BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 12-035
	)	(Enforcement – Water)
SIX M. CORPORATION Inc., an Illinois, corporation, WILLIAM MAXWELL, and MARILYN MAXWELL,	)	
	)	
Respondents.	)	
	)	
and	)	
	)	
JAMES MCILVAIN,	)	
	)	
Necessary Party.	)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on this 19th day of April 2017, I have electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, Complainant's Response to Respondents' Motion for Interlocutory Appeal, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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Certificate of Service

I, Elizabeth Dubats, do hereby certify that, today, April 19, 2017, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of Complaint's Response to Respondents' Motion for Interlocutory Appeal, on each of the parties listed below:

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BEFORE THE 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.	)	PCB No. 12-035 (Enforcement – Water)

COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR INTERLOCUTORY APPEAL

NOW COMES COMPLAINANT, the People of the State of Illinois, through its attorney LISA MADIGAN, Attorney General of the State of Illinois, and herein provides its Response in Opposition to Respondents' Motion for Interlocutory Appeal ("Response"). In support of this Response, the People state as follows:

ARGUMENT

On April 4, 2017, Hearing Officer Carol Webb ("Hearing Officer") exercised her discretion and authority to allow the reopening of discovery in this matter for the limited purpose of taking three depositions. She also exercised her discretion to extend the State's time to respond to Respondents' Motion for Summary Judgment until after the completion of these three depositions. The Hearing Officer's April 4, 2017 order was made within the bounds of her

discretion, allows for the most informed and efficient resolution of Respondents' pending Motion for Summary Judgment, and does not prejudice Respondents in any way, therefore it should be affirmed.

A. The Hearing Officer Is not Bound by the Board's Procedural Rules to Require a Supreme Court Rule 191(b) Affidavit

While Respondents frame their objection to the April 4, 2017 Hearing Office Order as an objection to an improper Supreme Court Rule 191(b) request, they do not address the fact that, under Section 101.100 of the Board's Regulations, 35 Ill. Adm. Code 101.100, the Board is not held to the Supreme Court Rules except for where the Board's own procedural rules provide otherwise. In this instance, the Hearing Officer ruled, and the State agrees, that it is neither necessary nor desirable to apply Supreme Court Rule 191(b) to Complainant's Motion to Reopen Discovery.

The Board's procedural rules do provide that, pursuant to Section 101.616 of the Board's Regulations, 35 Ill. Adm. Code 101.616, the Hearing Officer has the authority to order discovery so long as it is completed at least ten days prior to the scheduled hearing. Under Section 101.612 of the Board's Regulations, 35 Ill. Adm. Code 101.612, the Hearing Officer also has the authority to set the schedule to complete the record and may revise the schedule as long as it is complete at least thirty days before a statutory decision deadline and prevents material prejudice. Furthermore, under Section 101.522 of the Board's Regulations, 35 Ill. Adm. Code 101.522, a hearing officer may extend the time for filing any document for good cause. Respondents have not demonstrated why a Rule 191(b) affidavit is required by the Board in order to extend Complainant's time to file a response, when 35 Ill. Adm. Code 101.522 gives hearing officers the discretion to extend the time for filing *any* document for good cause.

Respondents cite two Board cases, one, *Des Plaines River Watershed Alliance v. IEPA*, PCB 04-88 (April 21, 2005), where the Board applied Supreme Court Rule 191(b) to evaluate the sufficiency of the 191(b) affidavit filed with the Village's motion to stay, and another, where the Board suggested the filing of a 191(b) affidavit in a footnote if the moving party wished to obtain Agency notes and documents relating to Agency meetings before responding to the pending motion for summary judgment (*White & Brewer Trucking v. IEPA*, PCB 96-250 (Nov. 21, 1996)).

The Hearing Officer distinguished these two cases on two distinct grounds that both go to the function of Rule 191(b) and when the Board would choose to apply it. First, the April 4, 2017 Order notes that both Board orders that reference Rule 191(b) were part of permit appeal proceedings where discovery outside of the record is scrutinized. Second, the April 4, 2017 Order notes that, unlike the movant in *Des Plaines*, the State has named the individuals from whom it seeks discovery in the Motion and identifies information relevant to the pending Motion for Summary Judgment that the State would ask for at deposition. Thus, the essential functions of a Rule 191(b) affidavit of providing notice of and a clear justification for the discovery sought have been fulfilled.

This distinction is also consistent with other cases where the hearing officer exercised common sense discretion in extending the time to respond to a motion for summary judgment in an enforcement matter to allow discovery depositions. For example, in *People of the State of Illinois v. Altivity Packaging*, LLC, PCB 2012-021, a respondent requested depositions prior to responding to the State's motion for summary judgment and the November 14, 2012 Hearing Officer Order allowed respondents to wait until after the requested depositions to respond to the motion for summary judgment.

Respondents' Rule 191(b) arguments also disregard the fact that Complainant's Motion to Reopen Discovery was not limited to depositions for the purposes of responding to Respondents' Motion for Summary Judgment, but also for the purposes of hearing preparation. Even if a Rule 191(b) affidavit were necessary for a Hearing Officer to stay the pending Motion for Summary Judgment, the lack of an affidavit would not prevent the Hearing Officer from allowing further discovery generally.

B. The Hearing Officer Correctly Found Good Cause for A Limited Reopening of Discovery

There is good cause to allow the discovery depositions of William Maxwell, Thomas Maxwell, and James McIlvain. All three witnesses named in the State's Motion are parties to this matter and would likely be called to testify at hearing. To date, no oral discovery has been conducted in this matter. As Respondents affirmatively claim that the reason they have failed to conduct a site investigation on the McIlvain property is that they have been denied access (*see* Respondents' Answer and Affirmative Defense Dec. 2, 2011), deposition of both Respondents and McIlvain would provide valuable information for all parties in preparing to examine these witnesses in advance of hearing. Furthermore, as Respondents claim that, between Thomas and William Maxwell, the operations of Six M. Corporation have largely been conducted by Thomas and not William Maxwell (*see* Respondents' Motion for Summary Judgment Mar. 7, 2017), deposition of William and Thomas Maxwell would allow parties to gather up to date testimony regarding both individuals' respective roles in Six M. Corporation, ownership and operation of the Walker Service Station, and oversight of the pending Site Investigation.

It is also worth noting that Respondents' Motion for Summary Judgment is directed to William Maxwell only. Similarly the bulk of Respondents' objections to reopening discovery

center around William Maxwell. It is not clear why or to what extent Respondents' objections to the deposition of William Maxwell should prevent the deposition of Thomas Maxwell as a corporate representative of Six M. Corporation or James McIlvain as a necessary party witness as both would likely be called to testify at hearing even if Respondents were granted Summary Judgment in favor of William Maxwell.

Respondents dismiss the State's rationale for requesting discovery depositions as insufficient to constitute "good cause" for extending a deadline under Section 101.522 of the Board's Regulations, 35 Ill. Adm. Code 101.522. Respondents ignore the fact that the attorney of record at the time of the original discovery scheduling order left the Attorney General's Office and the matter was not reassigned to present counsel until after the oral discovery deadline had passed. Respondents also disregard the fact that hearing officers regularly find good cause to exercise their discretion to extend deadlines pursuant to 35 Ill. Adm. Code 101.522 to accommodate the realities of litigation, including busy work schedules and changes in counsel. *See e.g. People of the State of Illinois v. Michel Grain Company, Inc.*, PCB 96-143, at *5 (Aug. 1, 1996) (Board finding good cause to allow a late filed Motion to Dismiss where Respondents claimed delay was caused by change of counsel); *Sierra Club v. IEPA*, PCB 2015-189, at *1 (Oct. 6, 2015) (finding good cause for extending deadlines due to busy attorney work schedules).

There is also good cause to extend time to respond to Respondents' Motion for Summary Judgment until after the three requested depositions are taken. While the request to stay Respondents' Motion for Summary Judgment was largely incidental to a broader request, it would still benefit all parties and the Board to wait until oral discovery is complete for Complaint's Response and the Board's ruling. Doing so would allow parties to work out questions of fact regarding the ownership and operation of the Walker Service Station that

underlie Respondents' Motion for Summary Judgment. Respondents' Motion as filed contains no direct testimony from William Maxwell himself regarding his role this matter and the affidavit provided for Thomas Maxwell appears from the fax machine time stamps to be over five years old. In deciding to allow the reopening of discovery, the April 4, 2017 Order noted the utility of the requested depositions for all parties to resolve issues of fact now in order to increase the likelihood that the case against William Maxwell can be resolved by summary judgment.

Finally, Respondents would not be prejudiced by allowing a modest extension of time to respond to allow for the deposition of three witnesses. Respondents' concerns that the State's demands may never end if the Board allows the State's request for limited discovery is completely unwarranted here. First, the State's request is limited to the deposition of three party witnesses. The request was explicit and proposed reasonable deadlines. Second, the request is predicated on the State's desire to set a hearing date and finally resolve this matter after years of allowing the parties wide latitude to negotiate the property access necessary for Respondents to achieve compliance voluntarily. *See* Hearing Officer Orders in PCB 12-35 from July 30, 2012 to August 1, 2016 (Documenting Respondents time to report compliance progress and settlement progress until August 1, 2016 where it is noted "settlement discussions at impasse".). It is disingenuous of Respondents to wait over five years to file a Motion for Summary Judgment, then suggest that another two months of discovery would prejudice them in any way, especially when the Hearing Officer herself has indicated that allowing depositions would resolve gaps in the current evidence and increase the likelihood that William Maxwell's liability could be resolved via summary judgment.

In conclusion, the April 4, 2017 Hearing Officer Order allowing an extension of deadline for Complainant's Response to Respondents' Motion for Summary Judgment until July 5, 2017

and allowing for the discovery deposition of witnesses William Maxwell, Thomas Maxwell and James McIlvain was a valid and appropriate exercise of Hearing Officer discretion and should be affirmed.

WHEREFORE, the Complainant requests the Board affirm the Hearing Officer's April 4, 2017 Order.

PEOPLE OF THE STATE OF ILLINOIS,
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MATTHEW J. DUNN, Chief
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