

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
(VIA ELECTRONIC MAIL)	(VIA ELECTRONIC MAIL)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board a **MOTION FOR CLARIFICATION** 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: February 23, 2006

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

Thomas G. Safley
Gale W. Newton
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CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, certify that I have served the attached

MOTION FOR CLARIFICATION 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 February 23, 2006, 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 February 23, 2006.

/s/ Thomas G. Safley
Thomas G. Safley

WVSC:002/Fil/NOF-COS – Motion for Clarification

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MOTION FOR CLARIFICATION

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 for their Motion for Clarification, state as follows:

1. On February 2, 2006, the Board issued its Order on Respondents' Verified Motion to Stay Proceedings.

2. The undersigned received a copy of that Order on February 8, 2006.

3. At page 13 of that Order, the Board states in part:

... 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 [sic] (Dec. 17, 1981).

Board Order, February 2, 2006, at 13.

4. In the case that the Board cites for this proposition, Pielet Brothers, the Board held that no statute of limitations applied to an enforcement case brought by the State of Illinois. See Illinois EPA v. Pielet Bros. Trading, Inc., PCB No. 80-185, 1981 Ill. ENV LEXIS 402, at *10 (Ill.Pol.Control.Bd. Dec. 17, 1981).

5. On appeal, the Illinois Appellate Court affirmed this decision, stating in part:

Unless the terms of a statute of limitations expressly include the State, county, municipality or other governmental agencies, the statute, so far as public rights are concerned, as distinguished from private and local rights, is inapplicable to them. The question is whether the State (or its agency or subdivision) is asserting public rights on behalf of all the people of the State or private rights on behalf of a limited group. Here, the Agency argues, and we agree, that what the Agency seeks is to protect the public's right to a clean environment. Moreover, not only does section 14 of the Limitations Act fail to expressly include the State or the Agency, but section 14 is one of a group of sections that, in general, pertain to personal actions.

Defendant's authorities directed to this point are both inapposite. They both involve actions by private parties, unlike the instant case.

In conclusion, we hold that the Board did not err in determining that section 14 of the Limitations Act did not apply to the instant action.

Pielet Bros. Trading, Inc. v. The Pollution Control Board, et al., 442 N.E.2d 1374, 1379 (5th Dist. 1982). (Emphasis added.)

6. Since these decisions, the Board has cited to Pielet Brothers for the proposition that “[i]t is well-settled that ‘there is no statute of limitations that applies to enforcement actions brought by the State pursuant to Section 31 of the Act.’” People v. Peabody Coal Co., PCB No. 99-134, 2003 Ill. ENV LEXIS 314, at *15 (Ill.Pol.Control.Bd. June 5, 2003). (Emphasis added; citations omitted.)

7. However, in at least one case, the Board has held that an action brought by a private party under the Illinois Environmental Protection Act (“Act”) is governed by a statute of limitations – specifically 735 ILCS 5/13-205.

8. Section 13-205 provides that:

Except as provided in Section 2-725 of the "Uniform Commercial Code," approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

735 ILCS 5/13-205. (Emphasis added.)

9. In Union Oil Co. of Cal. d/b/a Unocal v. Barge-Way Oil Co., Inc., et al, the Board, citing to Pielet Brothers, held that:

a statute of limitations bar will not preclude any action seeking enforcement of the Act, if brought by the State on behalf of the public's interest,

but that:

[t]he instant case, [i.e., a case brought by a private party under the Act], however, does not fall under this exception.

Union Oil Co. of Cal. d/b/a Unocal v. Barge-Way Oil Co., Inc., et al, PCB No. 98-169, 1999 Ill. ENV LEXIS 9, at **11-12, n.1 (Ill.Pol.Control.Bd. Jan. 7, 1999). (Emphasis added.)

10. In a later decision in that same case, the Board, citing to its January 7, 1999 opinion, stated:

Barge-Way correctly points out that the Board has already concluded that, pursuant to Section 13-205 of the Code of Civil Procedure (735 ILCS 5/12-205 (1998)), the statute of limitations applicable to this case is five years.

Union Oil Co. of Cal. d/b/a Unocal v. Barge-Way Oil Co., Inc., et al, PCB No. 98-169, 2001 Ill. ENV LEXIS 89, at *3 (Ill.Pol.Control.Bd. Feb. 15, 2001). (Emphasis added.)

11. The instant case is brought by private individuals, Vernon and Elaine Zohfeld, not by the State of Illinois.

12. Therefore, Respondents are unsure of the meaning of the Board's statement in its February 2, 2006, Order that "a statute of limitations does not apply to actions brought before the Board under the Act," and the Board's citation to Pielet Brothers in support of that statement, as Pielet Brothers addressed only the issue of whether a statute of limitations applies to the State, and the Board in Union Oil Co. held that Section 13-205 did apply to an action brought by an individual.

13. That is, Respondents are unsure whether the Board means its February 2, 2006, Order in this matter to reverse the Board's holdings in Union Oil Co., or whether the Board cited to Pielet Brothers for some other purpose.

14. This issue is relevant in this case, as Complainants' Complaint alleges that "[t]he [alleged] overdrift events have occurred many times, both before and after the May 8, 2000 incident," i.e., in some cases, more than five years before Complainants filed their Complaint on May 9, 2005, and Complainants' Complaint asks the Board to penalize Respondents "for each violation of the Act and regulations." See Complainants' Complaint at ¶19, Request for Relief D. (Emphasis added.)

15. Thus, if Section 13-205 applies to actions by private parties under the Act, to the extent that Complainants seek penalties based on "overdrift events" that "occurred. . . before . . . May 8, 2000," Respondents would be in a position to argue that any such claims accrued more than five years before the Complainants filed their Complaint, and therefore are barred by Section 13-205.

16. Accordingly, Respondents move the Board to clarify the meaning of its statement that “a statute of limitations does not apply to actions brought before the Board under the Act.” Board Order, February 2, 2006, at 13.

WHEREFORE, for the above and foregoing reasons, Respondents WABASH VALLEY SERVICE COMPANY, MICHAEL J. PFISTER, NOAH D. HORTON, and STEVE KINDER, respectfully move the Illinois Pollution Control Board to clarify its February 2, 2006, Order as set forth above, and to award Respondents all other relief just and proper in the premises.

Respectfully submitted,

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

Dated: February 23, 2006

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

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