

ILLINOIS POLLUTION CONTROL BOARD  
November 17, 2011

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

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

The People of the State of Illinois (People) filed a two-count complaint, against Six M. Corporation, Inc. (Six M), William Maxwell, and Marilyn Maxwell (respondents) on August 25, 2011. The complaint concerns two alleged releases from leaking underground storage tanks (USTs) on May 13, 1996 and March 6, 2006 at respondents' gasoline service station (Walker's Service Station or Walker's Tire Service) at 430 West Clinton Avenue, Farmer City, De Witt County, Illinois. The People allege that respondents 1) caused or allowed groundwater contamination and water pollution as a result of discharges of gasoline containing BETX and benzene in excess of Board standards, and 2) failed to timely conduct a site investigation and take corrective action after receiving approval from the Illinois Environmental Protection Agency (IEPA).

For the reasons below, the Board grants respondents' motion to dismiss decedent Marilyn Maxwell, but denies the motion to dismiss respondent William Maxwell. In this order, the Board first addresses the procedural history. The Board then summarizes the respondents' motion and the People's response. Finally, the Board discusses its reasoning for granting the motion to dismiss with regard to Marilyn Maxwell.

**PROCEDURAL HISTORY**

The Board accepted the August 25, 2011 complaint for hearing on September 8, 2011. By order of October 6, 2011, the Board granted the People's motion for joinder of James

McIlvain as a necessary party<sup>1</sup> under the Board's procedural rules at 35 Ill. Adm. Code 101.403. Mr. McIlvain was served with the complaint, and filed an appearance and assent to the joinder on October 7, 2011.

### MOTION

On October 25, 2010, respondents filed a motion to dismiss (Mot.) both the individual respondents, and a suggestion of death related to respondent Marilyn Maxwell only. Respondents assert that their motion is filed pursuant to Section 101.500 of the Board's Procedural Rules. *See* 35 Ill. Adm. Code 101.500(a) and Section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619). The motion is supported by the affidavit of Tom Maxwell, son of William and Marilyn, and is accompanied by several exhibits.

As to William Maxwell, respondents allege that he had retired from active management of Walker Tire Service prior to the events complained of in 1996. Mot. at 2. Respondents acknowledge that, in 1986, William signed and submitted a UST tank notification form to the Office of the State Fire Marshall (OSFM), in which he listed himself as tank owner, but stated that this was "on behalf of Walker's Service". Mot. at 2, and Ex. D. Respondents contend that a similar 1992 form lists Six M as the UST owner/operator. Mot. at 3, and Ex. E.

Respondents assert that Six M is the owner and operator of the tanks, and that William Maxwell performed no actions for which he should be held liable as a corporate respondent. *Id.* at 3-4.

### RESPONSE

On November 1, 2011, the People filed a response (Resp.). In summary, the People's response stated that, as to Marilyn Maxwell, the People consent to her dismissal and "accepts the suggestion of death as a properly submitted affirmative matter barring judgment". Resp. at 2. The People oppose the requested dismissal of William Maxwell. *Id.*

---

<sup>1</sup> In its October 6, 2011 order, the Board related that, in the joinder motion, the People recited:

James McIlvain owns property adjacent to "Walker's Service Station" and located at 407 West Clinton Avenue, Farmer City. As alleged in the Complaint, the McIlvain property was contaminated by the May 13, 1996 LUST incident and this off-site contamination has not been corrected due to the failure of the Respondents to complete corrective action and to comply with all applicable statutory and regulatory response requirements.  
PCB 12-35, slip op. at 2 (Oct. 6, 2011)

The People argue that the motion should be denied as untimely filed under the Board's procedural rules at 35 Ill. Adm. Code 101.506. The people contend, the motion to dismiss filed on October 25, 2011 is untimely because respondents received service of the complaint on August 26, 2011.

As to the merits of the matters asserted in the motion, the People state that the Tom Maxwell affidavit complies with Supreme Court Rule 191 and is admissible pursuant to the Illinois Code of Evidence. However, the People argue that the substance of this affidavit does not effectively raise any "affirmative matter" under Section 2-619(a)(9) to defeat the claims against William Maxwell. Resp. at 3.

Furthermore, the People object to the exhibits to the motion, arguing they are not admissible, lack foundation, and are not mentioned in the Tom Maxwell affidavit. As such, the People believe that the Board should not consider the exhibits for any purpose. Resp. at 7. The People argue that the exhibits contradict allegations in the complaint rather than admit the complaint and provide affirmative matter. Resp. at 5.

The People characterize Maxwell's motion as if the corporation is the successor in interest to the individual owners and operators. However, the People did not plead any allegation that William Maxwell is a corporate officer and as such is somehow personally liable for the violations. Rather, the People state that the complaint alleges that William Maxwell is personally responsible for failure to take corrective action, and that the inadmissible materials suggesting otherwise are not properly considered by the Board. Consequently, the People request denial of the motion to dismiss. Resp. at 7-8.

### **DISCUSSION**

The Board first considers the procedural objection to the timeliness of filing of the motion. The Board notes that the motion was filed close to 60 days after the service of the complaint, rather than the 30 days specified by 35 Ill. Adm. Code 101.506. But, the Board will not deny the motion on this procedural ground, as there is no evidence of prejudice to any party as a result of the late filing.

As to the merits of the motion, the Board that in ruling a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g. Beers v. Calhoun*, PCB 04-204, slip op. at 2 (July 22, 2004).

Next, the Board observes the explicit provision in its procedural rules at 35 Ill. Adm. Code 101.100 (b):

The provisions of the Code of Civil Procedure [735 ILCS5] and the Supreme Court rules [Ill. S. Ct. Rules] do not expressly apply to proceedings before the Board. However, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent. 35 Ill. Adm. Code 101.100(b).

The Board grants the motion to dismiss Marilyn Maxwell, noting the People's consent to the dismissal.

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.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 17, 2011, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

---

John Therriault, Assistant Clerk  
Illinois Pollution Control Board