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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

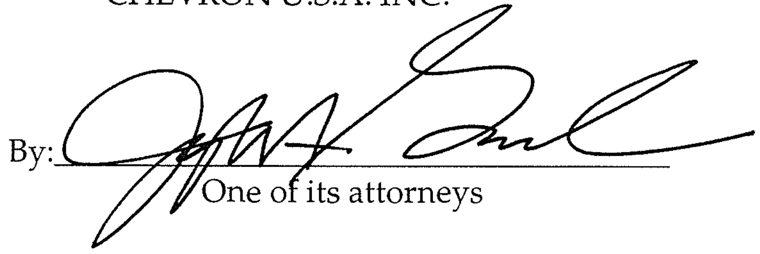
ELMHURST MEMORIAL HEALTHCARE and ELMHURST MEMORIAL HOSPITAL,	)	
Complainants,	)	
vs.	)	No. PCB 2009-066 (Citizen's Suit Enforcement Action)
CHEVRON U.S.A., INC.	)	
Respondent.	)	

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 21, 2009, we filed with the clerk of the Illinois Pollution Control Board an original and nine copies of the Response Of Chevron U.S.A. Inc. To Complainants' Motion To File Reply Instanter, a copy of which is attached hereto and herewith served upon you.

CHEVRON U.S.A. INC.



Dated: July 21, 2009

By: ______________________
One of its attorneys

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

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CHEVRON U.S.A., INC.	)	
Respondent.	)	

RESPONSE OF CHEVRON U.S.A. INC.
TO
COMPLAINANTS' MOTION TO FILE REPLY INSTANTER

Respondent, Chevron U.S.A. Inc., incorrectly named as Chevron U.S.A., Inc. ("Respondent"), by its attorneys Henderson & Lyman, pursuant to Section 101.500(d) of the procedural rules of the Illinois Pollution Control Board ("Board"), responds to the motion of Complainants, Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital ("Complainants"), to file a reply in support of their motion to strike Respondent's affirmative defenses, as follows:

Argument

With respect to filing a reply in support of a motion, the procedural rules of the Board, at Section 101.500(e), provide that the "moving party [Complainants here] will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." Complainants try to come within the ambit of this "material prejudice" requirement by accusing Respondent of improperly having the Board believe, in Respondent's response, that Complainants' claim was discharged in

the Texaco Inc. bankruptcy. Complainants allege this somehow prejudiced them, and that they now need to clarify the matter.

To the contrary, however, the claim has been discharged by the Texaco Inc. bankruptcy and Respondent's response is not the first time that Respondent has made this allegation. Respondent's affirmative defense alleges the claim was discharged by the bankruptcy. Complainants filed a motion to strike the defense and Respondent filed a response. For Complainants to now argue that the response is the first time that Respondent alleged the claim was discharged is preposterous. As will be demonstrated below, the only thing that is improper here is Complainants' accusations, and the Board should deny Complainants' motion.

Notwithstanding Complainants' claim of material prejudice, the actual reason that Complainants request leave to file a reply is that in their motion to strike this defense they chose not to cite, mention or argue against the holding of the Texaco Inc. bankruptcy court in Texaco Inc. v. Fred Saunders, et al. (In re Texaco Inc.), 182 B.R. 937 (1995), which Respondents relied upon in their response. As demonstrated in Respondent's response, Saunders is on point with the underlying facts of this case (as they are alleged in Complainants' complaint), and Saunders was decided in the Texaco Inc. bankruptcy proceeding, making it the law of the case regarding Texaco Inc. bankruptcy discharge issues.

The Complaint alleges that the releases took place while Texaco Inc. owned or operated the USTs, which is before 1978, and some nine years before the Texaco Inc. bankruptcy; thus, the releases alleged are clearly "pre-petition releases". Because of this, any debt or claim created by those releases (no matter who may bring that claim)

was discharged by the Texaco Inc. bankruptcy. As the Saunders court stated in discharging the Saunders plaintiffs' claims, "All of the physical events required to establish causation and damage for such claims occurred prior to the confirmation." Texaco v. Saunders, 182 B.R. at 951. And that is the case here.

Not being able to argue against the holding in Saunders, Complainants now try to distinguish themselves from the Saunders plaintiffs by arguing that since Complainants did not own the property at issue at the time of the Texaco Inc. bankruptcy, they did not have the same pre-bankruptcy relationship with Texaco Inc. that the Saunders plaintiffs had. Complainants, consequently, argue that, being a later purchaser, they could not have had their claim discharged in the bankruptcy because they could not have known they had a claim. This reasoning is fundamentally flawed. It is undisputed, per Saunders, that the owner of the Complainants' property at the time of the Texaco Inc. bankruptcy could not now bring this claim. And a simple sale of that property to a third party does not, somehow, reincarnate this claim and wash away the bankruptcy discharge. As successors-in-interest to the owner at the time of the Texaco Inc. bankruptcy, Complainants inherit and are bound by that owner's pre-bankruptcy relationship with Texaco Inc. See, e.g.: Humphrey Property Group, LLC v. The Village of Frankfort, 2009 Ill. App. Lexis 431 (June 18, 2009), holding that a later purchaser of land is a successor-in-interest and is bound and estopped by the acts of its predecessor-in-interest. If that were not the case a bankruptcy discharge would be meaningless. A late claimant could simply sell real estate or a business entity to a third party who could then bring claims that the late claimant failed to bring and would be barred from now bringing. For this reason, the determination of whether or not a claim has been

discharged focuses on the underlying circumstances that occurred to give rise to the claim, irrespective of whether the owner at the time of a bankruptcy brings the claim or a subsequent owner brings the claim. Because Complainants cannot factually or legally argue against this conclusion they resort to calling Texaco's argument "highly misleading and, indeed, false". Complainants' Motion, at p. 4.

Recognizing this flaw in their reasoning, Complainants try to bring themselves within the purview of some of the language, but not the holding, in In re Chateaugay Corp., 944 F.2d 997 (2nd Cir. 1991). The holding in Chateauga militates against Complainants as the U.S. Court of Appeals affirmed the decision of the U. S. District Court which discharged claims for future cost recovery brought by the United States Environmental Protection Agency for pre-petition releases by LTV Corp. And pre-petition releases are exactly what Complainants seek recovery for here.

In discussing when a claim is dischargeable the Chateaugay court indicated that a pre-bankruptcy relationship would be necessary to discharge certain claims. By way of example the Chateaugay court stated that it would be absurd to find that the claim of a person who is injured in a post-bankruptcy accident, as a result of a pre-bankruptcy design flaw, was discharged. The reasoning is clear. All of the circumstances that were necessary to give rise to the injured person's claim had not occurred before the bankruptcy took place. Such a person could not have known that he would be injured in the future, and, therefore, could not have had a pre-petition bankruptcy claim. This Chateaugay example does not mean that any claim brought by a claimant, who did have a pre-bankruptcy relationship with the bankrupt party, cannot be discharged. Nor is this example in conflict with the holding in Saunders (where the court specifically

found that all of the circumstances that had to occur for the claim to brought had, in fact, occurred and could have been known of before the claims bar date).

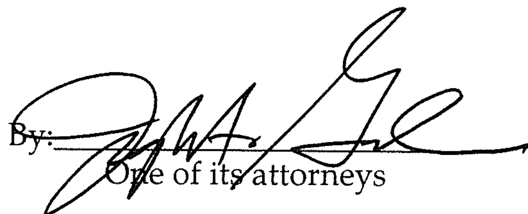
A claim for cost recovery could have been brought by the prior owner of Complainants' property in the Texaco Inc. bankruptcy, but was not. Changing the name of the claimant from the prior owner to Complainants does not change a thing. Complainants' predecessors-in-interest at the time of the Texaco Inc. bankruptcy had any necessary pre-bankruptcy relationship with Texaco Inc., and Complainants, as their successors-in-interest, are bound by that relationship. Humphrey Property Group, LLC, supra . By no stretch of one's imagination can the Chateaugay language cited by Complainants be argued to mean that a subsequent owner such as Complainants would have the right to bring this claim. As pointed out in other of Respondent's affirmative defenses, Complainants should have performed the usual and customary environmental due diligence before acquiring the property. Had they done so they would have not found themselves in the position in which they now are. Given all of these facts, Complainants' labeling Respondent's argument on discharge of the claim as being "false" is outrageous and should be sanctioned by the Board.

In summary, notwithstanding all of Complainants' deleterious accusations, the plain and simple conclusion is that their claim was discharged by the Texaco Inc. bankruptcy and they have not been materially prejudiced by Respondent's response brief. Complainants should have dealt with the Saunders decision in their initial motion, and they should not now be allowed to try to do so.

For all of the foregoing reasons Respondent submits that Complainants' motion to file a reply in support of their motion to strike the affirmative defenses should be

denied. In the alternative, should the Board grant Complainants' motion to file a reply, Respondent requests that the Board grant it 14 days to file a sur-reply.

Respectfully submitted,
Chevron U.S.A. Inc.



Dated: July 21, 2009

By: ______________________
One of its attorneys

Joseph A. Girardi
Robert B. Christie
Henderson & Lyman
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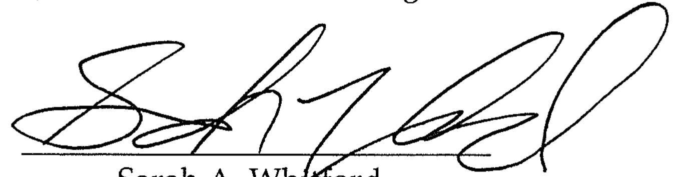
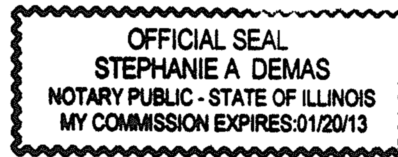
PROOF OF SERVICE BY MAIL

I, Sarah A. Whitford, a non-attorney on oath, state that I served a copy of this Response Of Chevron U.S.A. Inc. To Complainants' Motion To File Reply Instanter on the persons to whom the Notice is directed at the address contained in the Notice by depositing the same in the U.S. mail at 175 West Jackson Boulevard, Chicago, Illinois 60604 before 5:00 p.m. on July 21, 2009.



Sarah A. Whitford

Subscribed and sworn to before me this 21st day of July, 2009.



Notary Public

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