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July 23, 2010

VIA ELECTRONIC FILING

Illinois Pollution Control Board
Clerk's Office
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601
<http://www.ipcb.state.il.us/>

Re: *Elmhurst Memorial Healthcare, et al. v. Chevron U.S.A. Inc., et al.* (PCB 2009-066)

Dear Clerk:

This law firm represents Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital in the above-referenced case. Please find enclosed "Complainants' Response to 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 Notice of Filing and Certificate of Service are enclosed as well.

Very truly yours,



Andrew J. Marks

Encl.

cc: Via Regular Mail

Joseph A. Girardi
Henderson & Lyman
Attorneys for Chevron U.S.A. Inc.
and Texaco Inc.
175 W. Jackson Blvd., Suite 240
Chicago, Illinois 60604

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

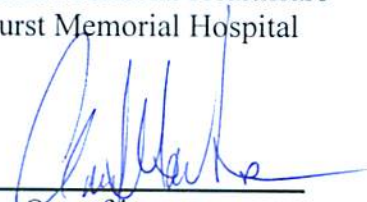
ELMHURST MEMORIAL HEALTHCARE and)	
ELMHURST MEMORIAL HOSPITAL)	
)	
Complainants,)	
)	
v.)	PCB 09-66
)	(Citizen's Enforcement – Land)
CHEVRON U.S.A. INC. and)	
TEXACO INC.,)	
)	
Respondents.)	

NOTICE OF FILING

To:	Joseph A. Girardi	Gary. L. Blankenship, Board Member
	Robert B. Christie	Bradley P. Halloran, Hearing Officer
	Henderson & Lyman	Illinois Pollution Control Board
	Attorneys for Chevron U.S.A. Inc.	James R. Thomson Center, Suite 11-500
	and Texaco Inc.	100 W. Randolph Street
	175 W. Jackson Blvd., Suite 240	Chicago, Illinois 60601
	Chicago, Illinois 60604	312-814-8917
	312-986-6960	

PLEASE TAKE NOTICE that I have on July 23, 2010, electronically filed with the Clerk of the Pollution Control Board the attached "Complainants' Response in Opposition to 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 hereby served upon you.

Elmhurst Memorial Healthcare
Elmhurst Memorial Hospital

By: 
One of its attorneys

Carey S. Rosemarin (ARDC No. 6181911)
Andrew J. Marks (ARDC No. 6286796)
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ajm@rosemarinlaw.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ELMHURST MEMORIAL HEALTHCARE and)	
ELMHURST MEMORIAL HOSPITAL)	
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CHEVRON U.S.A. INC. and)	
TEXACO INC.,)	
)	
Respondents.)	

COMPLAINANTS' RESPONSE TO 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

Complainants, Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital (collectively referred to as "EMH"), by and through their attorneys, the Law Offices of Carey S. Rosemarin, P.C., and pursuant to Board rule 101.500(d), file this response to Respondents' above captioned motion ("Motion"). 35 Ill. Adm. Code 101.500(d).

In support thereof, EMH states as follows:

1. Pursuant to the Board's June 3, 2010 Order, EMH served its amended two-count complaint ("Amended Complaint") upon Respondents Chevron U.S.A. Inc. ("Chevron U.S.A.") and Texaco Inc. ("Texaco") on June 11, 2010. The Amended Complaint seeks to recover EMH's remediation costs from those parties responsible for the contamination – Chevron U.S.A. and Texaco. The Motion asserts that such action is frivolous.

2. The Amended Complaint states that representatives of the Respondents told a representative of EMH "that Chevron U.S.A., or some other subsidiary of Chevron Corporation, was responsible for the liabilities of Texaco." (Amended Complaint, ¶ 31.)¹

¹ See paragraphs 1-30 and 32-47 for allegations of Texaco's liabilities.

- a. Taking this statement as true (along with all other well-plead facts in the Amended Complaint), Respondents' Motion must fail. The language quoted from the Amended Complaint clearly alleges sufficient facts to state a cause of action against Chevron U.S.A., contrary to Respondents' assertions. *See Elston v. Purex*, PCB 03-55, 2003 WL 215127868, at *12 (June 19, 2003).
- b. Respondents also assert that the Board does not have authority under the Illinois Environmental Protection Act ("Act") to hold Chevron U.S.A. liable for the contamination at Texaco's former gas station. Respondents fail to point to any support for the Board's purported lack of authority.² Taking EMH's allegation quoted above as true, it is as if Chevron U.S.A. itself violated the Act (as a result of a merger involving Texaco and subsequent corporate restructuring, Chevron U.S.A. is also liable for the violations).

3. Additionally, Respondents' retroactivity argument is simply a rehashing of Chevron U.S.A.'s third affirmative defense in its Answer (May 08, 2009). Accordingly, EMH incorporates by reference its June 6, 2009 Motion to Strike, at 9-10. Again, *State Oil v. People*, 822 N.E. 2d 876, 352 Ill. App. 3d 813 (2004), held that the Act may be applied retroactively in enforcement cases that seek reimbursement for clean-up costs, such as the case here. *Id.* at 881-82; *cited by Grand Pier v. River East*, PCB 05-157, 2005 WL 1255254, at *4 (May 19, 2005); *see also EMH v. Chevron*, PCB 09-66, 2010 WL 2147432, at *23 (March 18, 2010).

4. Finally, Respondents assert that a five-year statute of limitations is applicable and was triggered almost thirty-years before EMH purchased 701 South Main Street, Lombard, Illinois

² Respondents rely on two wholly unrelated cases. (Motion, at 6 (citing *EPA v. Will County Landfill*, PCB No. 72-13, (Dec. 12, 1972); *EPA v. Kenneth Martin, Jr.*, PCB 71-308, 72-328 (May 24, 1973))). Both *Will County* and *Martin* deal with contractual indemnification and breach of contract asserted against third parties – not the case here.

(the "Property"). Respondents cite to no authority for the proposition that a cause of action for damage to property accrues before one has an interest in that property. EMH alleges that it purchased the Property in 2005. Its June 2010 Amended Complaint was filed within five years.

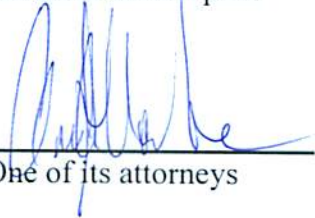
WHEREFORE, EMH prays for an order that:

- A. Denies Respondents' Motion for the reasons set forth above; and
- B. Accepts the Amended Complaint for hearing.

Dated: July 23, 2010

Respectfully submitted,

Elmhurst Memorial Healthcare
Elmhurst Memorial Hospital

By: 
One of its attorneys

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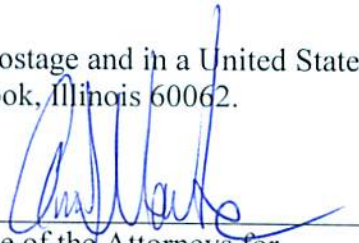
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)
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CERTIFICATE OF SERVICE

I, the undersigned, on July 23, 2010, caused the foregoing "Complainants' Response to 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," and Notice of Filing to be electronically filed with the Office of the Clerk, and caused a true and correct copy of said documents to be served upon:

Joseph A. Girardi
Robert B. Christie
Henderson & Lyman
Attorneys for Chevron U.S.A. Inc.
and Texaco Inc.
175 W. Jackson Blvd., Suite 240
Chicago, Illinois 60604

by placing same in an envelope bearing sufficient postage and in a United States Postal Service mailbox located at 500 Skokie Boulevard, Northbrook, Illinois 60062.



One of the Attorneys for
Elmhurst Memorial Healthcare
Elmhurst Memorial Hospital

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