

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JAN 11 2012

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.)
)
SIX M. CORPORATION INC., an Illinois)
corporation, WILLIAM MAXWELL, and)
MARILYN MAXWELL,)
Respondents,)
)
and)
)
JAMES McILVAIN,)
)
Necessary Party-Respondent)

PCB No. 12-35

(Enforcement-Water)

ORIGINAL

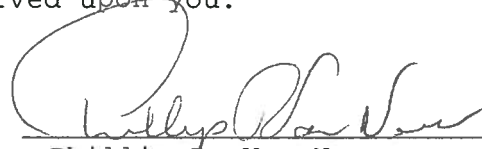
NOTICE OF FILING

RETURN TO CLERK'S OFFICE

TO: ALL PERSONS ON SERVICE LIST

PLEASE TAKE NOTICE that on the 9 day of January, 2012, I filed with the Clerk of the Pollution Control Board the NECESSARY-PARTY RESPONDENT McILVAIN'S RESPONSE TO AFFIRMATIVE DEFENSE, on behalf of JAMES McILVAIN, a true and correct copy of which is attached and served upon you.

BY:



Phillip R. Van Ness
One of his attorneys

Phillip R. Van Ness
WEBBER & THIES, P.C.
202 Lincoln Square
Urbana, IL 61801
(217) 367-1126

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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 SIX M. CORPORATION INC., an Illinois)
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 Respondents,)
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 JAMES McILVAIN,)
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 Necessary Party-Respondent)

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NECESSARY-PARTY RESPONDENT McILVAIN'S
RESPONSE TO AFFIRMATIVE DEFENSE

Now Comes Necessary-Party Respondent, JAMES McILVAIN ["McIlvain"], by his attorneys, Webber & Thies, P.C. and hereby responds to the Affirmative Defense ("Impossibility") asserted by Respondents as follows:

As a preliminary matter, McIlvain adopts in its entirety the People's "Objection" to said purported Affirmative Defense as a matter of law. The concept of "Impossibility" has no application to the statutory violations alleged in the People's Complaint. Nevertheless, and without waiving such objection, McIlvain responds to the allegations of the Affirmative Defense as follows:

1. Admit
2. Admit
3. McIlvain admits that Armor Shield applied to the State Fire Marshall for permission to remove certain underground storage tanks [USTs] from the property due to the presence of a gasoline release; answering further, McIlvain has insufficient information to admit or deny whether said USTs were "unnecessary or unused", or were characterized as such by Armor Shield.
4. McIlvain admits that four tanks were removed from the

Respondents' property, but has insufficient information to admit or deny that upon such removal only three tanks remained behind, or that such tanks were "active."

5. McIlvain has insufficient information to admit or deny whether said USTs "experienced an overflow or spill" as alleged, and demands strict proof thereof. Answering further, McIlvain personally observed that the condition of some of the tanks so removed was so degraded as to preclude their ability to contain any product within, irrespective of any spill or overflow.

6. Admit.

7. Admit.

8. McIlvain admits entering into a "Full And Final Settlement Agreement And Release" [hereafter, "Settlement Agreement"] with Respondents but denies that the terms alleged by the Respondents fully and accurately reflect the terms and scope of the parties' agreement. Answering further, insofar as Respondents' Affirmative Defense has implicitly waived the confidentiality provisions of said Settlement Agreement, McIlvain hereby submits a true and complete copy of said Settlement Agreement as Attachment A of this Response and incorporates same as if fully set forth herein.

9. McIlvain admits entering into an Access Agreement in 1999 as alleged, but denies that the terms alleged by the Respondents fully and accurately reflect the terms and scope of the parties' agreement. Answering further, McIlvain hereby submits a true and complete copy of said Access Agreement as

Attachment B of this Response and incorporates same as if fully set forth herein.

10. McIlvain has insufficient information to admit or deny the allegations of paragraph 10.

11. McIlvain has insufficient information to admit or deny the allegations of paragraph 11.

12. McIlvain has insufficient information to admit or deny the allegations of paragraph 12.

13. Admit.

14. Admit.

15. McIlvain has insufficient information to admit or deny the allegations of paragraph 15.

16. McIlvain denies the allegations of paragraph 16; answering further, McIlvain admits that it has denied access to the McIlvain property for purposes of investigating or remediating the 2006 release without a new access agreement to govern such access, but affirmatively states that access to the McIlvain property for purposes of investigating or remediating the 1996 release is and at all times since August 2, 1999, has been available to the Respondents in accordance with the 1999 Access Agreement.

17. McIlvain has insufficient information to admit or deny the allegations of paragraph 17.

18. Admit.

19. Admit. Answering further, McIlvain proposed several terms to govern the new access agreement, to which proposal

Respondents made no reply or counter-proposal.

20. Deny. Answering further, the USTs removed in response to the 2006 release were situated a considerable distance from the USTs removed in 1996, and in very close proximity to the McIlvain property. Insofar as monitoring results obtained from the nearest monitoring point within the McIlvain property subsequent to the 2006 release suggested the presence of gasoline contamination, Respondents' assertion that there was 'no evidence that the 2006 incident contaminated the McIlvains' property' is wholly without merit.

21. McIlvain admits that CSD Environmental submitted a revised Corrective Action Plan [CAP] as alleged, but denies that the subject thereof was limited to the 1996 incident.

22. McIlvain admits that the McIlvains objected to the CAP, but denies that they stated that Six M did not have authority to access the property for purposes of investigating or remediating the 1996 incident.

23. Admit.

24. McIlvain has insufficient information to admit or deny the allegations of paragraph 24.

25. McIlvain has insufficient information to admit or deny the allegations of paragraph 25.

26. McIlvain admits that CWM advised the McIlvains that it desired to access the McIlvain property, but denies that McIlvain denied access to the property for purposes of investigating or remediating the 1996 incident.

27. Denied.

28. Paragraph 28 states a legal conclusion and an expression of subjective 'hope' on the part of the Respondents, to which no response is required or given.

RESPECTFULLY SUBMITTED,

JAMES McILVAIN

BY:



PHILLIP R. VAN NESS
One of his attorneys

PHILLIP R. VAN NESS
Webber & Thies, P.C.
202 Lincoln Square
P.O. Box 189
Urbana, IL 61801
Telephone: 217/367-1126
Telefax: 217/367-3752

THIS FILING IS SUBMITTED ON RECYCLED PAPER

McILVAIN\RESPONSE TO AFFIRM DEFENSE.PCB

Case No. PCB 12-35

CERTIFICATE OF SERVICE BY UNITED STATES MAIL

I, Phillip R. Van Ness, hereby certify that I delivered the foregoing NECESSARY-PARTY RESPONDENT McILVAIN'S RESPONSE TO AFFIRMATIVE DEFENSE upon:

John T. Therriault, Assistant Clerk
IL Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, IL 60601

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East, P.O. Box 19274
Springfield, IL 62794-9274

Thomas Davis
Chief, Environmental Bureau
Office of the Illinois Attorney General
500 South Second Street
Springfield, IL 62706

SIX M CORPORATION INC.
%William Maxwell, R.A.
430 West Clinton Ave.
Farmer City, IL 61842

William and Marilyn Maxwell
430 West Clinton Ave.
Farmer City, IL 61842

Patrick Shaw, Esq.
Mohan, Alewelt, Prillaman & Adami
1 North Old State Capitol Plaza, Suite 325
Springfield, IL 62794-9276

Kyle Davis, Esq.
Assistant Counsel
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 N. Grand Avenue East, P.O. Box 19276
Springfield, IL 62794-9276

by placing a true and correct copy of said documents in the U.S. mail at Lincoln Square Mall, Urbana, Illinois, at or about the

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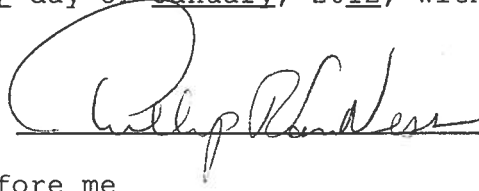
JAN 11 2012

STATE OF ILLINOIS
Pollution Control Board

ORIGINAL

RETURN TO CLERK'S OFFICE

hour of 5:00 p.m. on the 9 day of January, 2012, with proper postage prepaid.



SUBSCRIBED AND SWORN to before me
this 9 day of January, 2012.





THIS INSTRUMENT IS SUBMITTED ON RECYCLED PAPER

FULL AND FINAL SETTLEMENT AND RELEASE

For such valuable consideration as set forth below, the receipt and sufficiency of which is hereby acknowledged, James Howard McIlvain and Deborah Irene McIlvain (hereinafter "Releasors") fully and forever release and discharge Six-M Corporation, Inc., and its officers, directors, agents and employees and their heirs, administrators, executors, insurers, attorneys, successors and assigns (hereinafter "Releasees") from all claims, set offs, demands, damages, actions, or rights of action, of whatsoever kind or nature, which Releasors now have or may hereafter have, whether known or unknown, anticipated or unanticipated, arising out of, in consequence of, or on account of all known and unknown injuries and damages resulting to Releasors in any way from petroleum contamination and the remediation thereof, which arose, existed or were created prior to or on the date of this Full and Final Settlement and Release from sources located upon Releasees' property, which claims were or could have been included in the case James Howard McIlvain and Deborah Irene McIlvain v. Six-M Corporation, Inc., Case No. 97-L-6, DeWitt County, Illinois (hereinafter "the litigation").

THE TERMS OF SETTLEMENT include the following:

(1) As consideration to Releasors, payment of \$17,000 is made by Six-M Corporation, Inc. to Releasors, the receipt of which is hereby acknowledged. Releasors acknowledge that the release given by them as aforesaid extends to and includes, besides themselves, their dependent family members, and any businesses or corporations of which Releasors, or either of them, have a controlling interest, and covers, through compromise and settlement, all bodily injury and property damage suffered as a result of a release of petroleum from an underground storage tank system owned by Six-M Corporation, Inc., which release is currently being remediated by Six-M Corporation, Inc., under the jurisdiction and direction of the Illinois Environmental Protection Agency, as remediation of Incident Number 96-0810.

(2) Releasees deny any negligence, but do admit and agree that the bodily injury and property damage alleged to have been suffered by Releasors and their family members was the result of a release of petroleum from the underground storage tank system owned and operated by Six-M Corporation, Inc.

(3) Bodily injuries and property damages expressly covered by this Full and Final Settlement and Release, for which consideration hereunder is given, include without limitation:

(A) Costs for plant or tree removal (except for the trees previously removed as a part of corrective

action) and replacement of any trees or other landscaping items on Releasors' property, which Releasors claim were destroyed, injured or otherwise affected by the release of petroleum from the underground storage tank system owned and operated by Six-M Corporation, Inc.

(B) All damages attributable to any actions taken by or on behalf of Six-M Corporation, Inc. to the date of this Full and Final Settlement and Release for purposes of remediating the petroleum released from the underground storage tank system owned and operated by Six-M Corporation, Inc.

(C) All damages to Releasors' real property, including yard and vegetation, attributable to the presence of petroleum contamination or attributable to any actions taken by or on behalf of Six-M Corporation, Inc. on or before the date of this Full and Final Settlement and Release in the course of remediating the petroleum released from the underground storage tank system owned and operated by Six-M Corporation, Inc.

(D) All past, present and future physical injuries, discomfort, annoyance, inconvenience, aggravation, and nausea, and any and all other claims of physical, emotional or mental suffering or injury of Releasors or their family members as a result of the release of petroleum from the underground storage tank system owned and operated by Six-M Corporation, Inc., or the remediation of that release.

(E) All damages for activities remaining to be conducted pursuant to the Access Agreement executed on August 2, 1999, by the McIlvains and Six-M Corporation, Inc. Access Agreement is attached hereto and expressly incorporated herein, only except for those damages expressly excluded from the coverage of the Access Agreement (such as damage to structures or sidewalks, and the indemnification expressed in paragraph 9). Releasors and Releasee expressly agree that the Access Agreement supersedes in its entirety the Memorandum of Agreement executed by Releasors on October 1, 1997, and by Six-M Corporation, Inc., on September 30, 1997. Nothing herein shall preclude any party to the Access Agreement from enforcing the terms thereof as set forth therein, nor preclude any party to the Access Agreement from seeking damages for injuries suffered as a result of intentional torts or willful or wanton negligence.

(4) In further exchange for the consideration herein recited, Releasors agree to seek and obtain the dismissal

with prejudice of the litigation, all parties to bear their own costs, as soon as practicable upon execution of this Full and Final Settlement and Release.

(5) Releasors agree that no part of this settlement is intended to pay for or reimburse Releasors for any litigation consultants, expert witnesses or attorneys' fees, it being expressly agreed that each party bears its own costs, expenses, and fees relating to the litigation.

(6) Nothing herein is intended in any way to affect the obligations of Six-M Corporation, Inc. pursuant to the Illinois Environmental Protection Act to remediate the petroleum release from its underground storage tank system, consistent with Releasors' agreement hereunder to provide Six-M Corporation, Inc., access to Releasors' property to perform any necessary remedial action.

(7) Releasees hereby fully and forever release and discharge Releasors and their respective agents, executors, heirs, administrators, insurers, attorneys, successors and assigns from any claims, counterclaims, setoffs, demands, damages, actions or rights of action of whatsoever kind or nature, which Releasees now have or may hereafter have against Releasors, arising out of, in consequence of, or on account of all known injuries or damages resulting in any way from the release of petroleum from any source owned or operated by Releasors, which were or could have been included by Releasee in the litigation, including those claims and allegations included in Releasees' affirmative defenses filed in the litigation.

THE PARTIES DECLARE AND AGREE that the consideration above stated herein is the sole consideration for this release and that the terms of this release are contractual and not a mere recital.

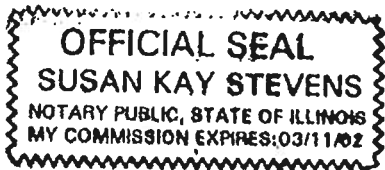
THE PARTIES AGREE that neither they, directly or indirectly, nor their attorneys, agents, representatives, or anyone acting on their behalf, shall reveal to anyone any of the terms of this Full and Final Settlement and Release or the amounts paid by or on behalf of any party (including but not limited to any Releasee), except as required by law or insurers or for obtaining reimbursement from the Underground Storage Tank Fund, or for the enforcement of this Full and Final Settlement and Release, and that the matter has been settled to the satisfaction of all parties.

THE PARTIES HAVE READ THE FOREGOING RELEASE AND HAVE DISCUSSED IT WITH THEIR RESPECTIVE COUNSEL AND FULLY UNDERSTAND IT.

Tom Maxwell
SIX-M CORPORATION, INC.

STATE OF ILLINOIS)
) SS.
COUNTY OF DEWITT)

On this 2nd day of August, 1999, before me personally appeared Tom Maxwell, Officer of Six-M Corporation, Inc. known to me to be the person who executed the above and foregoing release, and who this day acknowledged that he executed the same as his free act and deed for the uses and purposes therein set forth.



Susan Kay Stevens
Notary Public

ACCESS AGREEMENT

Access
Agreement
8/24

1. This Access Agreement ("Agreement") is entered into between Six-M Corporation, Inc. ("Six-M"), sometimes referred to as "the Remediator", and Mr. and Mrs. James McIlvain (hereafter, "the McIlvains"). Consideration for this Access Agreement consists of the mutual promises contained herein, the sufficiency of which all parties hereto acknowledge.
2. This Agreement sets forth the conditions upon which the McIlvains will continue to permit access by the Remediator to certain real property belonging to the McIlvains, commonly referred to as 405-407 West Clinton Avenue, Farmer City, Illinois (hereafter, "the Property") to facilitate the identification, treatment and removal of petroleum contamination (hereafter, "remediation") of the Property originating from a leaking underground storage tank system located on adjacent property belonging to Six-M, such remediation to be conducted by a consultant or consultants of Six-M's choice. It is expressly agreed that the parties hereto are entering into this Agreement as part of and in furtherance of a settlement between the McIlvains and Six-M ("Full And Final Settlement And Release") dated August 2, 1999, relative to pending litigation before the Sixth Circuit Court, DeWitt County (case No. 97-L-6). This Agreement governs the respective rights and duties of the parties to this Agreement, including their respective assigns, heirs, estates, successors and legal representatives, relative to all remediation activities conducted on and after the date of this Agreement.
3. All work performed by the Remediator shall be performed so as to attempt to avoid disruption to the McIlvains' family and business (J. McIlvain Inc.) to the extent possible, and Remediator shall use best efforts to minimize any known inconvenience to the McIlvains and their business.
4. All digging work and other invasive remedial activities shall be performed continuously upon commencement without material interruption until such invasive work is completed (subject to normal working days, holidays, acts of God and other uncontrollable circumstances), except as otherwise required by work schedules approved by the Illinois Environmental Protection Agency. The McIlvains will be given not less than 48 hours' prior notice of such activities; thereafter, any items of personalty or moveable fixtures belonging to the McIlvains and lying within the area to be disturbed may be moved or resituated on or around the Property by the Remediator as the Remediator shall in its sole discretion determine.
5. Remediator shall provide a Certificate of Insurance or acceptable equivalent in its own name or that of its

remediation consultant showing the McIlvains as "additional insureds" against liability to third persons associated with hazards created by the Remediator's activities, with a minimum \$100,000/\$300,000 coverage.

6. With respect to normal access onto the Property from Clinton Avenue, Remediator shall assure that (a) foot and vehicular access to the McIlvains' business and residence is unimpaired throughout any remedial activity [by provision of covering/bridging or filling], and that (b) any excavation will be filled in and appropriately leveled and compacted to minimize hazards to vehicles and persons as soon as possible thereafter, but in no event later than 24 hours after whatever needs to be done in that area is completed (subject to reasonable exception for acts of God and other uncontrollable circumstances).
7. Consistent with the Full And Final Settlement And Release dated August 2, 1999, entered into between McIlvains and Six-M to resolve litigation pending in the circuit court in DeWitt County, Illinois, as Case No. 97-L-6, this Agreement shall be construed solely as mandating that Remediator restore any disturbed area of the McIlvains' property to its original contours using the original topsoil or at least three inches of reasonable alternative topsoil as the uppermost layer of fill material; it does not mandate that Remediator restore the McIlvains' property to its original condition, replace landscaping, reseed disturbed areas or provide care for vegetation or pay additional damages with respect thereto. However, any damage to structures or sidewalks caused by Remediator's remediation activity occurring on or after the date of this agreement shall be the sole responsibility of the Remediator. For purposes of this provision, "structures" shall include, without limitation, the building presently upon McIlvains' property anchored to a poured concrete pad; Remediator shall be responsible for any damage to that building or the concrete pad (including, if necessary, any costs for moving the, building and replacing the concrete pad). As to all structures, fixtures and landscaping, Remediator shall make every reasonable effort to assure that its remedial activities are conducted so as to avoid damage or disturbance to the extent feasible consistent with its obligations to comply with directions or plans of work approved by the Illinois Environmental Protection Agency in remediation of Incident Number 96-0810.
8. Any and all exposed excavations and accumulations of soils will be suitably marked (by signs, caution tapes, etc.) as exclusion zones and protected by appropriate barricades or fencing when and where activity is not actually underway

(e.g., overnight, on weekends and; on workdays, in areas away from the active work area).

9. Remediator shall indemnify, defend and hold harmless both the McIlvains and the McIlvain business from any and all liability or claims arising out of the Remediator's activities on the Property, including but not limited to any claims for injuries or alleged injuries suffered by the principals or employees of Six-M or its consultants or subcontractors. In like manner, the McIlvains shall indemnify, defend and hold harmless the Remediator from any liability or claims by the McIlvains or their representatives (while such representatives are acting within the scope of their employment on behalf of the McIlvains) or their guests or invitees for injuries or alleged injuries suffered within an active work area or any exclusion zone suitably posted and protected pursuant to paragraph 8 of this Agreement.
10. Recognizing that the remediation activity is part of a larger project potentially affecting the Property, the Remediator will assure that its remediation consultant provides the McIlvains a written copy of the Corrective Action Plan and any revision thereof relating to any measures proposed to be taken affecting the McIlvains and/or the Property, no fewer than 7 days following submission of same to the Illinois EPA. Upon signing of this Agreement, Remediator shall immediately provide the McIlvains copies of any such documents and related correspondence between Remediator and the Illinois EPA, if such documents are not already in the possession of the McIlvains.
11. The parties hereto agree that the terms of this Agreement may be enforced judicially only after reasonable informal efforts to resolve any disputes have failed.
12. The parties hereto agree that no material change or deviation from the terms of this Agreement shall be made without obtaining the prior written consent of each other party. Nothing herein shall preclude any party from designating in writing another person to serve as his/her/its agent for purposes of this Agreement.
13. Each person signing this Agreement on behalf of another person or a corporation expressly warrants to all others that he or she is the duly authorized agent of, or the attorney for, said person or corporation and that he or she has the full authority of that person or corporation to execute this Agreement on its behalf, and that in so doing, the person or corporation is bound by the terms hereof.

FOR SIX-M CORPORATION, INC.:

Signed and sealed by me
in Dewitt County,
Illinois, on August 2, 1999.

Tom Meyers

FOR JAMES HOWARD MCILVAIN:

Signed and sealed by me
in Dewitt County,
Illinois, on August 2, 1999.

James Howard McIlvain

FOR DEBORAH IRENE MCILVAIN:

Signed and sealed by me
in Dewitt County,
Illinois, on August 2, 1999.

Deborah Irene McIlvain

WEBBER & THIES, P.C.
ATTORNEYS AT LAW
202 LINCOLN SQUARE
P.O. Box 189
URBANA, ILLINOIS 61803-0189

RICHARD L. THIES
CARL M. WEBBER
DAVID C. THIES
HOLTEN D. SUMMERS
JOHN E. THIES
PHILLIP R. VAN NESS
KARA J. WADE
J. AMBER DREW
J. MATTHEW ANDERSON
JAMES R. SHULTZ

WEBSITE:
<http://www.webberthies.com/>

CHARLES M. WEBBER
(1903-1991)
CRAIG R. WEBBER
(1936-1998)

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WRITER'S E-MAIL ADDRESS:
pvanness@webberthies.com

January 9, 2012

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STATE OF ILLINOIS
Pollution Control Board

John T. Therriault, Assistant Clerk
IL Pollution Control Board
100 West Randolph, Suite 11-500
Chicago, IL 60601

Re: People of State of Illinois v. SIX M et al
PCB No. 12-35 (Enforcement-Water)

Dear Mr. Therriault:

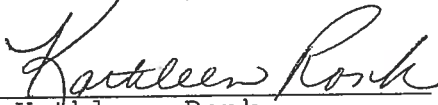
Enclosed please find the original and one copy of Necessary-Party Respondent McIlvain's Response to Affirmative Defense and the Notice of Filing. Please return a file stamped copy of each document to our office in the enclosed return envelope.

If you have any questions, please do not hesitate to call.

Sincerely,

WEBBER & THIES, P.C.

By


Kathleen Ronk
Legal Assistant

Encls.