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

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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board, MOTION FOR INTERLOCUTORY APPEAL FROM HEARING OFFICER ORDER REOPENING 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 April 7, 2017, before 5:00 p.m. The total number of pages in the transmission is 8.

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

BY: LAW OFFICE OF PATRICK D. SHAW

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MOTION FOR INTERLOCUTORY APPEAL
FROM HEARING OFFICER ORDER REOPENING DISCOVERY

NOW COME Respondents, Six-M Corporation, Inc. and William Maxwell, by their undersigned counsel, Section 101.518 of the Board's Procedural Rules (35 Ill. Admin. Code 101.518), moves for an interlocutory appeal from the Hearing Officer Order of April 4, 2017, reopening discovery, 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 at the age of 77 on July 20, 2009, that his father William Maxwell had 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 reopen the discovery schedule in order to conduct depositions.

12. On March 15, 2017, the People filed its Motion for Leave to Reopen/Amend Discovery Schedule, and on March 29, 2017, Respondents filed their objection, arguing that the Complainant had not complied with Supreme Court Rule 191(b) as required by the Board ruling in Des Plaines River Watershed Alliance v. IEPA, PCB 04-88 (April 21, 2005) and in any event no justification had been given to reopen the discovery schedule.

13. On April 4, 2017, the Hearing Officer entered her order, finding that Supreme Court Rule 191(b) only applied to permitting appeals, reopening discovery to allow Complainants to conduct three discovery depositions, and setting the deadline for responding to the pending motion for summary judgment for July 5, 2017.

LEGAL ARGUMENT

I. THE PENDING MOTION FOR SUMMARY JUDGMENT SHOULD BE RULED UPON BEFORE CONSIDERING REOPENING THE DISCOVERY SCHEDULE.

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 persons and their 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)

16. The clear purpose of Supreme Court Rule 191(b) is to allow use of the summary judgment process to determine whether further discovery is even necessary, avoiding additional expense and delays. E.g., Dep't of Fin. & Prof'l Regulation v. Walgreen Co., 2012 IL App (2d) 110452, ¶ 23 (holding that even overlooking Rule 191(b) issues, the redundant and/or privileged nature of the discovery sought meant that "further discovery would have been futile").

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. In addition, discovery ended in November.

18. There does not appear to be any question that Complainant has failed to comply with Rule 191(b), which the Board specifically ruled is required in Des Plaines River Watershed Alliance.

II. THE DES PLAINES RIVER WATER ALLIANCE DECISION IS APPLICABLE TO CIVIL ENFORCEMENT MATTERS.

19. The Hearing Officer distinguished the Board precedent on the grounds that the decision arose in permitting appeals." Des Plaines River Watershed Alliance v. IEPA, PCB 04-88 (April 21, 2005) (third-party NPDES appeal); White & Brewer Trucking v. IEPA, PCB 96-250 (Nov. 21, 1996) (landfill permit).

20. The distinction is accurate but immaterial. There is nothing in these decisions which expressly or indirectly limits their holding to anything other than continuances sought in the face of any summary judgment motion brought under the Board's general procedural rules applicable to all matters. (35 Ill. Adm. Code ¶ 101.516)

21. Furthermore, whatever distinctions that exist between permitting appeals and enforcement matters, favor applicability of Rule 191(b) to enforcement matters. Of all the

matters handled by the Board, enforcement matters are most similar to those adjudicated in the courts, and indeed the courts and the Board share jurisdiction over these types of cases. Had this case been filed in the court, Complainants would have had to comply with Rule 191(b), and therefore it would make no sense not to apply the rule here, while applying it to dissimilar circumstances than courts ever face.

22. An important distinction between this case and the permit appeals, however, is that those cases involved motions for summary at the outset of the case prior to any discovery being conducted. This case is unique in seeking to obtain a stay to pursue discovery after discovery has been completed. Complainants cannot object to not having the opportunity to conduct these depositions earlier. See Jordan v. Knafel, 378 Ill. App. 3d 219 (1st Dist. 2007) (party given opportunity to conduct discovery and who submits a conclusory 191(b) affidavit cannot complain that she was "denied access to the truth" through further discovery)

III. THE DISCOVERY SCHEDULE SHOULD NOT BE REOPENED.

23. No justification has been offered by Complainant other than the need to respond to the pending motion for summary judgment and "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.

24. As to the claim that no material prejudice would be suffered, the practice of reopening discovery after the discovery schedule is completed imposes monetary costs on

Respondents, and no comfort that this time and expense would be for Complainant's benefit to prepare the case. Furthermore William Maxwell will be 87 years old this September, and should not be compelled to testify on matters in which the Complainants have no evidence he participated in.

WHEREFORE, Respondents, SIX M. CORPORATION, INC. and WILLIAM MAXWELL, pray for an order reversing the Hearing Officer order, 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