

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 **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: September 22, 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  
Springfield, Illinois 62705-5776  
(217) 523-4900

**CERTIFICATE OF SERVICE**

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

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 September 22, 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 September 22, 2005.

/s/ Thomas G. Safley  
Thomas G. Safley

WVSC:002/Fil/NOF-COS – Reply to Response

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**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(e) of the Illinois Pollution Control Board's ("Board") procedural rules, 35 Ill. Admin. Code §101.500(e), submit this Reply to Complainants' Response to Motion to Stay Proceedings (the "Response").

1. On May 9, 2005, Complainants filed their Complaint with the Board (the "Complaint") in this matter.

2. Approximately two weeks before that date, on April 26, 2005, a criminal Information (the "Information") was filed with the United States District Court for the Southern District of Illinois relating to the same "incident" alleged in the Complaint. See United States of America v. Wabash Valley Service Co., Glen S. Kinder, and Noah David Horton, Criminal No. 05-40029-JPG, a copy of which Information is attached as an

exhibit to the Verified Motion to Stay Proceedings (“Motion to Stay”) filed by Respondents.

3. On July 8, 2005, Respondents filed a Motion to Stay.

4. On August 3, 2005, Complainants filed their Response.

5. On August 15, 2005, Respondents filed a Motion for Leave to Reply to Complainants’ Response to Motions to Stay Proceedings (the “Motion to Reply”) to prevent material prejudice because in the Response, the Complainants: (1) 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 to the circumstances at issue here; (2) grossly mischaracterized statements made in the Motion to Stay; and, (3) asserted new facts that are not of record in this proceeding.

6. On September 18, 2005, the Hearing Officer granted the Motion to Reply.

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

7. First, in their Response, Complainants state that “‘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), which states: “whether a party’s fifth amendment rights are implicated is a significant factor for the trial court to consider in deciding whether to stay civil proceedings, ‘but it is only one consideration to be weighed against others.’” Id. at 1136.)

8. However, in the very 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.” Id. at 1137. (Emphasis added.) See also Hollinger Int'l, Inc. v. Hollinger Inc., 2005 U.S. Dist. LEXIS 14437 (N.D. Ill. 2005) and Cruz v. County of Dupage, 1997 U.S. Dist. LEXIS 9220, \*7-8 (N.D. Ill. 1997).

9. In the matter at hand, the Information has been formally filed and is, therefore, an announced charge which should weigh heavily in the defendant's favor in deciding whether to stay this proceeding.

10. The Complainants’ statement that “‘great weight’ is not to be given to any particular factor” is also inaccurate with regard to case law because “[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.’” Hollinger Int'l, Inc., 2005 U.S. Dist. LEXIS 14437 (N.D. Ill. 2005). (Emphasis added.) See also Admiral Ins. Co. v. Federal Sec., 1996 U.S. Dist. LEXIS 3639 (N.D. Ill. 1996) (stating that “[a] stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter.”). (Emphasis added.)

11. As discussed in paragraphs 13-15 below, the matter before the Board and the criminal matter involve a substantial overlap of issues and are based on the same subject matter; therefore, the Board should grant Respondents’ Motion to Stay.

**MISCHARACTERIZATIONS**

12. Second, Complainants further state that Respondents' "own documentation shows" that no nexus exists between the complaint before the Board, 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.

13. The Complaint actually alleges that in Hamilton County, Illinois, "on or about May 8, 2000, . . . [Respondents] sprayed agricultural chemicals . . . in a manner that allowed the agricultural chemicals to . . . drift and cloud onto and across the adjacent property owned and occupied by the [Complainants]." Complaint at 3. (Emphasis added.)

14. The Information actually alleges that "on or about May 8, 2000" the defendants therein caused a registered pesticide "to be used in a manner inconsistent with its labeling – that is . . . to be applied to a field . . . at a time when the wind speed was approximately 20 m.p.h. . . ." Information at 1. (Emphasis added.)

15. Since both 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, a substantial overlap of the issues involved in the Board and criminal proceedings exists, and the actions are based on the same subject matter.

16. In addition, Complainants state that granting the stay would cause delay that would soon create problems of proof and stale evidence. 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. It is disingenuous for the Complainants to wait a full five years to file their Complaint and then demand that the Board “expedite this case for as quick a resolution on the merits as possible.” Response at 15.

### **NEW FACTS**

17. Third, Complainants state that recently a local (southern Illinois) television station aired a report on the alleged overdraft incident and that the report indicates strong public interest in the case (Response at 18); however, Complainants have provided no information that would allow Respondents or the Board to verify this allegation.

18. Complainants also state that “[c]ounsel for Complainants has been in communication with both the Illinois Attorney General’s Office and the Illinois Environmental Protection Agency, both of which indicated an interest in this case and its outcome.” Response at 18. However, Complainants do not indicate that the Attorney General’s Office has brought a complaint against Respondents, and the Board can take official notice that the State has filed no such action before the Board.

19. Finally, Complainants allege that the “May 2000 incident was the second direct discharge onto Complainants property.” Response at 19. However, any such earlier incident is not identified in the Complaint and would, in any case, be irrelevant and barred from consideration by the applicable statute of limitations. See generally the Complaint. “This case” does not involve any alleged “discharge” prior to May 2000.

WHEREFORE, Respondents, WABASH VALLEY SERVICE COMPANY, MICHAEL J. PFISTER, NOAH D. HORTON, and STEVE KINDER, respectfully move the Illinois Pollution Control Board to stay the proceedings in this matter until the conclusion of the criminal matter referred to herein, 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: September 22, 2005

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

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