

FEB 06 2007

STATE OF ILLINOIS
Pollution Control Board

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

PCB No. 05-193
(Citizen's Enforcement, Air)

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA FIRST CLASS MAIL)

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

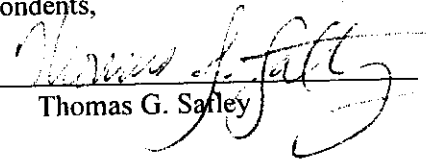
(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an original and nine copies each of **RESPONDENT MICHAEL J. PFISTER'S MOTION FOR SUMMARY JUDGMENT** and **AFFIDAVIT OF MICHAEL J. PFISTER**, copies of which are hereby served upon you.

Respectfully submitted,

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

Dated: February 1, 2007

By: 
Thomas G. Safley

Thomas G. Safley
Gale W. Newton
Lauren C. Lurkins
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776

CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, hereby certify that I have served the attached RESPONDENT MICHAEL J. PFISTER'S MOTION FOR SUMMARY JUDGMENT and AFFIDAVIT OF MICHAEL J. PFISTER upon:

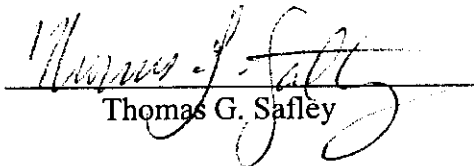
Ms. Dorothy M. Gunn
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Suite 11-500
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Carol Webb, Esq.
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Post Office Box 19274
Springfield, Illinois 62794-9274

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
Evansville, Indiana 47705-0779

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on February 1, 2007.


Thomas G. Safley

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STATE OF ILLINOIS
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**RESPONDENT MICHAEL J. PFISTER'S
MOTION FOR SUMMARY JUDGMENT**

NOW COMES Respondent MICHAEL J. PFISTER, by his attorneys, HODGE
DWYER ZEMAN, and for his Motion for Summary Judgment, states as follows:

I. INTRODUCTION

1. The Illinois Pollution Control Board ("Board") should grant Michael J. Pfister summary judgment in this case because Michael J. Pfister had no involvement in the alleged "overdrift" incident that allegedly occurred on May 8, 2000, and because Complainants are barred by the applicable statute of limitations with respect to any claim that may be alleged against Michael J. Pfister relating to any alleged "overdrift" events that occurred before May 8, 2000. Further, Michael J. Pfister did not apply agrichemicals or take any other action relating to Complainants' property, or property adjacent to Complainants' property, on or after May 8, 2000. Therefore, because of: (1) the statutory bar on any claims preceding May 8, 2000; (2) the fact that Michael J. Pfister was not involved with the alleged May 8, 2000 alleged "overdrift" incident; and (3) the fact that Michael J. Pfister was not involved with any activity following May 8, 2000

when any alleged “overdrift” event could have occurred, Complainants have no basis for their action against Michael J. Pfister. For these reasons, Michael J. Pfister is entitled to summary judgment as a matter of law.

II. BACKGROUND

2. On May 9, 2005, Complainants filed their Complaint against Respondents. *See* Complaint.

3. In summary, Complainants allege that “on or about May 8, 2000,” and “before and after the May 8, 2000 incident,” Respondents, including Michael J. Pfister, were involved in the application of agrichemicals to property owned by Respondent Bob Drake situated adjacent to property owned by Complainants, and that such agrichemicals drifted onto the property of the Complainants. Complaint at 2-3, 4, ¶¶ 13,19.

4. Michael J. Pfister previously admitted that he was or is “employed by Wabash Valley Service Company to drive spray equipment and to apply agrichemicals at various times and locations.” Michael J. Pfister’s Answer and Affirmative Defenses to Complainants’ Complaint at 2, ¶ 12.

5. However, Michael J. Pfister denied the allegations at paragraphs 13 and 19 of Complainants’ Complaint. *Id.* at 2, 3.

6. In connection with their allegations, Complainants claim that Respondents have caused air pollution as defined by Section 3.02 of the Illinois Environmental Protection Act (the “Act”), 415 ILCS 5/3.02, and violated Section 9(a) of the Act, 415 ILCS 5/9(a), and Section 201.141 of the Board’s regulations, 35 Ill. Admin. Code § 201.141. Complaint at 4, ¶ 20.

III. SUMMARY JUDGMENT STANDARD

7. Section 101.516(a) of the Board's procedural rules provides for the filing of Motions for Summary Judgment. See 35 Ill. Admin. Code § 101.516(a). The Board will enter summary judgment "[i]f the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." 35 Ill. Admin. Code § 101.516(b). In its determination of such a motion, the Board must consider the record "strictly against the movant and in favor of the opposing party." *Cassens and Sons, Inc. v. Illinois EPA*, PCB No. 01-102, 2004 Ill. ENV LEXIS 635, at *12 (Ill. Pol. Control. Bd. Nov. 18, 2004) (citing *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998)).

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.* (citing *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986)). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist 1994).

Cassens, 2004 Ill. ENV LEXIS at *11-12. (Emphasis added.)

8. The Illinois Supreme Court's *Purtill* decision, which the Board cites in *Cassens*, further emphasizes that "use of the summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit." *Purtill*, 111 Ill.2d at 240, 489 N.E.2d at 871 (citations omitted). The Illinois Supreme Court goes on as follows:

If a party moving for summary judgment supplies facts which, if not contradicted, would entitle such party to a judgment as a matter of law, the

opposing party cannot rely on his pleadings alone to raise issues of material fact. Thus, facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion.

Id. at 240-41, 871-72. (Citations omitted; emphasis added.)

9. For purposes of a motion for summary judgment, a fact is “material” if it is “[r]elated to the essential elements of the cause of action” (*Smith v. Neumann*, 289 Ill. App. 3d 1056, 1069, 682 N.E.2d 1245, 1254 (2d Dist. 1997) (citations omitted)); that is, if it will “affect the outcome of a party’s case.” *Westbank v. Maurer, et al.*, 276 Ill. App. 3d 553, 562, 658 N.E.2d 1381, 1389 (2d Dist. 1995). Thus, as the Board has noted, “[f]actual issues which are not material to the essential elements of the cause of action or defense, regardless of how sharply controverted, do not warrant the denial of summary judgment.” *Environmental Site Developers, Inc. v. White & Brewer Trucking, Inc.*, PCB No. 96-180, 1997 Ill. ENV LEXIS 649, at **27-28 (Ill.Pol.Control.Bd. Nov. 20, 1997) (citing *Swope v. Northern Illinois Gas Co.*, 251 Ill. App. 3d 850, 858, 623 N.E.2d 841, 846 (3d Dist. 1993)).

10. Finally, the *Gauthier* decision cited by the Board in *Cassens* makes clear that “[i]f from the papers on file, a plaintiff fails to establish an element of his cause of action, summary judgment for the defendant is proper.” *Gauthier*, 266 Ill. App. 3d at 220, 693 N.E.2d at 999 (citations omitted).

IV. ANALYSIS

11. Complainants’ Complaint alleges in relevant part that “[o]n or about May 8, 2000, and at other times . . . [Michael J.] Pfister . . . sprayed agrichemicals . . . on and around Drake’s field, in a manner that allowed the agrichemicals to, and in fact ensured

that they would, drift and cloud onto and across the adjacent property owned and occupied by the Zohfelds,” and that “[t]he [alleged] overdr[i]ft events have occurred many times, both before and after the May 8, 2000 incident.” *See* Complaint at 4, ¶ 19.

12. Complainants’ Complaint also asks the Board to assess civil penalties against Michael J. Pfister “for each violation of the Act and regulations.” *See* Complaint at 5, Request for Relief D. (Emphasis added.)

13. On February 23, 2006, Respondents filed a Motion for Clarification seeking explanation of the Board’s February 2, 2006 Order with regard to application of Illinois’ general statute of limitation to Board actions. *See* Respondents’ Motion for Clarification.

14. In its February 2, 2006 Order, the Board referred to its previous Opinion in the case of *IEPA v. Piolet Bros. Trading, Inc.*, PCB 80-105 (Dec. 17, 1981), and stated, in part, that it “has previously decided that a statute of limitations does not apply to actions brought before the Board under the Act.” Board Order, February 2, 2006, at 13.

15. In their Motion for Clarification, Respondents noted that in *Union Oil Co. of Cal. d/b/a Unocal v. Barge-Way Oil Co., Inc. et al.*, the Board 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 also noted that the present case was brought by a private party under the Act, and thus, “does not fall under this exception.” Respondents’ Motion for Clarification, at ¶ 9 (citing *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.)

16. The Respondents also noted in their Motion for Clarification that in a later decision in the *Barge-Way Oil* case, the Board, citing to its January 7, 1999 Opinion, stated that it had “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.” Respondents’ Motion for Clarification, at ¶ 10 (citing *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)).

17. The Board stated in its April 6, 2006 Order ruling on Respondents’ Motion for Clarification that it did not intend “to reverse any of its previous opinions or orders in its February 2, 2006 [O]rder.” Board Order, April 2, 2006, at 1.

18. The instant case is brought by private individuals, Vernon and Elaine Zohfeld, not by the State of Illinois. *See* Complaint.

19. Just as in *Union Oil Co.*, the statute of limitations applicable to the instant case is five years.

20. Therefore, any claims that accrued more than five years before Complainants filed their Complaint on May 9, 2005 (the actual expiration of the five-year limitations period was May 8, 2005, but presumably because that date fell on a weekend, Complainants filed their Complaint on Monday, May 9, 2005), are barred by Section 13-205. *Union Oil Co.*, 2001 Ill. ENV LEXIS 89, at *3.

21. Respondent Pfister did not spray agrichemicals or any other substance at or adjacent to Complainants’ property, nor was he present at Respondent Drake’s or Complainants’ property, either in the employ at Wabash Valley Service Company or

otherwise, on any date on or after May 8, 2000. *See* Affidavit of Michael J. Pfister, attached hereto as *Exhibit A*.

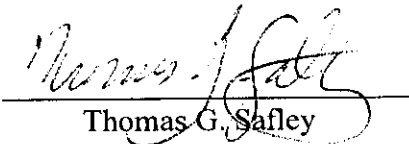
22. Therefore, Michael J. Pfister is entitled to summary judgment as a matter of law as to Complainants' claims that he violated the Act on or after May 8, 2000.

V. **CONCLUSION**

WHEREFORE, for the reasons stated above, Respondent MICHAEL J. PFISTER respectfully moves the Illinois Pollution Control Board to grant him summary judgment, to enter judgment in favor of Michael J. Pfister and against Complainants as to any and all claims by Complainants related to Michael J. Pfister, and to award Michael J. Pfister such other relief as the Illinois Pollution Control Board deems just.

Respectfully submitted,

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

By: 
Thomas G. Safley

Dated: February 1, 2007

Thomas G. Safley
Gale W. Newton
Lauren C. Lurkins
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

WVSC:002/Fil/Motion for Summary Judgment v2

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VERNON and ELAINE ZOHFELD,)
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Complainants,)
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vs.)
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BOB DRAKE, WABASH VALLEY)
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RECEIVED
CLERK'S OFFICE
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(Citizen's Enforcement Act)
STATE OF ILLINOIS
Pollution Control Board

AFFIDAVIT OF MICHAEL J. PFISTER

Michael J. Pfister, being first duly sworn, deposes and states under oath, and if sworn as a witness would testify, as follows:

1. I have personal knowledge of the matters set forth in this affidavit.
2. I am employed by Wabash Valley Service Company ("Wabash Valley") to drive spray equipment and to apply agrichemicals at various times and locations, in addition to other activities.
3. Wabash Valley transacts business by engaging in the selling and application of agrichemicals to fields in various counties of the State of Illinois.
4. I did not apply or spray or participate in any way in any application or spraying of any agrichemicals on or after May 8, 2000 on the property owned by Bob Drake that is situated adjacent to property owned by Vernon and Elaine Zohfeld.
5. I did not apply or spray any other substance at, nor was I present at, Complainants' property, Respondent Drake's property, or at any other property adjacent to Complainants' property, on or at any time after May 8, 2000.

6. I have no personal knowledge of any agrichemical spraying at any such property on or after May 8, 2000.

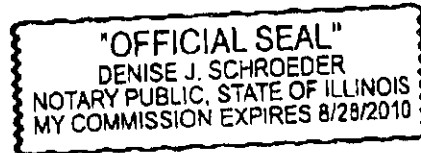
Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

FURTHER AFFIANT SAYETH NOT.

Michael J. Pfister
Michael J. Pfister

Subscribed and sworn to before
me this 1 day of FEBRUARY, 2007.

Denise J. Schroeder
Notary Public



WVSC:002/Fil/Affidavit of Michael J. Pfister