BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ELMHURST MEMORIAL HEALTHCARE and ELMHURST MEMORIAL HOSPITAL,	)	
Complainants,	)	
vs.	)	No. PCB 2009-066 (Citizen's Suit Enforcement Action)
CHEVRON U.S.A., INC. and TEXACO INC.	)	
Respondents.	)	

NOTICE OF FILING

To: Carey S. Rosemarin
Andrew J. Marks
Law Offices of Carey S. Rosemarin, P.C.
500 Skokie Boulevard, Suite 510
Northbrook, Illinois 60062

PLEASE TAKE NOTICE that on July 9, 2010, we filed with the clerk of the Illinois Pollution Control Board an original and nine copies of Motion Of Respondents Chevron U.S.A. Inc. And Texaco Inc. For A Determination That The Amended Formal Complaint Should Not Be Set For Hearing, a copy of which is attached hereto and herewith served upon you.

Chevron U.S.A. Inc. and Texaco Inc.

Dated: July 9, 2010

By: _____
One of their attorneys

Joseph A. Girardi
Robert B. Christie
Henderson & Lyman
Attorneys for Chevron U.S.A. Inc. and Texaco Inc.
175 W. Jackson Boulevard, Suite 240
Chicago, Illinois 60604
(312) 986-6960

PROOF OF SERVICE BY MAIL

I, Sarah A. Whitford, a non-attorney on oath, state that I served a copy of this Notice Of Filing and the Motion Of Respondents Chevron U.S.A. Inc. And Texaco Inc. For A Determination That The Amended Formal Complaint Should Not Be Set For Hearing on the persons to whom the Notice Of Filing is directed at the address contained therein by depositing the same in the U.S. mail at 175 West Jackson Boulevard, Chicago, Illinois 60604 before 5:00 p.m. on July 9, 2010

Sarah A. Whitford

Subscribed and sworn to before
me this 9th day of July 2010.

Notary Public

OFFICIAL SEAL
LINDSEY E LIABO
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:01/20/13

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ELMHURST MEMORIAL HEALTHCARE and ELMHURST MEMORIAL HOSPITAL,	)	
Complainants,	)	
vs.	)	No. PCB 2009-066 (Citizen's Suit Enforcement Action)
CHEVRON U.S.A., INC. and TEXACO INC.	)	
Respondents.	)	

APPEARANCE

The undersigned, Joseph A. Girardi and Robert B. Christie, of Henderson & Lyman, enter their appearance as counsel for Respondent Texaco Inc.

TEXACO INC.

Dated: July 9, 2010

By: _____
One of its attorneys

By: _____
One of its attorneys

Joseph A. Girardi
Robert B. Christie
Henderson & Lyman
Attorneys for Texaco Inc.
175 W. Jackson Blvd., Suite 240
Chicago, Illinois 60604
(312) 986-6960

PROOF OF SERVICE BY MAIL

I, Sarah A. Whitford, a non-attorney on oath, state that I served a copy of the foregoing Appearance of Respondent Texaco Inc. on:

Carey S. Rosemarin
Andrew J. Marks
Law Offices of Carey S. Rosemarin, P.C.
500 Skokie Boulevard, Suite 510
Northbrook, Illinois 60062

at the above address by depositing the same in the U.S. mail at 175 West Jackson Boulevard, Chicago, Illinois 60604 before 5:00 p.m. on July 9, 2010.

Sarah A. Whitford

Subscribed and sworn to before
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ELMHURST MEMORIAL HEALTHCARE and ELMHURST MEMORIAL HOSPITAL, Complainants, vs. CHEVRON U.S.A., INC. and TEXACO INC. Respondents.	)	No. PCB 2009-066 (Citizen's Suit Enforcement Action)

MOTION OF RESPONDENTS CHEVRON U.S.A. INC. AND TEXACO INC. FOR A DETERMINATION THAT THE AMENDED FORMAL COMPLAINT SHOULD NOT BE SET FOR HEARING

Respondents, Chevron U.S.A. Inc., incorrectly named as Chevron U.S.A., Inc., and Texaco Inc. (collectively "Respondents"), by their attorneys Henderson & Lyman, pursuant to Section 31(d) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/31(d), and Section 103.212 of the Illinois Pollution Control Board Procedural Rules ("Board Rules"), 35 Ill. Adm. Code 103.212, request that the Illinois Pollution Control Board ("Board") determine not to set for hearing the Amended Formal Complaint ("Amended Complaint") served on Respondents by Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital ("Complainants") on the ground that the Amended Complaint is frivolous. In support of their motion Respondents state as follows:

Background and Procedural History

This matter concerns real property ("Property") located in Lombard, Illinois. Complainants purchased the property in 2005 and commenced this proceeding in 2009

by filing a Formal Complaint ("Original Complaint") seeking reimbursement of remediation costs. The Original Complaint alleged that (i) Complainants found petroleum in the soil at the Property, (ii) the presence of the petroleum was the result of releases that occurred between 1959 and 1977 from an underground storage tank system ("USTs") at the Property, (iii) Texaco Inc. owned or operated a gasoline filling station at the Property when the releases allegedly occurred, and (iv) Complainants incurred costs to remediate the releases. The Original Complaint did not, however, name Texaco Inc. as a respondent. Rather, it named only Chevron U.S.A. Inc. as a respondent and claimed that Chevron U.S.A. Inc. was responsible for the liabilities of Texaco Inc. as a result of a "merger" of Texaco Inc. and Chevron Corporation in 2001.

Chevron U.S.A. Inc. filed an answer to the Original Complaint, in which it denied liability for the claims alleged, and also filed nine affirmative defenses. In affirmative defense number I, Chevron U.S.A. Inc. alleged facts demonstrating that, contrary to the assertions of Complainants, any liabilities of Texaco Inc. were not transferred to or assumed by Chevron U.S.A. Inc. as a result of a 2001 transaction or otherwise. Complainants did not move to strike this defense.

Complainants did, however, move to strike affirmative defenses numbered II – IX. The Board issued an order denying the motion to strike affirmative defenses numbered II and III, and granting the motion to strike affirmative defenses numbered IV – IX. Affirmative Defenses numbered II – III, which were allowed to stand, alleged that (i) Complainants' claims against Texaco Inc. were discharged in the prior

bankruptcy proceeding of Texaco Inc. and, thus, Chevron U.S.A. Inc. could not be responsible for them, and (ii) the Board did not have jurisdiction over the Original Complaint because the provisions of the Illinois Environmental Protection Act relied upon by Complainants were not in effect at the time of the releases were alleged to have occurred.

Thereafter, Complainants decided that they should amend the Original Complaint to name Texaco Inc. as a respondent and substantially reduce their allegations of liability against Chevron U.S.A. Inc. Complainants served their Amended Complaint on Chevron U.S.A. Inc. and Texaco Inc. on June 11, 2010.

Overview of the Amended Formal Complaint

In the Amended Complaint, Complainants add Texaco Inc. as a respondent and basically restate the allegations from the Original Complaint, claiming that Texaco Inc. owned or operated a gasoline filling station at the Property at the time of the alleged releases and is responsible for the occurrence of alleged releases. In respect to Chevron U.S.A. Inc., and in apparent deference to the allegations of Chevron U.S.A. Inc.'s affirmative defense number I to the Original Complaint, Complainants allege only that Chevron U.S.A. Inc. "may" also be responsible for Texaco Inc.'s obligations.

Overview of Respondents' Motion

Respondents allege that the Amended Complaint is frivolous because it seeks relief that the Board does not have the authority to grant and/or fails to state a cause of action upon which the Board can grant relief.

1. In respect to Respondent Chevron U.S.A. Inc.:

(a) the sole claim purported to be made against Chevron U.S.A. Inc. in the Amended Complaint is that it is responsible for the obligations of Texaco Inc. As the Amended Complaint does not allege that Chevron U.S.A. Inc. ever violated any provisions of the Act, the Board does not have the authority under the Act to hear the claim against Chevron U.S.A. Inc.; and

(b) even if the Board had the authority to hear the claim against Chevron U.S.A. Inc., the Amended Complaint does not allege sufficient facts to state a cause of action for such claim.

2. In respect to Respondent Texaco Inc.:

(a) the provisions of the Act that are alleged in the Amended Complaint to have been violated by Texaco Inc. were not in effect at the time of the alleged releases; and

(b) the Amended Complaint is barred by the five-year statute of limitations.

Procedural Law Applicable to the Respondents' Motion

Section 31(d) of the Act, 415 ILCS 5/31(d), and Section 103.212 of the Board Rules, 35 Ill. Adm. Code 103.212, provide that the Board shall determine whether or not a citizen's complaint is duplicitous or frivolous. Section 101.202 of the Board Rules, 35 Ill. Adm. Code 101.202, provides that a complaint is frivolous if it requests relief that the Board does not have the authority to grant or fails to state a cause of action upon which the Board can grant relief. Section 103.212 further provides that if the Board finds that a

complaint is frivolous, the Board shall not set the complaint for hearing, shall enter an order setting forth the reasons for so ruling, and shall inform the parties of its decision.

Argument

1. The Board does not have the authority to determine a claim for liability of Chevron U.S.A. Inc. for the obligations of Texaco Inc.

The Amended Complaint does not allege that Chevron U.S.A. Inc. ever owned, operated, leased, serviced or had any other legal or physical connection to the Property or the USTs located at the Property at any time whatsoever. More important, the Amended Complaint does not allege that Chevron U.S.A. Inc. ever violated the Act. Thus, Chevron U.S.A. Inc. could not have any liability to Complainants under the Act for the releases alleged. See: 415 ILCS 5/1, et seq. Notwithstanding the foregoing, Complainants try to bring a claim under the Act against Chevron U.S.A. Inc. by alleging that it is liable for Texaco Inc.'s actions. This tactic fails, however, as the Board is not authorized to determine whether Chevron U.S.A. Inc. is liable for the actions of Texaco Inc.

The Board is created by the Act and has limited, not general, jurisdiction. At 415 ILCS 5/5, et seq., the Act grants the Board the authority to hear and rule on only certain specified matters. In respect to enforcement actions, the Act, at 415 ILCS 5/5(d), provides as follows:

> (d) The Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order; upon administrative citations; upon petitions for variances or adjusted standards; upon petitions for review of the Agency's final

> determinations on permit applications in accordance with Title X of this Act; upon petitions to remove seals under Section 34 of this Act; and upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate. The Board may also conduct other proceedings as may be provided by this Act or any other statute or rule. [Emphasis supplied]

Thus, while the Board certainly has the authority to hear complaints alleging violations of the Act, the Board has not been given the authority to make determinations as to whether another entity, who is not alleged to have violated the Act, may have civil liability under corporate or contract law for the debts and obligations of the entity alleged to have violated the Act. Such non-violation types of claims are civil law claims that must be brought in a court of law (a court of general jurisdiction). From early in its history the Board has consistently interpreted the scope of its authority in precisely this manner.

In EPA v Will County Landfill, PCB No. 72-13 (December 12, 1972) the parties filed claims for indemnity arising out of the provisions of contracts and legal relationships among the parties. The Board dismissed the indemnity claims stating:

> We do not determine the rights of the parties for indemnity under the lease or for a breach of contract. For a determination of these issues the parties must resort to a court of law. We assert jurisdiction only to decide those issues relating to the quality of our environment. PCB No. 72-13

See also: EPA v. Kenneth Martin, Jr., PCB Nos. 71-308 and 72-328 (May 24, 1973).

Here, Complainants are not asking the Board to determine whether Chevron U.S.A. Inc. violated the Act; rather, they are asking the Board to find that Chevron U.S.A. Inc. is responsible for any monetary judgment that the Board could or might

enter against Texaco Inc for a violation of the Act by Texaco Inc. A determination of such responsibility is virtually identical to a determination of indemnity, and such a determination may be made only by a court of law. Thus, if Complainants seek relief against Chevron U.S.A. Inc. they must bring those claims in the proper court of law, and not before the Board.

2. The Amended Complaint fails to state a cause of action for liability of Chevron U.S.A. Inc. for the obligations of Texaco Inc.

Even if the Board had the authority to hear Complainants' claims against Chevron U.S.A. Inc., Complainants have not sufficiently alleged a cause of action for such relief. In ruling on a motion to dismiss all well plead facts contained in the pleading must be taken as true and all inferences from them must be drawn in favor of the non-moving party. People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001). A pleading should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proven under the pleadings which would entitle petitioner to relief. Shelton v. Crown, PCB 96-53 (May 2, 1996). Here, Complainants have not alleged sufficient "well plead" facts to state a cause of action, nor does any such set of facts exist.

Complainants make only the following vague allegations in support of their claim:

> (a) most of Chevron Corporation's United States businesses are managed and operated by Chevron U.S.A. Inc. (Am. Cmpl. at ¶5) and;
>
> (b) certain Chevron Corporation subsidiaries transferred assets to Chevron U.S.A. Inc., and as a result, Chevron U.S.A. Inc. may also be liable for Texaco's

pre-2001 actions relevant to this Amended Complaint. (Am. Cmpl. at ¶6).

Complainants do not allege that Texaco Inc. is one of the Chevron Corporation subsidiaries referred to in (a) above, or even if it were, that it was managed by Chevron U.S.A. Inc. during the period of time in which the violations are alleged to have occurred, or even if it were, how that alleged management would cause Chevron U.S.A. Inc. to be liable for the pre-2001 debts of Texaco Inc. Similarly, in (b) above Complainants do not allege that Texaco Inc. is one of the alleged subsidiaries that allegedly transferred assets to Chevron U.S.A. Inc., or if it were, how any alleged transfer would make Chevron U.S.A. Inc. liable for the debts of Texaco Inc. The foregoing types of factual allegations are necessary and required to allege the cause of action. They are not alleged here, however, because Complainants cannot do so under applicable rules for pleading, which require that a pleading be sufficiently well grounded in fact and warranted by existing law. See: Illinois Supreme Court Rule 137; See also, e.g.: Central Rivers Towing v. City of Beardstown, Illinois, 750 F2d 565 (7th Cir. 1984). (In cause of action for indemnity, plaintiff must allege facts which will support recovery under theory alleged); Chicago Upholsters' International Union Pension Fund v. Artistic Furniture of Pontiac, 920 F2d 1323 (7th Cir. 1990) (In corporate successor liability action, plaintiff must prove, inter alia, sufficient indicia of continuity between the two companies). Complainants try to meet these pleading requirements and avoid making unfounded allegations by using the word "may"; however, that is not sufficient. Complainants must affirmatively allege the facts to support the conclusion

that Chevron U.S.A. Inc. is liable for the obligations of Texaco Inc. or the claim should be stricken.

In summary, the Amended Complaint against Chevron U.S.A. Inc. is frivolous and should not be set for hearing because the (i) Amended Complaint purports to allege a claim for liability of one party for the debts of another, which the Board does have the authority to hear, and/or (ii) even if the Board has the authority to hear the claim, the Amended Complaint fails to allege sufficient facts to state a cause of action for such claim.

3. The Board does not have jurisdiction over the Amended Complaint against Texaco Inc. as the provisions of the Act that are alleged to have been violated by Texaco Inc. were not in effect at the time of the alleged releases.

The Amended Complaint alleges that Texaco Inc. owned or operated a gasoline filling station at the Property from 1959 through 1977 and that releases occurred from the USTs. (Am. Cmpl. at ¶8 - 12) The Amended Complaint further alleges that Texaco Inc. ceased using the Property in 1977 and that in 1978 the underground storage tanks were abandoned in place. (Am. Cmpl. at ¶13 - 14) Count I of the Amended Complaint alleges that the releases violated the current provisions of Section 21(a) of the Act, which provides that "No person shall: (a) Cause or allow the open dumping of any waste." (Am. Cmpl. at ¶34 – 40) Count II of the Amended Complaint alleges that the releases also violated the current provisions of Section 21(e) of the Act, which provides that "No person shall: (e) Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility

which meets the requirements of this Act and of regulations and standards thereunder." (Am. Cmpl. at ¶41 – 47). As demonstrated below, neither these current versions of 21(a) and 21(e), nor the current definition of "waste "contained in these provisions, were in effect in 1977 or prior thereto. As a result the Board is without jurisdiction to enforce these current versions of the Act against Texaco Inc. and the Board, therefore, does not have authority to hear this matter.[1]

When the Act became effective in 1970, section 21(a), then being 1971 Ill. Rev. Stat., Ch. 111½, Sect. 1021(a), provided only as follows:

> No person shall:
>
> (a) Cause or allow the open dumping of garbage;

There is no reference to "waste" in 1021(a), nor did the Act in 1970 even contain a definition for "waste." "Garbage" was defined as:

> (e) "Garbage" is waste resulting from the handling, processing, preparation, cooking, and consumption of food, and wastes from the handling, processing, storage, and sale of produce. 1971 Ill. Rev. Stat., Ch. 111½, Sect. 1003(e).

As the definition of "garbage" obviously does not include releases of petroleum from USTs, it is clear that Section 21(a), in 1970, did not relate to or regulate the releases from USTs that are alleged in the Complaint.

The same conclusion is true for Section 21(e). In 1970 Section 21(e) provided:

> No person shall:

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[1] As Complainants' claim against Chevron U.S.A. Inc. is that it is responsible for the obligations of Texaco Inc., a ruling in favor Texaco Inc. on this part of this motion would also be dispositive of Complainants' claim against Chevron U.S.A. Inc.

> (e) Conduct any refuse-collection or refuse-disposal operations, except for refuse generated by the operator's own activities, without a permit granted by the Agency upon such conditions, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations adopted thereunder, after the Board has adopted standards for the location, design, operation and maintenance of such facilities; 1971 Ill. Rev. Stat., Ch. 111½, Sect. 1021(e)

There is no reference to "waste" in 1021(e), nor did the Act in 1970 even contain a definition for "waste." "Refuse" was defined as:

> (k) "Refuse" is any garbage or other discarded solid materials. 1971 Ill. Rev. Stat., Ch. 111½, Sect. 1003(k)

As the definition of "refuse" obviously does not include releases of petroleum from USTs, it is clear that Section 21(e), in 1970, did not relate to or regulate the releases from USTs that are alleged in the Amended Complaint. And no other provision of the 1970 version of Section 1021, which is the only section of the 1970 Act prohibiting land pollution, related to or regulated the releases alleged from the USTs. See 1971 Ill. Rev. Stat., Ch. 111½, Sect. 1021 (b) – (d) and (f).[2]

The Amended Complaint alleges that Texaco ceased operating the USTs and the Property in 1977. The 1977 Illinois Revised Statutes contain revisions to the Act passed to and including July 2, 1977. The 1977 version of the Act continues, at 1021(a), to regulate only the open dumping of garbage, and, at 1021(e), to regulate only the disposal of refuse. 1977 Ill. Rev. Stat., Ch. 111½, Sect. 1021(a) and (e). The definition of "garbage," at Section 1003(e), remained the same, and the definition of "refuse," at

[2] While the Act, in 1970, defined the term "contaminant" as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source" (1971 Ill. Rev. Stat., Ch. 111½, Sect. 1003(d)), the release or discharge of a contaminant is regulated only in respect to air and water pollution, not land pollution. See 1971 Ill. Rev. Stat., Ch. 111½, Sect. 1009 and 1012.

Section 1003(k), also remained the same, except that radioactive materials are excepted from the definition. Thus, in 1977 the releases from the USTs alleged in the Complaint were not regulated by the Act.

The 1979 version of the Act, as contained in the 1979 Illinois Revised Statutes, makes the following relevant changes:

1. Sections 1021(a) and (b) are combined and the word "refuse" is substituted for "garbage". Ch. 111½, Section 1021 (a);

2. Section 1021(e) became Section 1021(d), but continued to regulate only refuse collection and refuse disposal. Ch. 111½, Sect. 1021(d);

3. The term "refuse" is redefined to mean simply "waste". Ch. 111½, Sect. 1003(s); and

4. For the first time the word "waste" became a defined term. Ch. 111½, Sect. 1003 (ff).

Whether the term "waste" in the 1979 laws did or did not include the releases alleged in the Amended Complaint is not relevant to this matter, as the earliest that any amendment contained in the 1979 Illinois Revised Statutes was effective is July 1, 1978, which is after the date that the Amended Complaint alleges Texaco Inc. ceased operating at the Property.

Therefore, a plain reading of Section 21 of the Act from its inception in 1970 through 1978 demonstrates that the Act never regulated releases of petroleum from USTs; thus, the Act cannot be applicable to the releases alleged in the Amended Complaint.

Further, these provisions of the Act cannot be applied retroactively, and the

decisions of the Board have consistently confirmed this conclusion. In Casanave v. Amoco Oil Company, PCB No. 97-84 (1997), the Board refused to apply Section 21 of the Act retroactively. There, the complainant brought a citizen's enforcement action against Amoco regarding leaking USTs under Sections 21(a), (d)-(f), (i) and (m) of the 1996 provisions of the Act. Amoco, however, had ceased operating the USTs and the property in 1952 and, therefore, moved to dismiss the Complaint alleging the Act cannot be applied retroactively. The Board agreed with Amoco and held that, in order for Amoco to have violated the provisions of the Act relied upon by Complainants, Amoco must have engaged in the proscribed conduct after those provisions became effective (citing People v. Fiorini, 143 Ill. 2d 318; 574 N.E. 2d 612). The Board stated:

> Because the complaint does not allege that Amoco owned, operated, possessed or controlled the property or the underground storage tanks after the effective date of the Act in 1970 or after the Section 21 provisions became effective, Amoco could not have allowed contamination to continue or disposed, stored or abandoned any waste based on the facts of this case after the Section 21 provisions became effective. See Mandel, PCB 92-33, slip op. at 5-6. Therefore, even assuming that all well-pleaded allegations are true, none of the conduct alleged in the complaint occurred after 1970, the effective date of the Act, or after the effective dates of the Section 21 provisions. Consequently, no set of facts in the complaint can be proved that would entitle the complainant to relief. Hence, the complaint must be dismissed. See People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 430 N.E.2d 1005, 1008-09 (1981).

Two years later in Union Oil Company v. Barge-Way Oil Company, PCB No. 98-169 (1999), the Board again held that Section 21 cannot be applied retroactively. There, Union Oil sought to enforce Section 21(e), as it was amended in 1979 to include "waste", against actions of Mobil Oil Company that are alleged to have occurred on or about

1974. Mobil moved to dismiss arguing that, in order for it to be liable under the 1979 amendments to Section 21, those amendments would have to be applied retroactively, and that they simply cannot be so applied. The Board agreed with Mobil and dismissed the claims, stating:

> Under Illinois law, a statutory amendment will be construed as applying prospectively absent express language to the contrary. People v. Fiorni, 143 Ill. 2d 318, 333, 574 N.E.2d 612 (1991). As stated in Fiorini, "an exception to the rule of prospectivity arises where the legislature intended that the amendment apply retroactively and where the amendment applies only to changes in procedure or remedies, rather than substantive rights," (Emphasis added.) Fiorini, 143 Ill. 2D at 333 (citing Matier v. Chicago Board of Education, [10] 82 Ill. 2d 373, 390, 415 N.E. 2d 1034 (1980)).
>
> Thus, in order for retroactive application to be permissible, there must be both express statutory language allowing for such application and the law which is sought to be retroactively applied is not substantive. *Id.* Illinois courts have defined substantive law as that "which establishes rights and duties that may be redressed through the rules of procedure." Fiorini, 143 Ill. 2d at 333.

The Board's holdings in Casanave and Union Oil are controlling here. The Amended Complaint does not allege that Texaco owned or operated the USTs or the Property at any time after 1977. The provisions of Section 21, upon which Complainants rely, were not amended to include a definition of the term "waste" that might apply to the alleged releases from the USTs until after 1977. Thus, the only manner in which Texaco Inc. could be liable under the 1979 amendments, or any post-1979 amendments, to Section 21 would be to apply the provisions of amended Section 21 retroactively, which the Board has clearly determined cannot be done. The amendments to Section 21 do not state they are to be applied retroactively and, in any

event, the prior decisions of the Board have determined that the amendments are substantive and, therefore, cannot be applied retroactively. See also: Vogue Tyre & Rubber Company v. Illinois EPA, PCB 96-10 (2004).[3]

4. The Amended Complaint against Texaco Inc. is barred by the applicable statute of limitations.

It is well settled that statutes of limitation do not apply to actions brought by governmental entities before the Board; however, it is equally well settled that, in cost recovery actions brought by private citizens, statutes of limitation do apply. Caseyville Sport Choice, LLC v. Erma I. Seiber, PCB No. 08-30 (October 16, 2008); Pielet Bros. Trading, Inc. v. The Pollution Control Board, 110 Ill. App. 3d 752; 442 N.E.2d 1374 (5th Dist. 1982); Union Oil Company of California d/b/a Unocal v. Barge-Way Oil Company, Inc., PCB No. 98-169 (January 7, 1999) Here, Complainants are private citizens bringing an action for cost recovery; thus, statutes of limitation apply.

In private cost recovery actions the applicable statute of limitations is the five-year statue, which is found at Section 13-205 of the Code of Civil Procedure, 735 ILCS 5/13-205, and provides as follows:

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[3] The Board's decision in Grand Pier Center LLC v. American International Specialty Lines Insurance Company, PCB No. 05-157 (2005) may incorrectly be interpreted as finding that the Act can be applied retroactively. The decision is plainly wrong and in apposite to all existing decisions of the Board. Grand Pier did not overrule Casanave, Union Oil or Vogue, nor did it even refer to or distinguish those decisions. Thus, Casanave, Union Oil and Vogue remain the law of the Board regarding the issue of retroactivity. Further, as the Board held in Casanave and Union Oil, there is a two-prong test that must be met before a statute may be applied retroactively: (i) the statute must specifically provide that it is to be applied retroactively, and (ii) the statute must be of a procedural nature and not affect substantive rights. In Grand Pier, the two prong test was misapplied to extend retroactivity to Section 21(e) of the Act; however, Section 21(e) clearly affects a party's substantive rights as it regulates a party's conduct. Under People v. Fiorini, supra, which is an Illinois Supreme Court decision, a substantive statute cannot be applied retroactively. Thus, Fiorini is controlling here and the holding in Grand Pier is not.

> Sec. 13-205. Five year limitation. Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

This five-year statute is applicable to Complainants' Amended Complaint. Caseyville, PCB No. 08-30; Union Oil Company, PCB No. 98-169.

Complainants did not serve the Amended Complaint on Texaco Inc. until June 11, 2010. The Amended Complaint alleges that releases from the USTs occurred during the period of time from 1959 – 1977, when Texaco Inc. was the owner or operator of a gasoline filling station at the Property. Therefore, it is clear from the Amended Complaint that Complainants' cause of action against Texaco Inc. accrued under the statute of limitations no later than December 31, 1977, and more than 32 years have passed between the date that the cause of action accrued and the date of service of the Amended Complaint on Texaco Inc. Thus, absent Complainants bringing themselves within the ambit of the "discovery rule," which could extend the five-year period limitations, the Amended Complaint does not state a cause of action upon which the Board may grant relief against Texaco Inc.

The Board has recognized the "discovery rule" in applying statutes of limitation. This doctrine provides that the beginning of the running of the statute of limitations may be delayed until the injured party knew or reasonably should have

known of the injury or the injury could have been discovered through the exercise of reasonable or appropriate diligence. Union Oil Company of California d/b/a Unocal v. Barge-Way Oil Company, Inc., PCB No. 98-169 (February 15, 2001); Caseyville, PCB No. 08-30. Texaco Inc. was not a party to the Original Complaint. The Amended Complaint, which first named Texaco Inc. as a respondent, was served on June 11, 2010, some 32 years after the cause of action accrued. Thus, in order to survive the bar of the statute of limitations, the Amended Complaint must affirmatively demonstrate that Complainants did not know, or could not reasonably have known, through the exercise of reasonable diligence or otherwise, of the existence of the releases alleged at the property on or before June 11, 2005. The Amended Complaint, however, does not meet this requirement.

In respect to when Complainants knew or reasonably should have known of the releases, the Amended Complaint is relatively silent. The Amended Complaint admits that Complainants "identified the Property" and "purchased the Property" in 2005; however, the Amended Complaint fails to give any specific dates in 2005 for those actions. And the Amended Complaint does not state in anyway what actions and investigations Complainants took in identifying and purchasing the Property in 2005. Indeed, sophisticated purchasers, such as Complainants, usually and customarily perform substantial due diligence in acquiring commercial property, including Phase I and additional investigations. These types of investigations would determine whether the Property had been used for a gasoline filling station in the past and whether the

releases alleged in the Amended Complaint could have been or were present. But the Amended Complaint is silent as to whether or not Complainants performed any due diligence before closing on the Property in 2005.[4] Consequently, Complainants have not demonstrated that they come within the ambit of the discovery rule and the Amended Complaint, therefore, does not state a cause of action upon which the Board can grant relief.[5]

In summary, the Amended Complaint against Texaco Inc. is frivolous and should not be set for hearing because the (i) Amended Complaint alleges violations of sections of the Act that were not in effect when the releases are alleged to have occurred; thus, the Board does not have jurisdiction or authority to enforce those sections against Texaco Inc., and/or (ii) the Amended Complaint is barred by the statute of limitations; thus, the Amended Complaint fails to state a cause of action for which the Board can grant relief.

Conclusion

Wherefore, for all of the foregoing reasons Respondents Chevron U.S.A. Inc. and Texaco Inc. request that the Board determine not to set the Amended Complaint for hearing.

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[4] Interestingly, while the Amended Complaint is silent as to Complainants' due diligence in 2005 before it closed on the Property, it conversely details each and every action that Complainants took after closing to remove USTs and remediate the Property.

[5] As Complainants' claim against Chevron U.S.A. Inc. is that it is responsible for the obligations of Texaco Inc., a ruling in favor Texaco Inc. on this part of this motion would be dispositive of Complainants' claim against Chevron U.S.A. Inc.

Respectfully submitted,

Chevron U.S.A. Inc. and Texaco Inc.

Dated: July 9, 2010

By: _____
One of their attorneys

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