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	**)**	
THOMAS MAXWELL, and	**)**	
Respondents.	**)**	
	)	
And	**)**	
	)	
JAMES McILVAIN,	**)**	
	)	
Necessary Party.	**)**	

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, RESPONDENTS' OPPOSITION TO MOTION TO STRIKE RESPONDENTS' AFFIRMATIVE DEFENSE, 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 February 7, 2019, before 5:00 p.m. The total number of pages in the transmission is 9.

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

BY: LAW OFFICE OF PATRICK D. SHAW

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RESPONDENTS' OPPOSITION TO MOTION TO STRIKE AFFIRMATIVE DEFENSE

NOW COME Respondents, by their undersigned counsel, pursuant to Section 101.500 of the Pollution Control Board's Procedural Rules (35 Ill. Admin. Code §101.500), in opposition to Complainant's Motion to Strike Respondents' Affirmative Defense, stating as follows:

PROCEDURAL BACKGROUND

When the original complaint in this matter was filed with the Pollution Control Board (hereinafter "the Board"), Complainant also moved to join James McIlvain as a necessary party because it was aware of access issues concerning work to be peformed on his property, and "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." (Mot. for Joinder, ¶ 4 & ¶ 6) However, Complainant averred that McIlvain may be justified in his stance (Id. at ¶ 5) Other than general allegations that substantial contaminated soil was removed from the McIlvain property (Complaint, ¶ 24), there are no allegations in the pleadings pertaining to the controversy

which compelled joinder of McIlvain.

The Board approved joinder of McIlvain for want of objection and indicated that he would be aligned as a party respondent. (Order of Oct. 6, 2011) Thereafter, then-Respondents filed an Answer and Affirmative Defense, which in relevant part alleged facts pertaining to the access issue that were used to justify joinder of McIlvain under the title of “Impossibility.” (Answer (Dec. 2, 2011)) Complainant filed a Response to Affirmative Defense, which contained both an objection and specific admissions and denials to the enumerated allegations in the Affirmative Defense. (Response (Dec. 7, 2011)) McIlvain filed an Answer to Complaint by Third-party Respondent Mcilvain on December 6, 2011, followed by Necessary-party Respondent McIlvain’s Response to Affirmative Defense on January 11, 2012, the latter of which supplied his position on the access issues and adopted the objection of Complainant.

On February 12, 2012, the Board construed the objection to the Affirmative Defense as a motion to strike and struck the affirmative defense. (Order of Feb. 12, 2012) The parties considered this to be a sua sponte motion by the Board, as such relief was not requested. (Emailed Comments of Thomas Davis (Feb. 27, 2012)), and that day it was agreed at a telephone conference with the hearing officer that this would be addressed by Respondents filing a motion for reconsideration, to which other parties may or may not choose to respond with their position. On March 23, 2012, Respondents filed a motion for reconsideration, to which Complainant responded that its position is that the Board erred in deeming the objection to be a motion requesting relief, and Necessary Party agreeing with Complainant in part, but also arguing that the Board had sua sponte authority if the pleading was deficient as a matter of law.

On May 17, 2012, the Board vacated its February 12, 2012, order, deciding that it “will

give effect to the parties' desire to litigate the issues presented by the affirmative defense." (Order of May 17, 2012) Thereafter, all of the discovery conducted by Complainant pertained to the site access agreement and correspondence between Six-M and McIlvain. (Reply in Support of Mot. S.J., at p. 4 & Ex. A) That is, it was all of the discovery conducted by Complainant until it successfully moved to reopen discovery. (Order of May 3, 2017)

Subsequently, Complainant filed and was given permission to amend its complaint. Complainant alleged that it was merely curing a defect in the original pleading by substituting Thomas Maxwell for his recently deceased father and as such there would be no prejudice since the case is already past the discovery stage. (Reply to Respondents' Objection to Motion to File First Amended Complain, at pp. 5-8) The Board agreed that such a substitution is not prejudicial as the party substitution was *de minimis*. (Order of September 20, 2018, at pp. 4-5)

In response to the First Amended Complaint, Respondents filed an Answer and Affirmative Defense, which largely restated the impossibility defense from the previous answer.

ARGUMENT

I. COMPLAINANT SHOULD BE PRECLUDED FROM REVISITING PLEADING ISSUES AT THIS STAGE.

The reason the affirmative defense has remained, albeit disputed, is to provide notice of the nature of the controversy that necessitated joinder of McIlvain. It probably would have been better had the access issue been pled within the complaint, but Complainant had other ideas, and Respondents are not aware of any specific requirement in the Board's rules, nor any civil proceeding that would serve as an analogous framework. McIlvan was not dismissed in the

repleading, so the issue remains that the Board may be asked to order affirmative relief against McIlvain in this case, presumably necessitating evaluation of the Section 33(c) factors.

Given that this matter was to be set for hearing in 2017, which was followed by reopening discovery and then repleading the complaint, with various promises that there would be no prejudice in doing so, Respondents submit it is reasonable for Complainant to be true to those words and just answer the affirmative defense as it has previously done.

II. IMPOSSIBILITY IS AN AFFIRMATIVE DEFENSE.

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").

The only Board decision in the motion did not deal with access issues. Board regulations address the problem of off-site access and permit; they do not require an owner or operator to seek a judicial order or pay the neighbor for access. (35 Ill. Adm. Code ¶ 734.350) This procedure permits issuance of a limited no further remediation letter. The complaint does not allege that Respondents have failed to use this procedure to close the file and indeed it is contrary to the essence of the pleadings that offsite cleanup has not occurred and Complainant may, depending upon the proofs at hearing, seek to compel McIlvain to provide access.

III. THE ALLEGATIONS OF THE COMPLAINT ARE WELL-PLED.

Complainant's various arguments that the that the pleading is confusing is belied by the ability of Complainant to answer the same allegations previously by affirmance, by denial, or by lack of knowledge. To the extent the motion to strike affirmative defenses is actually directed at the answer, the same is true. The answers reflect the fact that many of the allegations in the complaint contain conclusions, and not facts, and those confusions are built about a lack of attention to details such as the differences between incidents, releases and leaks.

The affirmative defense closely followed the previous version in order to play by the rules as I understood them to be – we are to avoid going back to the pleading stage. Had this been an

initial filing, I would have provided more allegations that would have brought matters up to speed and reflect the changing circumstances.

WHEREFORE, Respondents respectfully request that the motion to strike be denied, and alternatively, Respondents request leave to replead the affirmative or for such other and further relief as the Board deems meet and just.

Respectfully submitted,

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

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BY: /s/ Patrick D. Shaw

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