BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ELMHURST MEMORIAL HEALTHCARE and ELMHURST MEMORIAL HOSPITAL,	)	
Complainants,	)	No. PCB 2009-086
vs.	)	(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 March 25, 2011, we filed with the clerk of the Illinois Pollution Control Board an original and nine copies of Response of Chevron U.S.A. and Texaco Inc. to Complainants' Motion to Strike Affirmative Defenses to Amended Complaint, a copy of which is attached and served upon you.

CHEVRON U.S.A. INC. and
TEXACO INC.

Dated: March 25, 2011

By: _____
One of their attorneys

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

PROOF OF SERVICE BY MAIL

I, Douglas M. Grom, on oath, state that I served a copy of this Notice and Response of Chevron U.S.A. and Texaco Inc. to Complainants' Motion to Strike Affirmative Defenses to Amended Complaint 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 March 25, 2011.

Douglas M. Grom

Douglas M. Grom

Subscribed and sworn to before
me this 25th day of March, 2011.

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

RESPONSE OF CHEVRON U.S.A. INC. AND TEXACO INC. TO COMPLAINANTS' MOTION TO STRIKE AFFIRMATIVE DEFENSES TO AMENDED COMPLAINT

Respondents, Chevron U.S.A. Inc. and Texaco Inc. ("Respondents"), by their attorneys Henderson & Lyman, and for their response to the motion of Complainants, Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital ("Complainants"), to strike Affirmative Defenses Nos. II – VIII to the Amended Complaint, state as follows:

Affirmative Defense No. II - Discharge in Bankruptcy

Affirmative Defense No. II – Discharge in Bankruptcy is identical to the Affirmative Defense No. II filed in respect to Complainants' Original Complaint. As such, and as part of Respondents' argument in support of Affirmative Defense No. II, Respondents adopt and incorporate herein by reference the (i) *Response of Chevron U.S.A. Inc. to Motion to Strike Affirmative Defenses*, (ii) *Response of Chevron U.S.A. Inc. to Complainants' Motion to File Reply Instanter*, and (iii) *Sur-Reply of Chevron U.S.A. Inc. to Complainants' Reply in Support of Complainants' Motion to Strike Affirmative Defenses* filed with the Illinois Pollution Control Board ("Board") on June 26, 2009, July 21, 2009, and

August 25, 2009, respectively, all of which were filed in respect to the identical affirmative defense to the Original Complaint.

Inexplicably, Complainants state that the Board previously ruled against this defense. It is undisputed, however, that the Board refused to strike Affirmative Defense No. II to the Original Complaint. In its Order dated March 18, 2010 ("March Order"), the Board stated, in respect to Affirmative Defense No. II, "[T]here is a possibility that Chevron may prevail if the facts alleged in the affirmative defense are proven true. Therefore, the Board denies the motion to strike the affirmative defense." Elmhurst Memorial Healthcare v. Chevron U.S.A., PCB 09-066, slip op. at 22 (Mar. 18, 2010).

Respondents agree that the law of the case doctrine applies to the Board's March Order. As the March Order clearly states that Affirmative Defense No. II, entitled Discharge in Bankruptcy, has **not** been stricken by the Board, Complainants' position that Affirmative Defense No. II be stricken at this time is completely inconsistent with the law of the case established by the Board. Complainants may not selectively choose when to apply the law of the case doctrine; thus, Affirmative Defense No. II continues to be a valid defense.

Respondents, therefore, respectfully request that the Board enter an order denying Complainants' Motion to Strike Affirmative Defense No. II and for any further relief the Board deems appropriate.

Affirmative Defense No. III – Jurisdiction – Act Not Applicable

Affirmative Defense No. III – Jurisdiction – Act Not Applicable is identical to the Affirmative Defense No. III filed in respect to Complainants' Original Complaint. As such, and as part of Respondents' argument in support of Affirmative Defense No. III,

Respondents adopt and incorporate herein by reference the *Response of Chevron U.S.A. Inc. to Motion to Strike Affirmative Defenses* filed with the Board on June 26, 2009 in respect to the Original Complaint.

Complainants once again incorrectly state that the Board previously ruled against this defense. The Board has not rejected or stricken this defense. In fact, the Board specifically stated in its March Order that the "facts of this affirmative defense and the reasonable inferences drawn therefrom, raise the possibility that Chevron will prevail on this issue." Id. at 23. Thus, the Board denied Complainants' Motion to Strike Affirmative Defense No. III on March 18, 2010. Id.

Complainants, however, are trying to confuse the issue by blurring two separate and distinct Board Orders. When Complainants state that the Board has rejected this affirmative defense, Complainants cite to the Board's Order dated December 16, 2010 ("December Order"), which was the Order detailing the Board's decision regarding Respondents' Motion to Dismiss the Amended Complaint. The December Order was not intended to address the sufficiency of Respondents' Affirmative Defenses; it simply addresses the Board's reasoning for denying the Motion to Dismiss the Amended Complaint.

The standard used for ruling on a motion to dismiss and the standard used for allowing or striking an affirmative defense are completely different. The Board explained that when ruling on a motion to dismiss, "a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Elmhurst Memorial Healthcare v. Chevron U.S.A., PCB 09-066, slip op. at 14 (Dec. 16, 2010), *citing* Smith v. Central Illinois Regional Airport,

207 Ill. 2d 578, 584-85 (2003). Furthermore, when ruling on an affirmative defense, the Board will not strike an affirmative defense that alleges "...arguments that, if true, will defeat...[the] claim even if all allegations in the complaint are true." Elmhurst Memorial Healthcare v. Chevron U.S.A., PCB 09-066, slip op. at 20 (Mar. 18, 2010), *citing* People v. Community Landfill Co., PCB 97-193, slip op. at 3. (Aug. 6, 1998). The Board further explained that an affirmative defense is a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action." Id., *citing* Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n. 1 (Jan. 23, 1997). Complainants are trying to apply the motion to dismiss standard and reasoning to Respondents' Affirmative Defenses, which is incorrect and misleading. The December Order does not change the Board's decisions regarding the Affirmative Defenses found in the March Order, which is the law of the case.

The Board has never stricken Affirmative Defense No. III. In fact, in the "Procedural Background" section of the December Order, the Board summarized its decisions found in the March Order, stating, "On March 18, 2010, the Board issued an order **denying the Complainant's motion to strike Affirmative Defenses No. II and III**, and granting the Complainant's motion to strike Affirmative Defenses Nos. IV through IX." Elmhurst Memorial Healthcare v. Chevron U.S.A., PCB 09-066, slip op. at 2 (Dec. 16, 2010) (emphasis added). The Board went on to say that "Chevron [pleaded] the ultimate facts necessary to establish Affirmative Defenses No. II and III." Id. Thus, the Board previously allowed Affirmative Defense No. III to stand and the law of the case doctrine prevents Complainants from arguing that that the Board should strike it at this time. Respondents, therefore, respectfully request that the Board enter an order

denying Complainants' Motion to Strike Affirmative Defense No. III and for any further relief the Board deems appropriate.

Affirmative Defense No. IV – Jurisdiction – No Authority to Award Cost Recovery

Respondents agree that Affirmative Defense No. IV – Jurisdiction - Authority to Award Cost Recovery is identical to the Affirmative Defense No. IV filed in respect to Complainants' Original Complaint. As part of Respondents' argument in support of Affirmative Defense No. IV, Respondents adopt and incorporate herein by reference the *Response of Chevron U.S.A. Inc. to Motion to Strike Affirmative Defenses* filed with the Board on June 26, 2009 in respect to the Original Complaint. Respondents further agree that the Board struck this affirmative defense in its March Order ruling on Complainants' motion to strike the affirmative defenses to the Original Complaint.

Nevertheless, as Complainants have filed the Amended Complaint, which, *inter alia*, names Texaco Inc. as an additional party respondent, it is necessary and required that Respondents reallege this affirmative defense to the Amended Complaint in order to preserve the record for appeal.

Affirmative Defense No. V - Primary Implied Assumption of the Risk and Affirmative Defense No. VI - Secondary Implied Assumption of the Risk

Complainants incorrectly state that Affirmative Defenses Nos. V and VI are identical to Chevron U.S.A.'s Affirmative Defenses Nos. V and VI to the Original Complaint. To the contrary, Respondents significantly amended these defenses to comply with the requirements of the Board's March Order, and it would be premature to strike these defenses at this time.

In these defenses, Respondents allege that the Amended Complaint alleges that

Complainants are a major health care organization that employs a staff of more than 3,000 people, in 2005 Complainants identified the Property as a site which they were interested in acquiring, and Complainants closed on the purchase of the Property in that year. The defenses further allege that, at the time of Complainants' acquisition of the Property, the Property was improved commercial real estate, being improved with the building that was formerly used as the filling station building when the Property was operated as a filling station. The defenses further allege that it is usual and customary, and part of the standard conditions of a real estate purchase contract, that a buyer of commercial real estate will undertake an investigation of the environmental condition of the real estate, and that the results of such investigation must be acceptable to the buyer.

The defenses further allege that such an investigation begins with a Phase I environmental audit, which is performed by a licensed environmental consultant, and includes a physical inspection of, and a review of all records available to the public regarding the site. The defenses further allege that the results of the Phase I environmental audit provide a buyer of commercial real estate with knowledge of the past and current uses of the site, whether the site may be environmentally impacted, and whether to perform a Phase II or other additional environmental investigations, including sampling and laboratory analysis of the soil and groundwater on the site, to better determine the environmental condition of the site.

The defenses further allege that a buyer of commercial real estate, armed with the results of such an environmental investigation, then determines whether to assume the risks of the environmental condition of the site, negotiate changes to the purchase contract to provide for remediation of the site, or determine not to acquire the site at all. The

defenses further allege that had Complainants performed a Phase I environmental audit of the Property, Complainants would have known that the Property had previously been used as a gasoline filling station, that USTs may be, or were, present on the Property and that the soil and/or groundwater on the Property may be, or was, contaminated by releases of gasoline or other petroleum products.

The defenses further allege that Complainants are sophisticated buyers and users of commercial real estate, the Amended Complaint does not state that Complainants performed a Phase I or other environmental investigation of the Property before acquiring the Property, Complainants, therefore, assumed the risk of USTs and releases of gasoline or other petroleum being present on the Property, and, consequently, Complainants assumed the risk of incurring the cost of removal of the USTs and remediation of the Property. The defenses further allege that Complainants' purported ignorance of the environmental condition of the Property, through simply electing not to perform an environmental investigation of the Property before purchasing it, does not relieve them of having assumed this risk.

The defenses further allege that at the time of Complainants' acquisition of the Property, the Property was located on a corner of a main thoroughfare in a business area of Lombard, Illinois, the former filling station building was present on the Property, and Complainants, therefore, knew or should have known, even without the benefit of an environmental investigation, that the Property could have been used as a filling station in the past.

The applicable case law is clear that each of these two assumption-of-the-risk defenses is a viable affirmative defense recognized by Illinois courts. Russo v. The

Range, Inc., 76 Ill. App. 3d 236, 238 (1st Dist. 1979). The Illinois Appellate Court has held that "under the implied form of assumption of risk, plaintiff's willingness to assume a known risk is determined from the conduct of the parties rather than from an explicit agreement", while the "primary [assumption of the risk] label has been applied to situations where a plaintiff has assumed known risks inherent in a particular activity or situation." Duffy v. Midlothian Country Club, 135 Ill. App. 3d 429, 433 (1st Dist. 1985).

Additionally, as the Illinois Appellate Court has explained, implied assumption of the risk involves "some type of relationship with the defendant." Russo, 76 Ill. App. 3d at 238. The Russo court gave the example of a baseball fan choosing "an unscreened seat at a ball park and 'impliedly' consenting to permit the players to proceed without taking precaution to protect the fan from being hit by a foul [ball]." Id. Furthermore, the Russo court explained that "essential to all these situations is specific knowledge on the part of the plaintiff of the risk he is about to be subjected to...[and] the test for assumption of risk [is] a fundamentally **subjective** one." Id (emphasis added). Also, the Russo court noted that "a plaintiff cannot elude its application with protestations of ignorance in the face of obvious danger." Id.

Furthermore, the Illinois Appellate Court explained in another case that "the doctrine of assumption of risk presupposes that the danger which caused the injury was one which ordinarily accompanies the activities of the plaintiff and that the plaintiff knew, **or should have known**, that both the danger and the possibility of injury existed before the occurrence." Falkner v. Hinckley Parachute Center, Inc., 178 Ill. App. 3d 597, 602 (2d Dist. 1989) (emphasis added).

Here, Complainants, who are admittedly sophisticated business organizations employing more than 3,000 people, sought to acquire improved commercial real estate, located on the corner of a main thoroughfare, improved with a service station type of building; yet, according to their Amended Complaint, they did so without performing a Phase I environmental audit. The Phase I audit would have disclosed that the Property had been used as a filling station, the presence of, or at least the risk of, USTs and contamination being on the Property, before Complainants closed on the Property. The defenses allege this inaction is in direct contravention to the usual and customary practice in commercial real estate transactions.

These facts directly relate to the Complainants' conduct, and courts specifically look at a party's conduct to determine assumption of risk. Duffy, 135 Ill. App. 3d at 433. As the Board has stated in previous opinions, a respondent has a valid affirmative defense if the respondent alleges facts or arguments that, if true, will defeat the claim. Elmhurst Memorial Healthcare v. Chevron U.S.A., PCB 09-066, slip op. at 20 (Mar. 18, 2010), *citing* People v. Community Landfill Co., PCB 97-193, slip op. at 3. (Aug. 6, 1998). These defenses fall squarely within that standard. Simply electing not to perform an environmental investigation of the property before purchasing it does not relieve Complainants of having assumed the inherent risk that USTs or releases of gasoline or other petroleum products were present on the property. Consequently, Complainants have assumed the risk of incurring the cost of removal of the USTs and remediation of the property.

As Respondents have clearly alleged the necessary facts to support these affirmative defenses, and as it is Respondents' burden at trial to prove the existence of

these facts and circumstances after having the opportunity to complete discovery, it is entirely reasonable to determine, at this early stage of the proceedings, that Respondents may prevail on these defenses at trial.

Thus, Respondents respectfully request that the Board enter an order denying Complainants' Motion to Strike Affirmative Defenses Nos. V and VI and for any further relief the Board deems appropriate.

Affirmative Defense No. VII - Statute of Limitations

Affirmative Defense No. VII should not be stricken because it is a new defense, alleges facts which, if proven at trial would defeat the claims made in the Amended Complaint, and it would be premature to strike it when discovery has not been completed. In this defense, Respondents allege that Complainants are private citizens bringing an action for cost recovery and that the five-year statute of limitations, Section 13-205 of the Code of Civil Procedure, 735 ILCS 5/13-205, is applicable.

The defense further alleges that the Amended Complaint alleges that releases from the USTs occurred from 1959 - 1977, when Texaco Inc. was the owner or operator of a gasoline filling station at the Property. The defense further alleges that Complainants' cause of action against Texaco Inc. under the statute of limitations accrued no later than December 31, 1977. The defense further alleges that Texaco Inc. was first named as a Respondent in the Amended Complaint, the Amended Complaint was not served on Texaco Inc. until June 11, 2010, more than 32 years after the cause of action accrued, and Complainants' cause of action is, therefore, time barred by the five-year statute.

The defense further alleges that the five-year limitation period may be extended

by the "discovery rule," which would require that Complainants did not know, nor should Complainants have reasonably known, of the existence of their cause of action before June 11, 2005. The defense further alleges that the Amended Complaint admits that Complainants "identified the Property" and "purchased the Property" in 2005, but fails to allege any specific dates in 2005 for those actions. The defense further alleges that Complainants, therefore, may have known or reasonably should have known of the existence of their cause of action before June 11, 2005 and their cause of action would be barred by the statute of limitations under the "discovery rule" also.

It is well settled that statutes of limitation apply to cost recovery actions brought by private citizens. Caseyville Sport Choice, LLC v. Erma I. Seiber, PCB No. 08-030 (Oct. 16, 2008); Union Oil Company of California d/b/a Unocal v. Barge-Way Oil Company, Inc., PCB No. 98-169 (Jan. 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:

> 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. Id.

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 limitations period, the allegations of the affirmative defense would defeat Complainants' claims at trial.

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 (Feb. 15, 2001); Caseyville, PCB No. 08-030 (Oct. 16, 2008). In order to survive the bar of the statute of limitations, Complainants 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 affirmative defense, however, alleges that Complainants do 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 any way 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 the exact date in 2005 on which Complainants closed on the Property and whether Complainants performed any due diligence before closing on the Property. Moreover, in the motion to strike this defense, Complainants do not state any more specific information than the general allegations of the Amended Complaint. Complainants could have put the issue to rest by making affirmative allegations regarding when they closed on the Property, what pre-closing investigations they made and when they were made, when Complainants received any knowledge from those investigations and what they learned. But Complainants have chosen not to do so, creating the inference that they cannot meet the requirements of the statute of limitations in this matter. The discovery process, however, will provide the necessary facts to determine this issue. Therefore, it would be prejudicial to Respondents and

premature to strike this defense before discovery has been completed.

Additionally, Complainants' statement that the Board has previously ruled against this defense is disingenuous. In the December Order, the Board denied Respondents' motion to strike the Amended Complaint on the basis of the statute of limitations. As indicated earlier in this Response, however, the Board's ruling on a defense in terms of a motion to dismiss is not dispositive or controlling of the Board's ruling on that same defense in terms of it being alleged as an affirmative defense. See pages 3 - 4 infra. Moreover, the Board's December Order on the statute of limitations specifically envisions the limitations defense being pleaded by Respondents as an affirmative defense stating, "This is not to say that the Board finds that Complainants prevail on any statute of limitations issue that may arise in this case. However, when considering the limited record before the Board . . . there does exist a set of facts in which Complainants may prevail." Elmhurst Memorial Healthcare v. Chevron U.S.A., PCB 09-066, slip op. at 18 (Dec. 16, 2010) By allowing this affirmative defense to stand and discovery on it to take place, all of the facts will be known, and a complete, rather than limited, record will be available to the Board. At that time, there may not be any set of facts in which Complainants would prevail.

Thus, Respondents respectfully request that the Board enter an order denying Complainants' Motion to Strike Affirmative Defense No. VII and for any further relief the Board deems appropriate.

Affirmative Defense No. VIII - Laches

Affirmative Defense No. VIII – Laches is identical to the Affirmative Defense No. IX - Laches filed in respect to Complainants' Original Complaint. As such, and as part

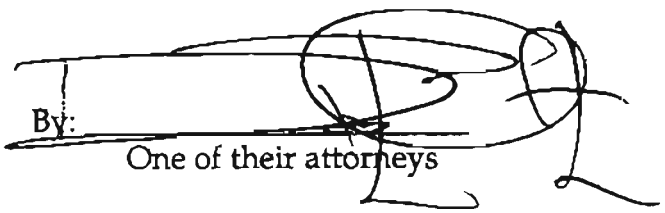
of Respondents' argument in support of Affirmative Defense No. VIII, Respondents adopt and incorporate by reference the *Response of Chevron U.S.A. Inc. to Motion to Strike Affirmative Defenses* filed with the Board on June 26, 2009 filed in respect to the Amended Complaint.

Respondents agree that the Board struck this affirmative defense in its March Order ruling on Complainants' motion to strike the affirmative defenses to the Original Complaint. Nevertheless, as Complainants have filed the Amended Complaint, which, *inter alia,* names Texaco Inc. as an additional party respondent, it is necessary and required that Respondents reallege this affirmative defense to the Amended Complaint in order to preserve the record for appeal.

Respondents, therefore, respectfully request that the Board enter an order denying Complainants' Motion to Strike Affirmative Defense No. VIII and for any further relief the Board deems appropriate.

Respectfully submitted,

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



By:
One of their attorneys

Dated: March 25, 2011

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