LAW OFFICES OF
CAREY S. ROSEMARIN, P.C.
847-897-8000
500 SKOKIE BOULEVARD, SUITE 510
NORTHBROOK, ILLINOIS 60062
WWW.ROSEMARINLAW.COM

Fax: 847-919-4600
ajm@rosemarinlaw.com

March 4, 2011

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 a dispositive motion directed to the Board titled "Complainants' Response to Affirmative Defense I and Motion to Strike Affirmative Defenses II Through VIII." A Notice of Filing and Certificate of Service are enclosed as well.

Very truly yours,

Andrew J. Marks

Encl.

cc: Via electronic mail

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
jgirardi@henderson-lyman.com
rchristie@henderson-lyman.com

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
Robert B. Christie
Henderson & Lyman
Attorneys for Chevron U.S.A. Inc. and Texaco Inc.
175 W. Jackson Blvd., Suite 240
Chicago, Illinois 60604
jgirardi@henderson-lyman.com
rchristie@henderson-lyman.com

Gary. L. Blankenship
Board Member
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thomson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have on March 4, 2011 electronically filed with the Office of the Clerk of the Pollution Control Board COMPLAINANTS' RESPONSE TO AFFIRMATIVE DEFENSE I AND MOTION TO STRIKE AFFIRMATIVE DEFENSES II THROUGH VIII, a copy of which is hereby served upon you.

Elmhurst Memorial Healthcare
Elmhurst Memorial Hospital

By: _____
One of their attorneys

Carey S. Rosemarin (ARDC No. 6181911)
Andrew J. Marks (ARDC No. 6286796)
Law Offices of Carey S. Rosemarin, P.C.
500 Skokie Boulevard, Suite 510
Northbrook, IL 60062
847-897-8000
312-896-5786 (fax)
csr@rosemarinlaw.com
ajm@rosemarinlaw.com

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.	)	

COMPLAINANTS' RESPONSE TO AMENDED AFFIRMATIVE DEFENSE I AND MOTION TO STRIKE AFFIRMATIVE DEFENSES II THROUGH VIII

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., respond to Respondents' Affirmative Defense I and moves this Board for an order striking Respondents' Affirmative Defenses II through VIII.

INTRODUCTION

EMH's Amended Complaint seeks to recover remediation costs from Respondents Chevron U.S.A. Inc. ("Chevron U.S.A.") and Texaco Inc. ("Texaco"). Texaco operated a gasoline filling station at 701 South Main Street, Lombard, Illinois (the "Property") from approximately 1958 to 1977, and as a result of this operation, released petroleum to the environment. Texaco also improperly abandoned underground storage tanks on the Property. Texaco is thus liable for the associated remediation costs. (EMH purchased the Property in 2005.) Texaco's liabilities have devolved upon Chevron U.S.A. as a result of various corporate transactions. Thus, Chevron U.S.A. is also liable for the remediation costs.

Respondents assert eight (8) affirmative defenses, all of which are virtually identical to those asserted by Chevron U.S.A. in its original answer, dated May 8, 2009, except for the statute of limitations defense (Aff.Def.VII). EMH moved to strike the earlier versions of seven of those previously asserted defenses on June 5, 2009. The Board granted EMH's motion as to five of the seven on March 18, 2010. *EMH v. Chevron U.S.A.*, PCB 09-06, slip op. (March 18, 2010). Accordingly, in this Response and Motion, EMH: i) incorporates by reference its June 5, 2009 Motion to Strike and its August 12, 2009 Reply in Support of its Motion to Strike[1]; ii) responds to Affirmative Defense I; and iii) moves to strike Affirmative Defenses II through VIII because they do not satisfy the Board's standard for affirmative defenses, and because they are covered by the "law of the case" doctrine.

RESPONSE TO AFFIRMATIVE DEFENSE I
(Chevron U.S.A. Inc. Is Not Liable For Texaco Inc.'s Actions)

Aff.Def.I. ¶1. Paragraph 4 of the Amended Complaint alleges that, pursuant to an October 9, 2001 transaction, the common stock of Texaco Inc. was acquired by a subsidiary of Chevron Corporation. Paragraph 4 further alleges that, as a result of this transaction, Texaco Inc. became a wholly-owned subsidiary of Chevron Corporation.

Response: EMH admits that paragraph 4 of the Complaint alleges: "Pursuant to an October 9, 2001 transaction, the common stock of Texaco was acquired by a subsidiary of Chevron Corporation. As a result of this transaction, Texaco became a wholly-owned subsidiary of Chevron Corporation. Texaco remains liable for its pre-2001 actions relevant to this Amended Complaint." EMH denies any and all other allegations contained in Aff.Def.I ¶ 1.

Aff.Def.I. ¶2. Paragraph 5 of the Amended Complaint alleges that Chevron U.S.A. Inc. is a subsidiary of Chevron Corporation and manages most of Chevron Corporation's United Sates businesses.

Response: EMH admits the allegations in Aff.Def.I ¶ 2.

[1] EMH's August 12, 2009 reply incorporated by reference EMH's Motion for Leave to File Reply Instanter (July 10, 2009).

Aff.Def.I. ¶3. Paragraph 6 of the Amended Complaint alleges that, as a result of corporate restructuring, 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.

Response: EMH admits the allegations in Aff.Def.I ¶ 3.

Aff.Def.I. ¶4. In fact, on October 9, 2001 a transaction took place in which:
(a) The common stock of Texaco Inc. was acquired by a subsidiary of Chevron Corporation; and
(b) As a result Texaco Inc. became and remains a wholly-owned, indirect, subsidiary of Chevron Corporation; and
(c) The transaction did not provide that Chevron U.S.A. Inc. assumed the liabilities of Texaco Inc.

Response: EMH does not have sufficient knowledge to form a belief as to the truth of the allegations of Aff.Def.I ¶4 and, as such, denies same.

Aff.Def.I. ¶5. As a result, any liability of Texaco Inc. for the actions alleged in the Amended Complaint is not the liability of Chevron U.S.A. Inc.

Response: EMH denies the allegations of Aff.Def.I ¶5.

Wherefore, Respondent Chevron U.S.A. Inc. respectfully requests that the Illinois Pollution Control Board enter an order finding in favor of this Respondent and against the Complainants on each and every claim for relief requested by Complainants, and for such other and further relief as the Board may deem appropriate.

Response: EMH adopts and relies on its responses to Aff.Def.I ¶¶ 1 through 5 and denies that Respondent Chevron U.S.A.'s requested relief is appropriate.

MOTION TO STRIKE AFFIRMATIVE DEFENSES II THROUGH VIII

EMH incorporates by reference the legal standard set forth in its June 5, 2009 Motion to Strike. Essentially, the standard requires the Respondents to assert new facts or legitimate legal arguments that, if true, will defeat EMH's claims even if all of the allegations in the complaint are true. *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (Aug. 6, 1998). In addition, the "law of the case" doctrine is a rule of practice requiring the court to adhere to its prior rulings. *E.g., Madigan v. Ill. Comm. Commission*, 2010 WL 5191666, at *11-12, (Ill. App.

1st Dist. Dec. 17, 2010). As discussed below, Respondents' Affirmative Defenses II through VIII must be stricken because the Board has already ruled against these identical defenses, and because Respondents fail to assert facts which would preclude EMH's recovery.

A. Bankruptcy

This affirmative defense is identical in substance to Chevron U.S.A.'s original Affirmative Defense II. Accordingly, EMH incorporates by reference its June 5, 2009 Motion to Strike (at pp. 6-8), its August 12, 2009 Reply in Support of its Motion to Strike[2], and reasserts the same. Affirmative Defense II should be stricken.

B. Jurisdiction/Retroactive Application of Illinois Environmental Protection Act

This affirmative defense is identical in substance to Chevron U.S.A.'s original Affirmative Defense III. Accordingly, EMH incorporates by reference its June 5, 2009 Motion to Strike (at pp. 9-10), and reasserts the same. Additionally, EMH asserts the "law of the case" doctrine. *EMH v. Chevron U.S.A.*, PCB 09-06, slip op. at 22-23 (March 18, 2010); PCB 09-066, slip op. at 16-17 (Dec. 16, 2010). The Board previously ruled in this case that the Illinois Environmental Protection Act (IEPA) is to be applied retroactively if Respondents left contamination which remained on the Property through the time period in which the relevant sections of the IEPA were passed. *EMH v. Chevron U.S.A.*, PCB 09-066, slip op. at 17 (Dec. 16, 2010). The Board has soundly rejected Respondents' Affirmative Defense III, asserting that the IEPA may never be applied retroactively; it should be stricken.

C. Jurisdiction/Authority to Award Cost Recovery – Previously Stricken

This affirmative defense is identical in substance to Chevron U.S.A.'s original Affirmative Defense IV, which was stricken by the Board. *EMH v. Chevron U.S.A.*, PCB 09-06,

[2] Again, EMH's August 12, 2009 Reply incorporated by reference EMH's Motion for Leave to File Reply Instanter (July 10, 2009). That July 10, 2009 motion for leave (pp. 3 to 10) addresses Respondents' bankruptcy affirmative defense. Thus, EMH also incorporates it by reference into the instant Response and Motion, and reasserts the same.

slip op. at 23 (March 18, 2010); *see also* PCB 09-066, slip op. at 15-16 (Dec. 16, 2010). The Board "has consistently held that, pursuant to the broad language in Section 33 of the Act, [it] has the authority to award clean-up costs to private parties for a violation of the Act." *EMH*, slip op. at 23 (March 18, 2010). Accordingly, EMH incorporates by reference its June 5, 2009 Motion to Strike (at p. 10), and reasserts the same. Additionally, EMH asserts the "law of the case" doctrine. Affirmative Defense IV should be stricken.

D. Assumption of the Risk (Aff. Defs. V and VI) – Previously Stricken

These affirmative defenses are identical in substance to Chevron U.S.A.'s original Affirmative Defense IV, which was stricken by the Board. *EMH v. Chevron U.S.A.*, PCB 09-06, slip op. at 23 (March 18, 2010). In its March 18 order, the Board clearly prescribed what Respondents would have to allege to survive a motion to strike – that EMH was "in fact aware of the risk of petroleum releases and voluntarily purchased property knowing of the risk." *EMH*, slip op. at 24 (March 18, 2010). Rather than make this simple assertion, Respondents beat around the bush and cause the Board to use its imagination about what EMH knew. (Amended Answer, at pp. 17-21). And in any case, Respondents have cited no case authority suggesting that EMH's purchase of the Property could possibly defeat its cause of action against Respondents. Accordingly, EMH incorporates by reference its June 5, 2009 Motion to Strike (at pp. 10-11), and reasserts the same. Additionally, EMH asserts the "law of the case" doctrine. Affirmative Defenses V and VI should be stricken.

E. Statute of Limitations

Respondents' statute of limitations affirmative defense contains two parts. First, Respondents assert that the statute of limitations accrued in 1977, when Texaco allegedly ceased operating the Property as a gas station and returned possession and control to the Property owner,

almost 30 years before EMH had any interest in the Property. (Response to Amended Complaint ¶ 13). The Board previously ruled that "[t]he injury to [EMH] did not accrue prior to their purchase of the property." *EMH v. Chevron U.S.A.*, PCB 09-066, slip op. at 18 (Dec. 16, 2010). Under the "law of the case" doctrine, therefore, Respondents' first part of its statute of limitations defense should be stricken.

Respondents' second statute of limitations defense asserts that when EMH purchased the property in 2005 it "may have known or reasonably should have known of the existence of [EMH's] cause of action before June 11, 2005," which was the filing date of the Amended Complaint. An affirmative defense "must do more than merely refute well-pleaded facts in the complaint." *Pryweller v. Cohen*, 668 N.E.2d 1144, 1149, 282 Ill. App. 3d 899 (1st Dist. 1996), *appeal denied* 675 N.E.2d 640, 169 Ill.2d 588 (1996). Respondents offer neither a factual nor legal basis for the statement that EMH "may have known or reasonably should have known" that it had a cause of action prior to June 11, 2005. Thus, Respondents' Affirmative Defense VII is insufficient and should be stricken.

F. Laches – Previously Stricken

This affirmative defense is identical in substance to Chevron U.S.A.'s original Affirmative Defense IX, which was stricken by the Board. *EMH v. Chevron U.S.A.*, PCB 09-06, slip op. at 23 (March 18, 2010). Accordingly, EMH incorporates by reference on its June 5, 2009 Motion to Strike, its August 12, 2009 Reply in Support of its Motion to Strike, and reasserts the same. Additionally, EMH asserts the "law of the case" doctrine. Accordingly, Affirmative Defense VIII must be stricken.

CONCLUSION

Affirmative Defense I is denied. The Board should strike Affirmative Defenses II through and including VIII because they do not satisfy the Board's standard for affirmative defenses, and because they are covered by the "law of the case" doctrine, as set forth above.

Dated: March 4, 2011

Respectfully submitted,

Elmhurst Memorial Healthcare
Elmhurst Memorial Hospital

By: _____
One of their attorneys

Carey S. Rosemarin (ARDC No. 6181911)
Andrew J. Marks (ARDC No. 6286796)
Law Offices of Carey S. Rosemarin, P.C.
500 Skokie Boulevard, Suite 510
Northbrook, IL 60062
847-897-8000
312-896-5786 (fax)
csr@rosemarinlaw.com
ajm@rosemarinlaw.com

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Respondents.	)	

CERTIFICATE OF SERVICE

I, the undersigned, on March 4, 2011 caused the foregoing "Complainants' Response to Affirmative Defense I and Motion to Strike Affirmative Defenses II Through VIII" 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, by electronic means, 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
jgirardi@henderson-lyman.com
rchristie@henderson-lyman.com

One of the Attorneys for
Elmhurst Memorial Healthcare
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Carey S. Rosemarin (ARDC No. 6181911)
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csr@rosemarinlaw.com
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