BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
Petitioner,	)	
v.	)	**PCB NO. 12-35**
	)	**(Enforcement – Water)**
SIX-M CORPORATION, INC., and	)	
WILLIAM MAXWELL, and	)	
Respondents.	)	

NOTICE OF FILING AND PROOF OF SERVICE

To: Don Brown, Clerk
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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board, RESPONDENTS' OPPOSITION TO MOTION FOR LEAVE TO REOPEN DISCOVERY, a copy of which is herewith served upon you.

The undersigned hereby certifies that a true and correct copy of this Notice and attached document were served upon the above counsel of record to this cause by electronic mail on March 29, 2017, before 5:00 p.m. The total number of pages in the transmission is 7.

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

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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RESPONDENTS' OPPOSITION TO MOTION TO REOPEN DISCOVERY

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 §101.500), in opposition to Complainant's Motion for Leave to Reopen Discovery/ Amend Discovery Schedule, stating as follows:

BACKGROUND

1. On August 25, 2011, the People brought this action against Six-M Corporation, William Maxwell, and Marilyn Maxwell. (Complaint)

2. On October 25, 2011, Respondents filed a Motion to Dismiss Individual Respondents and Suggestion of Death Directed to Board. This motion included an affidavit from Tom Maxwell stating *inter alia* that his mother Marilyn Maxwell had passed away on July 20, 2009, at the age of 77, that his father William Maxwell was retired, and that he himself has managed and overseen environmental matters at the facility.

3. On November 17, 2011, the Board entered an order dismissing Marilyn Maxwell, but denying the motion to dismiss William Maxwell because the evidence attached to the motion was premature at the pleading stage:

> **As to William Maxwell, the Board is persuaded by the People's arguments that the Board should not consider the exhibits attached to the respondents' motion. Based on the well-pleaded allegations of the complaint and the material properly before the Board, the motion to dismiss William Maxwell is denied. In so holding, the Board takes no position as to whether this respondent will ultimately be found to be an owner/operator of the USTs at Walker's Service within the meaning of the complaint.**

(Board Order, at p. 4 (Nov. 17, 2011).

4. Accordingly any issue regarding whether William Maxwell might ultimately found to be to be an owner/operator was clearly identified over five years ago.

5. Following the pleading stage, the parties engaged in informal discovery, primarily the acquisition and distribution of digital copies of the Agency's underground storage tank file for the site. (See Hrg. Officer Order of May 30, 2012; see also Mot. S. J., Ex. A (Request to Admit)

6. The People submitted its first written discovery requests on April 8, 2016, and an agreed formal discovery order was entered on June 2, 2016.

7. The discovery schedule was completed on November 15, 2016, without any party requesting or conducting any depositions.

8 Prior to the completion of the discovery schedule, the People indicated that it had started working on a motion for summary judgment. (Hrg Officer Order of Oct 17, 2016)

9. When new counsel was appointed for the People, the idea of filing a motion for summary judgment was put aside in favor of going to hearing. Respondents requested, and were given six weeks to file a motion for summary judgment, and if the motion had not been filed, the People were prepared to set this matter for hearing. (Hrg Officer Order of Jan. 23, 2017)

10. On March 6, 2017, Respondents timely filed the motion for summary judgment

based upon the affidavit of Tom Maxwell filed with the Board in 2011, and documents from the Agency's files shared by the parties in 2012.

11. On March 8, 2017, the Hearing Officer stayed the deadline to respond to the motion for summary judgment in order to allow the People to file a motion to supplement discovery by March 15, 2017.

12. On March 15, 2017, the People filed its Motion for Leave to Reopen/Amend Discovery Schedule.

LEGAL ARGUMENT

I. THE MOTION TO STAY SUMMARY JUDGMENT PROCEEDINGS SHOULD BE LIFTED.

13. "The Board has indicated that, if discovery is considered necessary to respond to a motion for summary judgment, then a party should demonstrate that need through an affidavit that meets the requirements of Illinois Supreme Court Rule 191(b)." Des Plaines River Watershed Alliance v. IEPA, PCB 04-88, slip op at 5 (April 21, 2005) (citing White & Brewer Trucking v. IEPA, PCB 96-250 (Nov. 21, 1996))

14. The Board further explained that Rule 191(b) "permits a . . . continuance for discovery if the affidavit names persons whose affidavits cannot be procured and 'what affiant believes they would testify to if sworn.'" Id. (quoting Ill. S. Ct. R. 191(b)) Without complaince with the rule, there is "no valid reason to direct the parties to conduct discovery before . . . respond[ing] to that motion." Id. at 6.

15. In fact, Rule 191(b) requires much more than simply identifying anticipated

testimony:

> **If the affidavit of either party contains [1] a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, [2] naming the persons and [3] showing why their affidavits cannot be procured and [4] what affiant believes they would testify to if sworn, [5] with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of documents so furnished, shall be considered with the affidavits in passing upon the motion.**

Ill. S.Ct. Rule 191(b)(numbers added); see also Giannoble v. P & M Heating and Air Conditioning, 233 Ill.App.3d 1051, 1064 (1st. Dist., 1992) (affidavit signed by attorney, not party is fatally defective).

16. The People's motion to continue the stay of summary judgment proceedings to allow discovery must be rejected for failure to comply with Rule 191(b) in almost all respects. Clearly, there is no affidavit from a party, which is sufficient to reject the motion outright, but even if this requirement is set aside, nothing in the motion addresses any of the other requirements with the exception of naming the two people it would like to depose.

17. Apart from the Rule 191(b) failure, the Complainant "had ample opportunity to discover facts in opposition to defendant's motion for summary judgment." Giannoble v. P & M Heating and Air Conditioning, 233 Ill.App.3d 1051, 1065 (1st. Dist. 1992) (finding additional justification beyond Rule 1919(b) in passage of "nearly three years" between the filing of the lawsuit and the motion for summary judgment). Here, the length of time that passed without preparing for this issue is both greater and more absurd given that Respondents essentially filed

this motion over five years ago.

18. The Hearing Officer does not have authority under the Board's procedural rules to revise the schedule in light of the Board's holdings cited above that require compliance with Illinois Supreme Court Rule 191(b) in order to request discovery in order to respond to a motion for summary judgment, and therefore the stay should be lifted and a briefing schedule for the pending summary judgment motion should be entered.

II. THE DISCOVERY SCHEDULE SHOULD NOT BE REOPENED.

19. With respect to the more general request for discovery, no justification has been offered other than "oral discovery is necessary in order to fully prepare this matter for hearing." If this is all the justification is needed to show "good cause" (35 Ill. Adm. Code § 101.522), then there is no scheduling order that need ever end as long as a party wants to prepare more. There is a difference between "need" and "want," and had oral discovery been necessary to prepare for the hearing, it would have been requested at the necessary time.

20. As to the claim that no material prejudice would be suffered, Respondents find paying their lawyer's hourly rate to prepare Complainant's case against them material enough to constitute its own form of punishment. Moreover, William Maxwell will be 87 years old this September, and compelling him to participate in whatever fishing expedition Complainant belatedly wants to administer on his memory to likewise be material prejudice.

WHEREFORE, Respondents, SIX M. CORPORATION, INC. and WILLIAM MAXWELL, pray for an order deny Complainant's Motion and directing a briefing schedule to be entered on the pending motion for summary judgment.

Respectfully submitted by

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

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THIS FILING IS SUBMITTED ON RECYCLED PAPER