

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
by LISA MADIGAN, Attorney)	
General of the State of Illinois)	
)	
Complainant,)	
)	
v.)	PCB No. 12-035
)	(Enforcement – LUST/Water)
SIX M. CORPORATION INC., an Illinois,)	
corporation, and WILLIAM MAXWELL,)	
an individual,)	
)	
Respondents,)	
)	
and)	
)	
JAMES MCILVAIN,)	
)	
Necessary Party.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that on this 27th day of July, 2018, I caused to be filed with Clerk of the Illinois Pollution Control Board, via the “COOL” System the attached Notice of Filing and Complainant’s Motion for Leave to File Reply *Instaner* and Reply to Respondents’ Objection to Motion to File First Amended Complaint, a true and correct copy of which is attached hereto and is hereby served upon you.

Respectfully submitted,
PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
State of Illinois

By: /s/ Elizabeth Dubats
Elizabeth Dubats
Assistant Attorney General
Environmental Bureau
Environmental Bureau
69 W. Washington, 18th Floor
Chicago, Illinois 60602
(312) 814-2069
edubats@atg.state.il.us

SERVICE LIST

Carol Webb
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601
[Carol Webb@Illinois.Gov](mailto:Carol.Webb@Illinois.Gov)

Don Brown
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601
donbrown@illinois.gov
(via electronic filing)

Patrick D. Shaw
Law Offices of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704
pdshaw1law@gmail.com

Phillip R. Van Ness
Webber & Thies, P.C.
202 N. Lincoln Square
P.O. Box 189
Urbana, IL 61801
pvanness@webberthies.com

CERTIFICATE OF SERVICE

I, Elizabeth Dubats, an Assistant Attorney General, do certify that I caused to be served this 27th day of July, 2018, the attached Notice of Electronic Filing and Complainant's Motion for Leave to File Reply *Instaner* and Reply to Respondents' Objection to Motion to File First Amended Complaint on the parties named on the attached service list by electronic mail.

By: /s/ Elizabeth Dubats

Elizabeth Dubats
Assistant Attorney General
Environmental Bureau
69 W. Washington, 18th Floor
Chicago, Illinois 60602
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COMPLAINANT’S MOTION FOR LEAVE TO REPLY INSTANTER AND REPLY TO RESPONDENTS’ OPPOSITION TO MOTION TO FILE FIRST AMENDED COMPLAINT

NOW COMES COMPLAINANT, People of the State of Illinois, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.500(e) of the Illinois Pollution Control Board’s (“Board”) procedural rules, 35 Ill. Adm. Code 101.500(e), and respectfully moves the Board for leave to file its Reply to Respondents’ Opposition to Complainant’s Motion for Leave to File a First Amended Complaint, and replies instanter. In support of this motion, the Complainant states as follows:

MOTION FOR LEAVE TO REPLY INSTANTER

Section 101.500(e) of the Illinois Pollution Control Board’s (“Board”) procedural rules, 35 Ill. Adm. Code 101.500(e) provides in pertinent part:

The moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice. A motion for permission to file a reply must be filed with the Board within 14 days after service of the response.

Respondents' Opposition makes a number of misleading and inaccurate representations in support of their objection to the filing of Complainant's First Amended Complaint, and Complainant would be materially prejudiced if not permitted to address them. At paragraph 18 of their Opposition, Respondents allege that Complainant's Motion "lacks credibility" and "clearly lacks evidence to support its case". Respondents mischaracterize the issue of individual liability as to William or Thomas Maxwell as mutually exclusive. Specifically, Respondents frame the Complainant's allegations as to William Maxwell's ownership and involvement in the operations of the Walker Service Station property and business that raised genuine issues of material fact as to William Maxwell's liability as somehow preclusive of a credible allegation of individual operator liability on the part of Thomas Maxwell. However, the Board's finding that there is a genuine issue of material fact as to whether or not William Maxwell was the owner of Walker Service Station is not relevant to the separate legal question of Thomas Maxwell's potential individual liability. In mischaracterizing these as conflicting positions, Respondents ask the Board to ignore the evidence already placed before the Board of Thomas Maxwell's active involvement in the day-to-day operations of the Walker Service Station facility and remediation, particularly post-dating the filing of the original complaint.

As Complainant's Motion for Leave to File First Amended Complaint alleges at paragraphs 7 and 8, "Thomas Maxwell has represented that he is a corporate officer of Respondent Six M. Corporation, Inc. and the operator of the Walker Service Station facility during the period of time relevant to the Original Complaint" and Respondents have previously provided Leaking Underground Storage Tank fund and Tiered Approach to Corrective Action

Objectives documents addressed to Thomas Maxwell and/or bearing Thomas Maxwell's signature as evidence of Thomas Maxwell's involvement. Respondents' Motion for Summary Judgment (Mar. 6, 2017). Exs. A and B. Far from only relying on a single affidavit, the allegations of the proposed First Amended Complaint against Thomas Maxwell are based on Thomas Maxwell's own testimony and representations in numerous LUST documents submitted to the Illinois Environmental Protection Agency ("Illinois EPA") already produced in discovery.

Finally, Respondents' Opposition represents at paragraph 21 that Thomas Maxwell was "not given notice and opportunity for a meeting with Illinois EPA." First, the counts in the First Amended Complaint against Thomas Maxwell are brought on the Attorney General's own motion and therefore Section 31 is inapplicable. *People v. Freeman United Coal Mining Co., LLC*, PCB 10-61 & 11-02, at 31 (Nov. 15, 2012). Second, both the violation notice and notice of intent to pursue legal action in this case were addressed to Thomas Maxwell. *See* Respondents' Motion for Summary Judgment, Exs. A-4 and A-5. Therefore it is inaccurate to allege that Thomas Maxwell was not given notice and opportunity for a meeting with Illinois EPA.

Complainant should be granted the opportunity to correct these representations and file the following reply.

**COMPLAINANT'S REPLY TO RESPONDENTS' OPPOSITION TO
COMPLAINANT'S MOTION FOR LEAVE TO FILE FIRST AMENDED
COMPLAINT**

Respondents provide no authority that would support a denial of Complainant's Motion for Leave to File First Amended Complaint. Respondents' claim that Complainant's Motion for Leave to File First Amended Complaint is untimely requires the assumption that the recent death of the Walker Service Station's property owner and Six M. Corporation's key principal has no bearing on past, current, or future owner or operator liability in this action. However, the

unavailability of this individual respondent who is also the president and registered agent of the only other remaining respondent necessitates amendment to ensure this matter can proceed on the merits. Given the circumstances, Complainant's Motion for Leave to File First Amended Complaint is timely, appropriate, and necessary to protect the interests of the State in securing remediation of the soil and water contamination caused by the operation of Walker Service Station.

As a general rule "the Board's practice is to liberally allow amendments to complaints and petitions filed with the Board." *Mayer v. Lincoln Prairie Water Company*, PCB 11-22, Slip Op. at 4 (May 2, 2013). While the Board is not bound by the Illinois Code of Civil Procedure, the Board has looked to Illinois courts applying Section 2-616 in determining whether or not to exercise its discretion to allow the amendment of pleadings. *Mayer v. Lincoln Prairie Water Co.*, PCB 11-22, Slip Op. at pp.4-5 (May 2, 2013). In *Mayer*, the Board weighed four factors used by the First District in *Freedberg v. Ohio National Insurance Co.*, 2012 IL App (1st) 110938, ¶ 45 (1st Dist.). Those four factors are as follows:

In determining whether to allow an amendment to the pleadings, the trial court considers the following factors: (1) whether the proposed amendment would cure a defect in the pleadings; (2) whether the proposed amendment would prejudice or surprise other parties; (3) whether the proposed amendment is timely; and (4) whether there were previous opportunities to amend the pleading. See, e.g., *Krum v. Chicago National League Ball Club, Inc.*, 365 Ill.App.3d 785, 790, 303 Ill.Dec. 434, 851 N.E.2d 621 (2006). The trial court here considered each factor and determined that none of them weighed in favor of plaintiff.

2012 IL App (1st) 110938, ¶ 45. In *Mayer*, the Board denied the motion for leave to amend after none of the relevant factors weighed the complainant's favor.

Unlike the amended complaint in *Mayer*, the First Amended Complaint in this matter would be timely filed after the death of the only remaining individual respondent, and the president and registered agent of the only other respondent. In this matter, amendment to

substitute as an individual respondent the only remaining registered corporate officer of respondent Six M. Corporation is necessary to ensure this matter can be resolved on its merits. *See Mayer*, Slip Op. at p. 4 (“the courts have stated that Section 2-616(a) is to be “liberally construed so that cases are resolved on their merits.”). Furthermore, Complainant’s Motion to File First Amended Complaint and the proposed First Amended Complaint weigh favorably on all four *Freedberg* factors.

The proposed amendment would cure a defect in the pleading;

While the counts of the original complaint were sufficiently pleaded at the time of filing, the First Amended Complaint would dismiss the deceased William Maxwell as a respondent, as the Board has previously held that actions under the Illinois Environmental Protection Act do not survive the death of a respondent. *IEPA v. Leon Lamet*, AC 89–231, 117 PCB 195, December 20, 1990); *IEPA v. Donald and Catherine Bouthot*, AC 89–170, 111 PCB 439, May 24, 1990. By removing the counts against William Maxwell and replacing Thomas Maxwell as an individual respondent, Complainant is curing a recent defect in the Complaint.

In addition to removing and replacing William Maxwell in this action, the First Amended Complaint adds a count to address additional violations that have occurred subsequent to the filing of the original Complaint. By adding Count IV, which addresses Respondents’ failure to diligently pursue corrective action from March 12, 2012 forward, Complainant addresses the original Complaint’s failure to address the entirety of the Walker Service Station remediation. *Compare* Complaint Count II (addressing only lack of complete site investigation) *with* First Amended Complaint Counts III and IV (addressing lack of site investigation and corrective action). Without these amendments, the State cannot fully address the complete remediation of Walk Service Station in this action. In contrast, the complainant in *Mayer* was a private entity

seeking amendment in order to add claims for money damages and denial of leave to amend would not impact resolution on the merits.

The proposed amendment is timely

Since its inception, enforcement of this matter has always been complicated by the fact that Walker Service Station is a small family owned and operated enterprise under an unregistered d/b/a with significant ambiguity as to the roles and responsibilities of its associated individuals and entities. *See* Complainant's Response to Respondents' Motion for Summary Judgment (July 19, 2017). The Board ruled on September 7, 2017 that there remains a genuine issue of material fact as to whether or not William Maxwell was liable for Complainant's Water Pollution and Corrective Action claims as the owner of the Walker Service Station. Respondent William Maxwell passed away on March 4, 2018. To date, William Maxwell is still listed in the Secretary of State's records as the registered agent and president of Six M. Corporation. The State has an interest in ensuring that the contamination at the site is fully investigated and remediated. As alleged in the proposed First Amended Complaint, Thomas Maxwell has violated the Illinois Environmental Protection Act ("Act") and has a legal duty to address those violations. While Respondents argue Complainant's Motion is untimely, no hearing date has been set in this matter and no dispositive rulings have been made. *Compare: People v. Community Landfill* PCB 97-193, Slip Op. at p. 4 (Mar. 18, 2004) (denying leave to amend to add respondents after co-respondent had already been found to be in violation).

As for Respondent's argument that Complainant had the opportunity to seek leave to amend the Complaint before its June 26, 2018 Motion, upon learning of the death of this action's sole individual respondent and the president and registered agent of Six M. Corporation,

Complainant promptly informed the Hearing Officer during the April 30, 2018 status teleconference of its intention to amend the Complaint to “substitute an appropriate respondent”. In contrast, the complainant in *Mayer* did not provide an adequate explanation for why it was seeking leave to amend its complaint eleven months after demonstrating knowledge of the matters it sought leave to add. *Id.* Slip Op. at 5.

The proposed amendment would not prejudice or surprise other parties

As argued in the Motion for Leave to File First Amended Complaint, Respondents are neither surprised nor prejudiced by the allegations of the First Amended Complaint. As noted above, Thomas Maxwell received the original Illinois EPA violation notices in this matter which are addressed to him and the d/b/a Walker’s Service Station. Respondents’ Motion for Summary Judgment, Exs. A-4 and A-5. Thomas Maxwell is registered as secretary of Six M. Corporation. He is also the person who has been acting as Six M. Corporation’s corporate representative in this litigation and has been privy to every stage of litigation thus far. As noted, above, in Complainant’s Motion for Leave to Reply, Thomas Maxwell has consistently and actively held himself out as the operator of Walker Service Station and the individual in charge of overseeing corrective action at the Walker Service Station site. Motion ¶¶7-8; Respondents’ Motion for Summary Judgment (Mar. 6, 2017). Exs. A and B.

In contrast to the complainant in *Mayer*, the allegations of the First Amended Complaint do not seek to “introduce novel allegations to the case that lay claim to a factual basis for an economic damages claim,” or make any new factual allegations beyond adding regulatory definitions to clarify Complainant’s claims under Section 12(a) of the Act, and updating the status of Respondents’ corrective action and site assessment submittals in support of claims for failure to complete site assessment and corrective action. The additional allegations are based on

Respondents' own corrective action submittals, information that is already within Respondents' possession. Unlike in *Mayer*, no further discovery would be necessary to confirm or deny these claims. Moreover, unlike *Mayer*, no expert witnesses have been identified or deposed by the parties. To the extent that any depositions were taken, they were taken by Complainant after Complainant's Motion to Reopen Discovery filed March 15, 2017. Respondents have not sought discovery depositions at any point in this action.

It is also worth noting that Respondents have consistently argued for the dismissal of William Maxwell as an individual respondent in this matter while holding out Thomas Maxwell as the primary corporate officer directing the actions of Six M. Corporation and as the individual in charge of the Walker Service Station remediation. *See* Respondents' Motion to Dismiss (Oct. 25, 2011); Respondents' Motion for Summary Judgment (Mar. 6, 2017). In effect, the First Amended Complaint is the pleading that Respondents have been pushing for as recently as 2017. Therefore, it is disingenuous for Respondents to argue that they are prejudiced by Complainant's voluntary dismissal of William Maxwell and substitution of Thomas Maxwell simply because Complainant is doing so to preserve its cause of action in light of a recent change in circumstances.

As it is the Board's practice to liberally allow the amendment of pleadings, as Complainant diligently kept the Hearing Officer apprised of its intention to amend its complaint in light of the death of Respondent William Maxwell, and as Respondents are not surprised nor prejudiced by the allegations of the First Amended Complaint, Complainant should be granted leave to file its First Amended Complaint.

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN
Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: /s/Elizabeth Dubats
Elizabeth Dubats
Office of the Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
312.814.2069
edubats@atg.state.il.us