the United States Constitution provides that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. Const., amend. V. “The fifth amendment does not, however, mandate a stay of civil proceedings pending the outcome of similar or parallel criminal proceedings.” People ex rel. Hartigan v. Kafka & Sons Building & Supply Co., 625 N.E.2d 16, 19 (1993). Wabash Valley, Horton, and Kinder assert that a stay “would maintain their rights against self-incrimination by appropriate application of the Fifth Amendment in any civil matter, including this case.” Mot. at 6. The same respondents assert that Drake and Pfister would also be prejudiced if the Board does not grant a stay. Mot. at 7. “[T]hey would be unable to obtain information from [the other] Respondents in respect to their defenses or in respect to any cross-complaints they may file, since [the other] Respondents intend to maintain their Fifth Amendment rights against self-incrimination.” *Id.*

Although the Board is not specifically required by the fifth amendment to stay this proceeding,

courts have enunciated several factors to be considered when determining whether to stay civil proceedings, including the following: (1) the plaintiff’s interest in an expeditious resolution of the civil case and any prejudice to the plaintiff in not proceeding; (2) the interest of and burdens on the defendant, including the extent to which the defendant’s fifth amendment rights are implicated; (3) the convenience to the court in managing its docket and efficiently using judicial resources; (4) the interests of persons who are not parties to the civil proceeding; and (5) the interests of the public in the pending civil and criminal actions.

Jacksonville Savings Bank, 762 N.E.2d at 1136, citing Keating v. Office of Thrift Supervision, 45 F.3d 322 (9th Cir. 1995) and Nowaczyk v. Matingas, 146 F.R.D. 169 (N.D. Ill. 1993). The Board addresses each of these factors in turn below.

#### **Complainants’ Interest**

Complainants have alleged that, as a result of spray drift occurring on or about May 8, 2000, and attributable to respondents, they have experienced various damages: loss of enjoyment of their property, serious and permanent injury to the health of Elaine Zohfeld, severe and permanent injuries to their horses, and the end of their horse-breeding business. Comp. at 2-4. Complainants seek remedies including a finding that respondents violated the Act and regulations as alleged, an order that respondents cease and desist from any further violation of the Act and regulations, and assessment of civil penalties of \$50,000 for each violation. Comp. at 5.

Where there is an allegation that a party has been a victim of a crime, that party is entitled to pursue its civil remedies. *See Jacksonville Savings Bank*, 762 N.E.2d at 1136. Furthermore, this proceeding is based upon events alleged to have occurred more than five and one-half year ago. Complainants argue that the delay resulting from a stay would cause problems related to proof and stale evidence. Resp. at 5. Respondents argue that it is “disingenuous” for complainants to raise this argument after filing a case with the Board five years after the relevant events. Respondents do not persuasively dispute the risks of delay cited by petitioners (*see* Reply at 4-5), and the Board has previously decided that a statute of limitations does not apply to actions brought before the Board under the Act. *IEPA v. Pielet Bros. Trading, Inc.*, PCB 80-105 (Dec. 17, 1981). The Board finds that this factor weighs against granting a stay.

### **Respondents’ Interest**

As stressed by the complainants, “whether a party’s fifth amendment rights are implicated is a significant factor for the trial court to consider in determining whether to stay civil proceedings, “but it is only one consideration to be weighed against other.” *Jacksonville Savings Bank*, 762 N.E. 2d at 1136, citing *Federal Savings & Loan Insurance Corp. v. Molinaro*, 889 F.2d 899, 902-03 (9th Cir. 1989). As stressed by respondents, “[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 Savings Bank*, 762 N.E. 2d at 1137, citing *Sterling National Bank v. A-1 Hotels International, Inc.* 175 F. Supp 2d 573 (S.D. N.Y. 2001) The Board notes, however, that “when the issues in a criminal matter significantly overlap with those in the civil proceeding, self-incrimination is more likely.” *Jacksonville Savings Bank*, 762 N.E. 2d at 1136-37, citing *Trustees of the Plumbers & Pipefitters National Pension Fund v. Transworld Mechanical, Inc.* 886 F. Supp 1134, 1139 (S.D. N.Y. 1995).

The complaint before the Board alleges that the five respondents caused or allowed air pollution “by causing or allowing agrichemicals to drift and cloud onto the adjacent property owned and occupied by the Zohfelds” in violation of the Act and Board regulations. Comp. at 4. The criminal information filed by the U.S. Attorney alleges that Wabash Valley, Kinder, and Horton used a registered pesticide in a manner inconsistent with its labeling in violation of the United State Code. While respondents argue that the complaint and information both involve the application and alleged drift of agrichemicals on the same date at the same location (Reply at 4), the Board cannot conclude on that basis alone that these two proceedings “significantly overlap.” The two matters involve different parties, are based upon completely different statutes and legal theories, and seek different remedies. Respondents may conceivably violate the Act without violating federal pesticide labeling requirements, and a conviction of violating those labeling requirements does not necessarily lead to a finding that respondents violated the Act.

In addition, respondents Wabash Valley, Horton, and Kinder argue only that denying a stay would burden them “*should they invoke their rights* against self-incrimination in this matter to protect themselves from the use of such testimony in the criminal case.” Mot. at 6 (emphasis added). Wabash Valley, Horton, and Kinder further argue that respondents Drake and Pfister would be prejudiced if a stay is not granted because they could not obtain information should the other three respondents invoke their fifth amendment rights in this proceeding. Because respondents have not indicated that they will invoke their Fifth Amendment rights, the Board

cannot now determine whether or to what extent they may be burdened. See Hollinger International, Inc. v. Hollinger, Inc., 2005 U.S. Dist. LEXIS 14437 at \*20-21 (July 15, 2005). In Jacksonville Savings Bank, the court cited extensively to the trial judge's decision to deny the motion for a stay. That decision stressed that the respondent intended to invoke the fifth amendment but had not yet done so and might never do so. Jacksonville Savings Bank, 672 N.E.2d at 1140-41. "I think until we see some facts a little closer to the case at hand, then I see no reason to prevent the plaintiff from pursuing [its] civil remedies." *Id.* "Let's find out down the road when there are specific requests and so forth as to when he wishes to assert that privilege. I will review it and if it's properly asserted and he shows a reasonable nexus between a potential criminal conviction and the information requested, I will certainly back him up in his assertion of his fifth amendment rights." *Id.* (upholding denial of stay). At this point in the Board proceedings, "the nature of the threat to defendants' Fifth Amendment rights is necessarily still imprecise." Sterling National Bank, 175 F. Supp. 2d at 578.

Furthermore, of the five respondents named in this action, only three are named as defendants in the federal criminal action. One of those three, Wabash Valley, is not a natural person and cannot invoke fifth amendment protections. People v. Monroe, 189 N.E.2d 350, 352 (1963) (citations omitted) ("Because the privilege against self-incrimination is personal and applicable only to natural individuals, the official records and documents of organizations such as corporations may not be withheld by their custodian under a claim of this privilege."). Drake and Pfister are not named as defendants in the federal criminal action. They are not charged with a criminal offense and do not risk criminal conviction in the case involving their three co-respondents in this case on the basis of any testimony they may provide in this matter. While the Board considers the respondents' fifth amendment rights a significant factor in weighing this motion for stay, "it is important also to note that ultimately, there is no threat that defendants will be deprived of those rights. They retain the absolute right to invoke the privilege. Ultimately, what is at risk is not their constitutional rights . . . but their strategic position in the civil case." Sterling National Bank, 175 F. Supp. 2d at 578, citing Baxter v. Palmigiano, 425 U.S. 308 (1976). The Board finds that this factor does not weigh in favor of granting a stay.

### **Convenience to the Board**

Respondents have asked the Board to stay this matter "until the conclusion of the criminal matter." Mot. at 8. While the issuance of an information has "somewhat reduced" the risk to complainants of a stay (Sterling National Bank, 175 F. Supp. 2d at 577), respondents in effect seek to stay this matter indefinitely. The Board thus cannot predict when the case could return to its active docket. See Jacksonville Savings Bank, 762 N.E.2d at 1143. This burdens the Board's ability to manage its cases, and the Board finds that this factor weighs against granting a stay. *Id.*

### **Private and Public Interests**

"[T]he interests of non-parties and the public favor prompt resolution of the civil case." Sterling National Bank, 175 F. Supp. 2d at 580. Furthermore, the Act emphasizes private actions as a means "to alleviate the burden on enforcement agencies, to assure that all interests are given a full hearing, and to increase public participation in the task of protecting the environment."

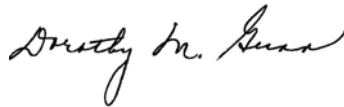
415 ILCS 5/2(a)(v) (2004). Furthermore, the information filed by the U.S. Attorney unambiguously demonstrates interest by other parties and the public in these respondents and their alleged actions. The Board finds that this factor weighs against granting a stay.

### **CONCLUSION**

The Board first denies complainants motion to strike respondents' reply to the response to the motion for stay. The Board then concludes that a stay of these proceedings is not appropriate. Having denied the motion for stay, the Board directs the hearing officer to proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 2, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board