

ILLINOIS POLLUTION CONTROL BOARD
September 20, 2018

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 12-35
) (Enforcement - Water)
SIX M. CORPORATION, INC., an Illinois)
Corporation, and THOMAS MAXWELL,)
)
Respondents)
)
and)
)
JAMES MCILVAINE,)
)
Necessary Party – Respondent)

ORDER OF THE BOARD (by C.K. Zalewski):

On August 25, 2011, the Office of Attorney General, on behalf of the People of the State of Illinois (People), filed a two-count complaint against Six M. Corp., Inc. (Six M.), William Maxwell, and Marilyn Maxwell (Comp.). The complaint concerns leaking petroleum underground storage tanks (USTs) at the Walker Service Station in Farmer City, Dewitt County. On July 2, 2018, the People filed a motion to amend the complaint (Mot.), attaching the First Amended Complaint (First Amended Complaint). Today’s order rules on that motion.

The amendments sought by the People would replace William Maxwell with Thomas Maxwell and allege violations occurring after the original complaint was filed. Because the amendments would cure a defect and do not prejudice respondents, and because the amendments are timely made at the People’s first opportunity, the Board grants the People’s motion and accepts the amended complaint for hearing. In this order, the Board discusses this case’s procedural history before turning to the motion.

PROCEDURAL HISTORY

The Original Complaint

The People’s August 25, 2011 complaint alleges that by failing to remediate two underground storage tank leaks, respondents violated water pollution and corrective action requirements of the Environmental Protection Act (Act), and associated Board regulations. Comp. at ¶¶ 27-29, 32-34 (citing 415 ILCS 5/12(a) (2016) (water pollution); 35 Ill. Adm. Code 620.301(a), 620.405, 620.410(c) (groundwater quality standards); 415 ILCS 5/57.6(a), 57.7(a)(4) (2016) (site investigation requirement)). The complaint concerns two releases of petroleum

products from underground storage tanks (USTs) at the facility known as the Walker Service Station, located in Farmer City, Dewitt County. Both leaks were reported to the Illinois Emergency Management Agency (IEMA); the first in 1996 and the second in 2006. The complaint alleges that Six M. Corp. and William Maxwell own and operate the Walker Service Station. Comp. at ¶ 6.

The Board granted the People's motion to add James McIlvain as a necessary party on October 6, 2011. And the Board dismissed Marilyn Maxwell from the original complaint on November 17, 2011, after her passing.

The Motion and Amended Complaint

The People seek to amend their complaint with two substantial changes. First, the amended complaint replaces William Maxwell with Thomas Maxwell as a named respondent. The People explain that William Maxwell passed away on March 4, 2018. Mot. at ¶ 5. The People's First Amended Complaint removes William Maxwell as a respondent and adds Thomas Maxwell because of his role as a corporate officer and manager of operations of Six M. Corp. Mot. at ¶¶ 7 & 8; First Amended Complaint at 10, ¶¶ 32 & 33.

In addition to adding Thomas Maxwell as a named respondent, the First Amended Complaint alleges new violations of the Act occurring after the People's original complaint was filed, adding two counts in the amended complaint. *See* First Amended Complaint at 7-8, ¶¶ 28-33; at 12-13, ¶¶ 21-24; at 14, ¶¶ 25-27; and at 17, ¶ 33-34. Specifically, the People add Counts III and IV against both Six M. Corp. and Thomas Maxwell. Count III alleges Six M. and Thomas Maxwell violated Sections 57.6(a) and 57.7(a) of the Act by failure to complete site investigations. 415 ILCS 5/57.6(a) and 57.7(a). Count IV alleges Six M. and Thomas Maxwell violated Sections 57.6(a), 57.7(a), and 57.7(b) of the Act and Section 734.100(d) of the Board's rules by failing to prepare and complete a comprehensive action plan. 415 ILCS 5/57.6(a), 57.7(a), and 57.7(b); 35 Ill. Adm. Code 734.100(d). The requested relief is unchanged.

Respondents Six M. and William Maxwell filed a response in opposition to the People's motion (Respondents Resp.) on July 16, 2018. Respondent James McIlvaine did not respond. And, on July 27, 2018, the People filed a motion for permission to reply, and included its reply to Respondents (People Reply). The Board grants permission and accepts the People's Reply.

On September 6, 2018, the Board declined to rule on the merits of the People's motion, finding that the People had not satisfied the Board's service and notice requirements. The People filed an Amended Notice of Filing and certificate of service on September 7, 2018. With these filings, the Board will consider the merits of the People's motion for permission to amend its complaint.

DISCUSSION

The Board's procedural rules allow for amending a complaint in an enforcement proceeding. *See* 35 Ill. Adm. Code 103.206(d). Subsection (e) of Section 103.206 provides for

form, content, and notice requirements of an amended complaint. 35 Ill. Adm. Code 103.206(e). Specifically, Section 103.206(e) states:

The pleading sought to be filed under subsection (d) must:

- (1) Set forth a claim that arises out of the occurrence or occurrences that are the subject of the proceeding; and
- (2) Meet the requirements of Section 103.204 of this Subpart, including the requirement to serve the pleading by U.S. Mail with a recipient's signature recorded, a third-party commercial carrier with a recipient's signature recorded, or personal service upon the respondent ... 35 Ill. Adm. Code 103.206(e).

The Board will first look to the second requirement. Section 103.206(e)(2) emphasizes the Board's service requirements and as noted above, *supra* at 2, the People have provided documentation that satisfy the Board's notice and service requirements. *See* 35 Ill. Adm. Code 103.206(e)(2), 103.204(a), (b), & (f). In addition to service and notice, Section 103.204(c) provides the form and content requirements of a complaint. 35 Ill. Adm. Code 103.204(c). The People's First Amended Complaint satisfies these requirements.

The Board now turns to Section 103.206(e)'s first requirement. The People's motion argues that allowing them to file the First Amended Complaint "will expedite the handling of this case by the Board." Mot. at 3. The People's Reply explains that the First Amended Complaint "clarif[ies] [the People's] claims under Section 12(a) of the Act, and updat[es] the status of Respondents' corrective action and site assessment submittals in support of" the People's claims. People Reply at 7. Upon inspection, the People's First Amended Complaint adds two new counts, and both additional counts arise from the same UST leaks and remediation process as that in the original complaint. *Compare* Comp. at ¶¶ 17 and 25 with First Amended Complaint at 5-8, ¶¶ 18, 27, & 29; at 10, ¶ 36; at 12-13, ¶¶ 21-24; at 14, ¶¶ 25-27; at 17, ¶¶ 31-34. The Board finds that the People's First Amended Complaint satisfies Section 103.206(e)(1).

Before the People may file the amended complaint, the Board must grant permission. 35 Ill. Adm. Code 103.206(d). When deciding how to exercise the discretion to grant permission, the Board has looked to the Illinois courts for guidance. Mayer v. Lincoln Prairie Water Company, PCB 11-22, slip op. at 4-5 (May 2, 2013). Specifically, the Board has relied on four factors in determining whether to allow an amendment to the pleadings:

- (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.

Mayer, PCB 11-22, slip op. at 5 (May 2, 2013) (quoting Freedberg v. Ohio National, 2012 Ill. App. (1st) 110938, 975 N.E.2d 1189, 1202 (2012)). The Board's practice is to liberally allow amendments to complaints. Mayer, PCB 11-22, slip op. at 4 (May 2, 2013).

Applying the four Freedberg factors, the Board grants the People’s motion to file its First Amended Complaint. The Board discusses the four factors below.

The Proposed Amendment Cures a Defect in the Complaint

The Board examines the first Freedberg factor by considering Respondents’ arguments and evaluating the defect identified by the People that the First Amended Complaint cures.¹

The People point to two changes in circumstance for amending the original complaint. Respondents argue that the People have not submitted evidence, argument, or authority in support of its motion. Respondents Resp. at 6, ¶¶ 15-16. The Board disagrees.

First, William Maxwell, the alleged owner and listed principal of Six M., passed away on March 4, 2018. Mot. at 2; Respondents Resp. at 5-6. An enforcement action before the Board under the Act against a respondent does not survive the respondent’s death. *See IEPA v. Leon Lamet*, AC 89-231, slip op. at 1 (Dec. 20, 1990). Continuing with William Maxwell as a respondent is a defect in the original complaint. The First Amended Complaint cures this defect by removing him as a named respondent.

Second, the People add two new counts that allege additional violations that are derived from the same two UST leaks—and have occurred since the filing—of the original complaint. People Reply at 5-6. The two new counts separate the violations of the site investigation and corrective action requirements of the Act, which the original complaint did not do. The First Amended Complaint also updates the status of remediation of the leaks. The greater clarity and specificity of the allegations and regulatory requirements at issue, and the materiality of the status of the remediation weighs in favor of allowing the amended complaint. *C.f. Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 274-275, 586 N.E.2d 1211 (1992) (finding that more specific allegations in an amended complaint that are material to the original cause of action and expand on the original complaint’s allegations cures a defect in the original complaint). Couple this with the cure of removing William Maxwell from this enforcement proceeding, and the first Freedberg factor weighs in favor of granting the People’s motion.

The Proposed Amendment Does Not Prejudice or Surprise Respondents

In Mayer, the Board considered the status of the case when evaluating the second Freedberg factor. Mayer, PCB 11-22, slip op. at 5. Here, the Board considers the status of the case and Respondents’ arguments.

Allowing the People to file an amended complaint at this stage of the case does not prejudice respondents. In this case, the parties have finished discovery. *See* Hearing Officer Order (June 19, 2017). Respondents argue that accepting the People’s First Amended Complaint

¹ In Mayer, the Board did not consider the first Freedberg factor in evaluating the motion to amend because it was “not an issue” among the complainant’s amendments. Mayer, PCB 11-22, slip op. at 5 (May 2, 2013).

would “enlarge and change the case on the eve of hearing”—adding a new party, new theories, new paragraphs, and new counts. Respondents Resp. at 6-7. But between September 7, 2018—when the Board denied Respondents’ motion for summary judgement—and April 30, 2018—when the People promptly informed the Board of William Maxwell’s passing and their intent to amend their complaint—the parties only indicated the possibility of settlement, not a readiness to proceed to evidentiary hearings. *See* Hearing Officer Order (Sept. 27, 2017); Hearing Officer Order (Feb. 27, 2018). The Board does not agree with the characterization of the People’s motion coming on the eve of hearing in light of this record.

The Board is also not persuaded that the addition of Thomas Maxwell as a respondent is surprising or prejudicial. Though not a named respondent in the original complaint, Thomas Maxwell has been actively involved in this proceeding. In this proceeding, Thomas Maxwell has held himself out as the operator of the Walker Service Station and acted as the agent for Six M., including providing affidavits and deposition. And the People note that Thomas Maxwell is listed as a corporate officer of Six M. with the Secretary of State. People Reply at 7. Under these circumstances, it is not surprising or unreasonable that Thomas Maxwell would be named as a respondent.

Nor is the addition of the two counts addressing the failure to perform a site investigation or corrective action since March of 2012 prejudicial. As discussed above, both additional counts in the First Amended Complaint originate from the same UST leaks in the initial complaint, and the same remediation process for both UST leaks. In fact, the People explain that the additional allegations are based on Respondents’ own corrective action submittals to the Illinois Environmental Protection Agency (IEPA). People Reply at 7-8. The Board also notes that allowing these amendments to the complaint is in the interest of administrative efficiency. Allowing the amendment of the People’s original complaint avoids the possibility of a second enforcement proceeding based on the same underlying facts. This rebuts Respondents’ warnings of the burdens of greater legal costs by efficiently addressing the entirety of the leaking USTs’ remediation in one proceeding.

Respondents also assert that Thomas Maxwell did not receive notice and an opportunity to meet with the IEPA as required by Section 31 of the Act, 415 ILCS 5/31 (2016). Respondents Resp. at 6. The amended complaint, however, states that the complaint is brought by the People on their own motion, as well as at the request of IEPA. Enforcement cases brought on the People’s own motion are not subject to Section 31’s pre-referral requirements. People v. Freeman United Coal Mining Co., PCB 10-61 & 11-02, slip op. at 31 (Nov. 15, 2012) (*citing* People v. John Crane, Inc., PCB 01-76, slip op at 5 (May 17, 2001)).

The Board finds that the second Freedberg factor weighs in favor of granting the People’s motion.

**The Proposed Amendments are Timely and
There Was No Previous Opportunity to Amend the Pleading**

Finally, the Board considers Freedberg factors three and four. In Mayer, the Board looked at the history of the case and whether there was evidence that there was no prior

opportunity to amend the complaint. Mayer, PCB 11-22, slip op. at 5-6. Here, the People informed the Board of their intent to amend the original complaint at the first status hearing after the passing of William Maxwell. Hearing Officer Order (Apr. 30, 2018). William Maxwell was alleged to be the principal of Six M., doing business as “Walker Service Station”; according to the People, the Secretary of State still lists him as the company’s president. People Reply at 6. It is after William Maxwell’s passing that the People could no longer proceed with him as a named respondent. *See supra* at 4. The People promptly informed the Board of their intention to amend the original complaint with a new named respondent. And, the First Amended Complaint is limited to adding the new respondent and updating the status of the remediation of the same two leaks at the root of the original complaint. Based on these facts, the Board finds there was no delay, or prior opportunity to make these amendments to the original complaint. The third and fourth Freedberg factors weigh in favor of granting the People’s motion.

CONCLUSION

The Board grants the People’s motion to file a First Amended Complaint and accepts that complaint for hearing. Upon its own motion or the motion of any party, the Board or the hearing officer may order that the hearing be held by videoconference. *See* 35 Ill. Adm. Code 101.600(b), 103.108. The Board refers the parties to its order of September 8, 2011, for more information about the enforcement proceedings.

In addition, the Board’s rules provide respondents with 30 days after receiving a complaint to file motions to strike, dismiss, or challenge the sufficiency of a pleading, 35 Ill. Adm. Code 101.506. If no motion is filed, respondents are provided with 60 days after receiving the complaint to answer the complaint, 35 Ill. Adm. Code 103.204(d). All future filings must reflect the amended caption of this order.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 20, 2018, by a vote of 5-0.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above the printed name and title.

Don A. Brown, Clerk
Illinois Pollution Control Board