BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)		
Complainant,	**)**	
v.	**)**	**PCB NO. 12-35**
	)	**(Enforcement – Water)**
SIX-M CORPORATION, INC., and	**)**	
WILLIAM MAXWELL,	**)**	
Respondents.	**)**	
	)	
and	**)**	
	)	
JAMES MCILVAIN,	**)**	
Necessary Party-Respondent.	**)**	

NOTICE OF FILING AND PROOF OF SERVICE

To: John T. Therriault, Acting Clerk
Illinois Pollution Control Board
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), a MOTION FOR RECONSIDERATION OF FEBRUARY 12, 2012 ORDER, a copy of which is herewith served upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 23rd of March, 2012.

Respectfully submitted,
SIX M. CORPORATION, INC. and WILLIAM MAXWELL

Respondents,

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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MOTION FOR RECONSIDERATION OF FEBRUARY 12, 2012 ORDER

NOW COME Respondents, Six-M Corporation, Inc., and William Maxwell, by their undersigned counsel, pursuant to Section 101.500 of the Board's Procedural Rules (35 Ill. Admin. Code §101.520), and move the Board to reconsider and reverse its February 12, 2012 Order, stating as follows:

PROCEDURAL BACKGROUND

On February 12, 2012, the Board entered an order with two components. First, it construed two objections to Respondents' affirmative defense of impossibility as a motion, and secondly, it granted the motions. (Order of Feb. 12, 2012) Undersigned counsel did not imagine the objection contained in the Complainant's reply (and which was merely incorporated by reference by James McIlvain) was a motion or would be treated as a motion. Accordingly, we are appreciative that the Assistant Attorney General, on his own volition and sense of propriety has formally placed his statement in the record that the objection "was not intended as a motion

to strike nor does it request that the alleged affirmative defense 'be stricken as improper.'" (Ex. A.) Respondent would hope that this statement would be sufficient to withdraw the effect of this mistake.

There are several problems with the approach taken by the Board here. First and most importantly, by treating the objection as a motion without prior notice to Respondents, we were denied notice and opportunity to address the issue prior to the Board's ruling. See Diamond Mortg. Corp. v. Armstrong, 176 Ill. App. 3d 64, 69 (1st Dist. 1988) (court violated due process rights by ruling on motion not presented). Second, to the extent this motion for reconsideration is the vehicle to address the issue, it is an inferior vehicle. Such motions are rarely granted and in this case shifts the burden onto the Respondents regarding an issue that should have been placed on the original movants. Also, the State and McIlvain are essentially being given the right to the "last word," since a traditional motion to strike would not have given a right to reply. (35 Ill. Adm. Code § 101.500) Third, the Board has exercised discretion entrusted to the State in its choices in how to prosecute this matter. Normally, this is an issue that only the State has standing to complain about, but the Board has made statements in the second paragraph of the discussion section in the subject Order, which may or may not reflect the State's position as to what Respondents should do.

With these procedural irregularities in mind, Respondents ask that the Board's Order of February 12, 2012 be voided. Without knowing whether such relief will be granted, however, Respondents will address the objection raised by the State, followed by the issues raised by the Board.

I. IMPOSSIBILITY IS AN AFFIRMATIVE DEFENSE.

The State only directed one specific objection to the Affirmative Defense of Impossibility: "Impossibility derives from common-law doctrines of contract law and has no application to the enforcement of statutory violations. In particular, the impossibility of performance is an affirmative defense to a breach of contract claim." (Response at p. 2) The rest of the Response recites boilerplate law regarding affirmative defenses.

The affirmative defense of impossibility may arise whenever performance is an issue. "The affirmative defense of impossibility is well established in the common law of Illinois." Radkiewicz v. Radkiewicz, 353 Ill. App. 3d 251, 260 (2d Dist. 2004). It has arisen in contract cases, id., as well as actions for contempt. E.g., Hall v. Melton (in Re Melton), 321 Ill. App. 3d 823, 829 (1st Dist. 2001) ("the party petitioning for the contempt finding has the burden of showing contempt, and the alleged contemnor has the opportunity to show compliance with the court's order, or an acceptable reason, like impossibility, for noncompliance"). As discussed herein, underground storage tank owners/operators have performance obligations that arise under the law, which differ little from those that may arise from the orders of judicial bodies.

While not specifically named as impossibility defenses, courts in environmental cases have recognized that an affirmative defense arises when lack of access to another's property prevents remediation of that property. In Carlson v. Ameren Corp., 2011 U.S. Dist. LEXIS 5997, 41 Envtl. L. Rep. 20074 (C.D. Ill. 2011), the plaintiff sued a utility under RCRA for disposing hazardous and solid waste on their property. The utility countersued and filed an affirmative defense based upon lack of access. The plaintiffs were found potentially liable under RCRA because they "prevented Ameren from accessing and repairing the land [and] . . . [a]s a result, the

Carlson's may be said to be actively contributing to the condition of the Property." Id. at p. 4. Similarly, a property's owner's "refusal to permit access to its property could be the basis for an affirmative defense." Id. at p. 5.

Similarly, the Northern District of Illinois ruled that a neighboring property owner's refusal to provide access may suspend liability for underground storage tank requirements under RCRA. Aurora Nat'l Bank v. Tri Star Mktg., 990 F. Supp. 1020, 1025-26 (N.D. Ill. 1998). The circumstances in that case are similar:

> **When Tri Star detected petroleum contamination near the lines in the pump islands, it filed an incident report with the IEPA as directed by the fire marshal. Tri Star further claims that it offered and attempted to perform site investigations on the property in 1992, but was obstructed from doing so when plaintiffs' attorney asserted that Tri Star's lease had been terminated on June 30, 1992. After that date plaintiffs would not allow Tri Star access to the property to perform testing for contamination unless Tri Star agreed to continue paying rent, which it refused to do. Tri Star claims that it continues to stand ready to conduct required site investigations and take any corrective action required under applicable laws and regulations.**

Id. at 1025.

The Court ruled that the underground storage tank owner may be relieved of liability to clean-up the neighboring property depending on "whether Tri Star is using the threat of rental payments as an excuse for its failure to comply with the UST laws or whether plaintiffs are attempting to use the citizen suit provision to obtain unwarranted rental payments from Tri Star." Id. at 1025.

Both Carlson and Aurora National Bank were decided prior to trial, so the final outcome was yet to be determined, but both Courts recognized an access denial defense as a matter of law. See also College Park Holdings v. Racetrac Petroleum, 239 F. Supp. 2d 1334, 1347 (N.D. Ga.

2002) (after trial; rejecting "access denial defense" because the court was not convinced access was denied); Albany Bank & Trust Co. v. Exxon Mobile Corp., 310 F.3d 969, 973 (7th Cir. 2002) (declining to follow Aurora National Bank in case where there were no allegations that the access was denied for want of "additional private payments unrelated to environmental law").

Returning to the present allegations. Six-M Corporation. is the owner/operator of the subject underground storage tanks (Aff. Def. ¶ 1), and accordingly is subject to a number of undisputed legal requirements, many of which are set forth without disagreement in the Complaint. (Compl. ¶ 30 - ¶ 32) Indeed, Six-M Corporation has performed over $500,000 of EPA-approved work that has been reimbursed from the LUST Fund, (Answer ¶ 23), including a substantial amount of soil removed from the neighbor's property in 2004. (Aff. Def. ¶ 13) While access to the neighbor's property was always intermittent and difficult for the consultants, all access has been denied since at least 2006. (Answer ¶ 26; Aff. Def ¶ 16) Access has been denied for want of additional remuneration, beyond that previously provided by the LUST Fund and beyond that needed for environmental purposes. (Aff. Def. ¶ 19 & ¶ 20)

These allegations and the reasonable inferences that can be drawn from them, liberally construed in favor of Respondents, establish circumstances in which Six-M has clear obligations under environmental law to submit and perform certain plans, but in which affirmative matter (access denial) is preventing performance. To the extent performance of the obligations under the LUST Program necessitate access to neighboring property, an affirmative defense should be recognized as a matter of law. Whether Respondents can prove impossibility would be a matter for hearing.

II. THE AFFIRMATIVE DEFENSE GIVES COLOR TO THE COMPLAINT.

As explained in the previous section, the Complaint alleges that Six-M, as owner/operator of underground storage tanks, had certain environmental obligations to perform; the affirmative defense gives color to that argument and concedes it, but raises affirmative matter in the nature of access denial as a defense. The affirmative defense is not premised on a disagreement over whether the 2006 incident caused or allowed pollution and triggered corrective action requirements. (Order at p. 6) Notably, this enforcement action was initiated in 2005 prior to the 2006 incident. (Aff. Def. ¶ 14) The 2006 incident may be relevant to the McIlvain's claims, but not the State's, nor the defense of impossibility. Whatever Respondents are required to do, whether from the 2006 incident or before, the affirmative defense seeks relief to the extent performance is impossible for want of access.

There is also a fundamental distinction between incidents and releases. The Board has ruled that an incident in which evidence of a release is observed and smelled in the tank pit, with soil samples above Tier 1 objectives, and an OSFM log report indicating a release has occurred are insufficient evidence to establish a new release at a site that experienced a prior release. Weeke Oil v. IEPA, PCB No. 10-1, at p. 59 (May 20, 2010). Nonetheless, the owner/operator has certain obligations that stem from the reporting of an incident, and Respondents have asked their new consultants to perform all tasks that are possible to perform on the former service station property that can be performed without access to the neighboring property. The impossibility defense is not directed towards matters of which access denial is not an issue.

III. RESPONDENTS HAVE NOT ASKED THE BOARD TO ADJUDICATE A CONTRACT DISPUTE.

Respondents did not request an adjudication of a contract dispute, nor file a contract with the Board. The State filed this action, joining McIlvain for the reason that he is not cooperating with access, but that such lack of cooperation may be justified. (Mot. Joinder at ¶ 4 - ¶ 5) Furthermore, "it may be necessary for the Board to impose some condition on him regarding site access in order for the Respondents to complete the remediation of this adjacent site." (Id. ¶ 6) The Board accepted the joinder, and by doing so, recognized the centrality of access to the issues in this enforcement action which are necessary for a complete determination of the issues herein. The Board has exercised jurisdiction in environmental disputes in which the underlying contracts are significant. Mather Investment Properties v. Illinois State Trapshooters, PCB No. 5-29, at pp. 38-39 (July 21, 2005). To determine whether access is being denied and whether such access denial is consistent with the environmental law are issues that the Board can certainly decide. If the Board cannot decide these issues, Respondents would be denied their opportunity to defend themselves by the State's choice of forum.

As to Respondent's failure to close-out this cleanup using the procedure of 35 Ill. Adm. Code 732.411, this is not an allegation made by the State or the Agency. If the State or the Agency were directing Respondent to close-out the cleanup, Respondents would have to take such a demand seriously and perhaps it would have no choice but to do so. But the allegations of the affirmative defense are of temporary impossibility, and Respondents do not claim that performance is excused permanently, as opposed to suspended by access denial. To direct Respondents to treat the denial as permanent would appear entirely inconsistent with the

environmental purposes of the Act which are to inform the Board's orders. (415 ILCS 5/33(c))

WHEREFORE, Respondents respectfully request that February 12, 2012 order be vacated, or for such other and further relief as the Board deems meet and just.

SIX M. CORPORATION, INC. and WILLIAM MAXWELL,
Respondents,

By their attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

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