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UTAH WATER QUALITY BOARD

IN THE MATTER OF CHEVRON
PIPELINE COMPANY,

SALT LAKE CITY, UTAH

DOCKET NUMBER I10-1
(Docket Nos. I10-01SA, I10-05SA)

**COMMENTS BY CERTAIN
PROPERTY OWNERS REGARDING
PROPOSED ADMINISTRATIVE
SETTLEMENT ORDER**

We are legal counsel for a number of residential property owners whose properties have been and continue to be directly and indirectly impacted by the oil pollution events in Red Butte Creek (“Impacted Property Owners,” listed as Exhibit A hereto) that are the subject of the above-referenced docket numbers and proposed settlement agreement. These comments are submitted pursuant to R317-8-1.9, Utah Administrative Code.

In response to, and because of, the oil pollution events at issue, certain of the Impacted Property Owners, at their own expense, have obtained independent consulting services from various environmental engineering and services firms, including HDR Engineering, Inc. (“HDR”), Wasatch Environmental, Inc. (“Wasatch”), and more recently, Boston Chemical Data Corporation (“BCD”). The following comments are based, in part, on information derived from these technical consultants.

A voluntary settlement of claims arising from the release of petroleum and other environmental toxins in violation of law, including the settlement of natural resource damages, must be fair, reasonable, and consistent with the relevant statutes. *See, e.g., Utah v. Kennecott Corp.*, 801 F.Supp. 553 (D. Utah 1992), *appeal dismissed*, 14 F.3d 1489 (10th Cir. 1994). The proposed Settlement Agreement does not satisfy the applicable legal standards and therefore must be rejected. Because the Settlement

Agreement is unsupported by evidence in the administrative record and is otherwise arbitrary and capricious, we offer the following comments in support of our recommendation that the proposed Settlement Agreement be rejected in its entirety.

COMMENTS

COMMENT NO. 1: Water Quality Violations Persist in Red Butte Creek

The Notices of Violation (“NOVs”) at issue in the proposed Settlement Agreement among the state of Utah, Salt Lake City, and Chevron Pipe Line Company (“Chevron”) are based on clear violations of legal water quality standards applicable to Red Butte Creek. The proposed Settlement Agreement, Paragraph 3, “settles the violations in the NOVs except as provided in ¶8.iii below.” This language suggests that the water quality violations that are the subject of the NOVs will have been resolved as a result of the Settlement Agreement. This conclusion is not supported by the administrative record and is therefore arbitrary and capricious. The limited administrative record available to the Impacted Property Owners, the limited data set provided by the Utah Division of Water Quality (“DWQ”) on its website, amply demonstrates a continuing violation of applicable water quality standards due to the presence of petroleum hydrocarbons resulting from the pipeline spill(s).

Ever since June of 2010, the Impacted Property Owners have been greatly concerned about the environmental impacts resulting from the two Chevron petroleum releases. For example, the concrete-lined trout pond at the Riedel Property has been drained, power-washed, and cleaned on over 15 different occasions since June 12, 2010. Despite these extensive remediation efforts, visible oil sheen has been present at the Riedel trout pond each and every day it has been observed since June 12, 2010, continuing to the date of these comments. The visible oil sheen detected every day the pond has been observed at the Riedel trout pond since June 12, 2010 and continuing to the date of these comments clearly originates upstream from the Riedel property and then flows downstream from the Riedel property. Thus, the water quality impacts demonstrated at the Riedel trout pond are also present throughout Red Butte Creek, including all of the other Petitioners’ properties.

In order to better understand the petroleum impacts to their properties, the Impacted Property Owners recently hired BCD to take environmental samples relating to Red Butte Creek, including water and sediments. The sampling work was performed on August 10 through August 12, 2011, close to the same time period that DWQ was also performing sampling work. We refer you to the BCD “Report on chemical quality analyses at Red Butte Creek, Salt Lake City, UT” dated October 3, 2011 (the “BCD Report”). A copy of the BCD Report, and related backup documentation, is attached hereto under TAB 1. The BCD Report concludes, in part, that “Property owners on Red Butte Creek continue to experience degradation of the waterway, and limitations

on their use of the waterway due to poor water quality. The degradation in water quality is caused by the presence of petroleum hydrocarbons, including PAHs [polynuclear aromatic hydrocarbons] at levels above regulatory standards.” BCD Report at 2. A table of PAH levels in excess of relevant criteria is included at page 3 of the BCD Report. The BCD Report also detected the presence, as of August 2011, of PAH levels in the surface water in the Riedel pond, for example, exceed the swimmable waters standards by 200 times and the drinking water standards by 800 times. PAH substances are highly carcinogenic and otherwise toxic. The following table appears in the BCD Report:

Benzo(a)pyrene was at 0.021 mg/L in Riedel pond, which is greater than the following limits:
0.002 mg/L Public notification level, SDWA, B(a)P
0.0002 mg/L SDWA MCL B(a)P
0.0028 mg/L Human health 10-6 cancer risk, B(a)P
0.0028 mg/L EPA ambient water quality criteria, B(a)P
0.00012 mg/L (AZ), B(a)P full body contact limit
Benzo(g,h,i)perylene was at 0.031 mg/L in Riedel pond, which is greater than the following limit:
0.00012 mg/L (AZ), Benzo(g,h,i)perylene full body contact limit
Chrysene was at 0.024 mg/L in Riedel pond, which is greater than the following limits:
0.00012 mg/L (AZ), chrysene full body contact limit
0.00003 mg/L domestic water supply limit (DWS)

Photograph 1 from the BCD Report shows the petroleum sheen that has been continuously present at the Riedel trout pond, every day that it has been observed since June 10, 2010 and continuing to the date of these comments. This photograph was taken on a calm afternoon on August 10, 2011:



The continuing presence of petroleum hydrocarbons in excess of regulatory standards is no small matter for the Impacted Property Owners and other people who use Red Butte Creek. We are surprised that DWQ has not been more vigilant in enforcing legal water quality standards in order to protect the health and welfare of private property owners and other people who use Red Butte Creek. In any event, the Settlement Agreement is not supported by the administrative record inasmuch as water quality violations continue. Thus, the Settlement Agreement is in violation of law because it presumes that no current and ongoing violations exist, is arbitrary and capricious, and represents a clear abuse of discretion.

COMMENT NO. 2: The Liability Release for Natural Resource Damages Is Illegal and Arbitrary and Capricious

In the proposed Settlement Agreement, the State of Utah and Salt Lake City both provide a robust, open-ended, general liability release to Chevron, including express reference to “natural resource damages.” Yet there is nothing in the administrative

record to suggest that any attempt has been made to evaluate the injury to natural resources and to otherwise comply with the Oil Pollution Act and applicable regulations and other guidance, in connection with the Mitigation Projects or otherwise in connection with the response to the oil spills or in connection with the Settlement Agreement.

Enacted as an amendment to the federal Clean Water Act, the Oil Pollution Act (“OPA”) provides for liability, among other things, for damages to natural resources arising from the release of petroleum. In fact, a major goal of OPA is to restore natural resources that are injured and services that are lost as a result of oil spills. Accordingly, the OPA provides that responsible parties must not only pay for natural resource damages but also for the costs of “assessing” natural resource damages, pursuant to 33 U.S.C. § 2702(b)(2)(A) (providing for the recovery of “Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.”).

The Oil Pollution Act, 33 U.S.C. § 2706 provides further, with respect to natural resource damages:

(a) Liability

In the case of natural resource damages under section 2702(b)(2)(A) of this title, liability shall be—

- (1) to the United States Government for natural resources belonging to, managed by, controlled by, or appertaining to the United States;
- (2) to any State for natural resources belonging to, managed by, controlled by, or appertaining to such State or political subdivision thereof;
- (3) to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such Indian tribe; and
- (4) in any case in which section 2707 of this title applies, to the government of a foreign country for natural resources belonging to, managed by, controlled by, or appertaining to such country.

(b) Designation of trustees

(1) In general

The President, or the authorized representative of any State, Indian tribe, or foreign government, shall act on behalf of the public, Indian tribe, or foreign country as trustee of natural resources to present a claim for and to recover damages to the natural resources.

(2) Federal trustees

The President shall designate the Federal officials who shall act on behalf of the public as trustees for natural resources under this Act.

(3) State trustees

The Governor of each State shall designate State and local officials who may act on behalf of the public as trustee for natural resources under this Act and shall notify the President of the designation.

(4) Indian tribe trustees

The governing body of any Indian tribe shall designate tribal officials who may act on behalf of the tribe or its members as trustee for natural resources under this Act and shall notify the President of the designation.

(5) Foreign trustees

The head of any foreign government may designate the trustee who shall act on behalf of that government as trustee for natural resources under this Act.

(c) Functions of trustees

(1) Federal trustees

The Federal officials designated under subsection (b)(2) of this section—

(A) shall assess natural resource damages under section 2702(b)(2)(A) of this title for the natural resources under their trusteeship;

(B) may, upon request of and reimbursement from a State or Indian tribe and at the Federal officials' discretion, assess damages for the natural resources under the State's or tribe's trusteeship; and

(C) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(2) State trustees

The State and local officials designated under subsection (b)(3) of this section—

(A) shall assess natural resource damages under section 2702(b)(2)(A) of this title for the purposes of this Act for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

* * * * *

(5) Notice and opportunity to be heard

Plans shall be developed and implemented under this section only after adequate public notice, opportunity for a hearing, and consideration of all public comment.

(d) Measure of damages

(1) In general

The measure of natural resource damages under section 2702(b)(2)(A) of this title is—

(A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;

(B) the diminution in value of those natural resources pending restoration; plus

(C) the reasonable cost of assessing those damages.

(2) Determine costs with respect to plans

Costs shall be determined under paragraph (1) with respect to plans adopted under subsection (c) of this section.

(3) No double recovery

There shall be no double recovery under this Act for natural resource damages, including with respect to the costs of damage assessment or restoration, rehabilitation, replacement, or acquisition for the same incident and natural resource.

(e) Damage assessment regulations

(1) Regulations

The President, acting through the Under Secretary of Commerce for Oceans and Atmosphere and in consultation with the Administrator of the Environmental Protection Agency, the Director of the United States Fish and Wildlife Service, and the heads of other affected agencies, not later than 2 years after August 18, 1990, shall promulgate regulations for the assessment of natural resource damages under section 2702(b)(2)(A) of this title resulting from a discharge of oil for the purpose of this Act.

(2) Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this Act made under subsection (d) of this section by a Federal, State, or Indian trustee in accordance with the regulations promulgated under paragraph (1) shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act.

(f) Use of recovered sums

Sums recovered under this Act by a Federal, State, Indian, or foreign trustee for natural

resource damages under section 2702(b)(2)(A) of this title shall be retained by the trustee in a revolving trust account, without further appropriation, for use only to reimburse or pay costs incurred by the trustee under subsection (c) of this section with respect to the damaged natural resources. Any amounts in excess of those required for these reimbursements and costs shall be deposited in the Fund.

(g) Compliance

Review of actions by any Federal official where there is alleged to be a failure of that official to perform a duty under this section that is not discretionary with that official may be had by any person in the district court in which the person resides or in which the alleged damage to natural resources occurred. The court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party. Nothing in this subsection shall restrict any right which any person may have to seek relief under any other provision of law.

A central feature of the natural resource assessment and settlement process involves meaningful public participation in compliance with the OPA and related regulations: 33 U.S.C. § 2706(a)(5) (“Plans shall be developed and implemented under this section only after adequate public notice, opportunity for a hearing, and consideration of all public comment.”).

Responsibility for acting on behalf of the public lies with designated federal, state, tribal, and foreign natural resource trustees. OPA directs trustees to (1) return injured natural resources and services to the condition they would have been in if the incident had not occurred, and (2) recover compensation for interim losses of such natural resources and services through the restoration, rehabilitation, replacement, or acquisition of equivalent natural resources or services.

As required by the OPA, the National Oceanic and Atmospheric Administration (“NOAA”) published a final rule to guide trustees in assessing damages to natural resources from a discharge of oil. The rule provides a blueprint that enables natural resource trustees to focus on significant environmental injuries, to plan and implement efficient and effective restoration of the injured natural resources and services, and to encourage public and responsible party involvement in the restoration process.

Under the rule, the natural resource damage assessment (NRDA) process is divided into three phases:

- **Preassessment.** The trustees evaluate injury and determine whether they have the authority to pursue restoration and if it is appropriate to do so.
- **Restoration planning.** The trustees evaluate and quantify potential injuries and use that information to determine the appropriate type and scale of restoration actions.
- **Restoration implementation.** The trustees and responsible parties implement restoration, including monitoring and corrective actions.

This process is designed to rapidly restore injured natural resources and services to the condition that would have existed had the spill not occurred, and to compensate the public for the losses experienced from the date of the spill until the affected natural resources and services have recovered. The primary purpose of the natural resource damage assessment, restoration planning, and environmental assessment process is to inform the public concerning the natural resource trustees' authorities and responsibilities under the Oil Pollution Act (OPA) (33 § 2701, *et seq.*), to assess the nature and extent of natural resource damages, to assess appropriate restoration projects necessary to mitigate the damages, all through an open public process in which the general public, including people who have been directly impacted by the pollution, the opportunity to be engaged in the process. None of these procedures have even been attempted here.

Because no attempt has even been made to assess natural resource damages, to identify and quantify restoration projects, and to otherwise involve the public in this process, the unqualified release of any and all natural resource damages by the State of Utah and the City of Salt Lake is illegal, arbitrary and capricious and their entry into the Settlement Agreement represents a clear abuse of discretion. In State of Utah v. Kennecott, 801 F.Supp. at 563-564, Judge Greene rejected a proposed consent decree settling natural resource damages asserted by the State of Utah for groundwater contamination relating to Kennecott Copper. In that case, the judge allowed the Salt Lake County Water Conservancy District to intervene and present evidence that the underlying settlement was not legal or fair. The court rejected the proposed administrative settlement agreement (consent decree), in part, because the state did not follow the federal regulations in developing a sufficient factual foundation to support its determination that contaminated ground waters could not be remediated: "In this case the State chose not to follow the existing federal regulations in making its determinations." Id. at 567-68. These regulations included the requirement to determine whether there has been an injury to natural resources. Id. at 568 n.15 ("Among other things the regulations require the Trustee to determine whether there has been an injury to the natural resources (43 C.F.R. § 11.61 - .64), to quantify the amount of the natural resources damaged (43 C.F.R. § 11.70 - .73), and to assess the dollar amount of damages to be paid (43 C.F.R. § 11.80 - .84).").

COMMENT NO. 3: The Civil Penalty of Approximately \$649 Per Penalty Day Is Arbitrary, Capricious, and Grossly Insufficient

The Settlement Agreement proposes to settle both NOV's for the payment of \$500,000. The first NOV relates to the oil pollution event that started on or about June 12, 2010. As of October 1, 2011 the water quality violations related to this NOV have been in effect for 475 consecutive days. As noted in Comment No. 1, water quality violations related to this pollution event persist in Red Butte Creek. Therefore there is no factual basis in the record to close the NOV.

The Utah Code provides for three levels of civil penalties for violations. Under the first level, civil penalties of up to \$10,000 per day may be imposed for violations of the Utah Water Quality Act based on simple negligence. For violations resulting from circumstances involving criminal negligence, civil penalties may be up to \$25,000 per day. For violations resulting from willful criminal violations, civil penalties may be up to \$50,000 per day. *See* Utah Code Ann. § 19-5-115.

Under the first NOV, potential civil penalties are \$4,750,000 as of October 1, 2011 under the simple negligence standard and up to \$11,875,000 for violations arising in circumstances involving criminal negligence.

The second NOV relates to the pipeline spill that occurred on December 1, 2010. The NOV finds that this pollution event also impacted water quality in Red Butte Creek. *See* Findings of Fact No. 7 (“While the initial response by Chevron prevented the surface flow of crude oil from reaching the creek, the release did impact waters of the state as evidenced by sampling conducted by the Division of Water Quality on December 2, 2010.”). As demonstrated by the administrative record and other information provided herein, these water quality violations persist and continue to impact the Impacted Property Owners and other members of the public. As of October 1, 2011, the water quality violations relating to this NOV have been in effect for 305 consecutive days. The potential civil penalty under the simple negligence standard for this NOV is \$3,050,000. The potential civil penalty for circumstances amounting to criminally negligent conduct would be \$7,625,000. *See* Utah Code Ann. § 19-5-115.

Thus, the total range of civil penalties for these two NOVs is \$7,800,000 under the simple negligence \$10,000 per day standard, and \$19,500,000 under the \$25,000 per day standard involving criminally negligent circumstances. We are not aware of any claim by EPA for civil penalties under the Clean Water Act relating to these events. The penalties assessed by PHMSA related to violations of pipeline health and safety laws, rules and regulations, not for the release of hazardous materials into the waters of the state.

The proposed settlement of both NOVs is for \$500,000. As of October 1, 2011, a total of 770 days of penalties have accrued under both NOVs. The settlement results not only in a termination of the NOVs despite the continuation of water quality violations, but in a payment equal to \$649.35 per penalty day. This penalty amount is grossly insufficient to satisfy the interests of justice in this matter.

The Utah Administrative Code provides a tremendous amount of detail about the standards and considerations applicable to the calculation of civil penalties for violations of the Utah Water Quality Act. There is nothing in the administrative record

to demonstrate what methodology DWQ employed in calculating the \$500,000 penalty, or approximately \$649 per penalty day. Any objective application of the assessment methodology and standards set forth in the Utah Administrative Code demonstrates that the \$649 per day civil penalty is arbitrary and capricious.

Utah Administrative Code, R317-1-8, Penalty Criteria for Civil Settlement Negotiations, provides as follows:

8.1 Introduction. Section 19-5-115 of the Water Quality Act provides for penalties of up to \$10,000 per day for violations of the act or any permit, rule, or order adopted under it and up to \$25,000 per day for willful violations. Because the law does not provide for assessment of administrative penalties, the Attorney General initiates legal proceedings to recover penalties where appropriate.

8.2 Purpose And Applicability. These criteria outline the principles used by the State in civil settlement negotiations with water pollution sources for violations of the UWPCA and/or any permit, rule or order adopted under it. It is designed to be used as a logical basis to determine a reasonable and appropriate penalty for all types of violations to promote a more swift resolution of environmental problems and enforcement actions.

To guide settlement negotiations on the penalty issue, the following principles apply: (1) penalties should be based on the nature and extent of the violation; (2) penalties should at a minimum, recover the economic benefit of noncompliance; (3) penalties should be large enough to deter noncompliance; and (4) penalties should be consistent in an effort to provide fair and equitable treatment of the regulated community.

In determining whether a civil penalty should be sought, the State will consider the magnitude of the violations; the degree of actual environmental harm or the potential for such harm created by the violation(s); response and/or investigative costs incurred by the State or others; any economic advantage the violator may have gained through noncompliance; recidivism of the violator; good faith efforts of the violator; ability of the violator to pay; and the possible deterrent effect of a penalty to prevent future violations.

8.3 Penalty Calculation Methodology. The statutory maximum penalty should first be calculated, for comparison purposes, to determine the potential maximum penalty liability of the violator. The penalty which the State seeks in settlement may not exceed this statutory maximum amount.

The civil penalty figure for settlement purposes should then be calculated based on the following formula: CIVIL PENALTY = PENALTY + ADJUSTMENTS - ECONOMIC AND LEGAL CONSIDERATIONS

PENALTY: Violations are grouped into four main penalty categories based upon the nature and severity of the violation. A penalty range is associated with each category. The following factors will be taken into account to determine where the penalty amount will fall within each range:

A. History of compliance or noncompliance. History of noncompliance includes consideration of previous violations and degree of recidivism.

B. Degree of willfulness and/or negligence. Factors to be considered include how much control the violator had over and the foreseeability of the events constituting the violation, whether the violator made or could have made reasonable efforts to prevent the violation, whether the violator knew of the legal requirements which were violated, and degree of recalcitrance.

C. Good faith efforts to comply. Good faith takes into account the openness in dealing with the violations, promptness in correction of problems, and the degree of cooperation with the State.

Category A - \$7,000 to \$10,000 per day. Violations with high impact on public health and the environment to include:

1. Discharges which result in documented public health effects and/or significant environmental damage.
2. Any type of violation not mentioned above severe enough to warrant a penalty assessment under category A.

Category B - \$2,000 to \$7,000 per day. Major violations of the Utah Water Pollution Control Act, associated regulations, permits or orders to include:

1. Discharges which likely caused or potentially would cause (undocumented) public health effects or significant environmental damage.
2. Creation of a serious hazard to public health or the environment.
3. Illegal discharges containing significant quantities or concentrations of toxic or hazardous materials.
4. Any type of violation not mentioned previously which warrants a penalty assessment under Category B.

Category C - \$500 to \$2,000 per day. Violations of the Utah Water Pollution Control Act, associated regulations, permits or orders to include:

1. Significant excursion of permit effluent limits.
2. Substantial non-compliance with the requirements of a compliance schedule.
3. Substantial non-compliance with monitoring and reporting requirements.
4. Illegal discharge containing significant quantities or concentrations of non toxic or non hazardous materials.
5. Any type of violation not mentioned previously which warrants a penalty assessment under Category C.

Category D - up to \$500 per day. Minor violations of the Utah Water Pollution Control Act, associated regulations, permits or orders to include:

1. Minor excursion of permit effluent limits.
2. Minor violations of compliance schedule requirements.
3. Minor violations of reporting requirements.
4. Illegal discharges not covered in Categories A, B and C.
5. Any type of violations not mentioned previously which warrants a penalty assessment under category D.

ADJUSTMENTS: The civil penalty shall be calculated by adding the following adjustments to the penalty amount determined above: 1) economic benefit gained as a result of non-compliance; 2) investigative costs incurred by the State and/or other governmental levels; 3) documented monetary costs associated with environmental damage.

ECONOMIC AND LEGAL CONSIDERATIONS: An adjustment downward may be made or a delayed payment schedule may be used based on a documented inability of the violator to pay.

Also, an adjustment downward may be made in consideration of the potential for protracted litigation, an attempt to ascertain the maximum penalty the court is likely to award, and/or the strength of the case.

8.4 Mitigation Projects. In some exceptional cases, it may be appropriate to allow the reduction of the penalty assessment in recognition of the violator's good faith undertaking of an environmentally beneficial mitigation project. The following criteria should be used in determining the eligibility of such projects:

- A. The project must be in addition to all regulatory compliance obligations;
- B. The project preferably should closely address the environmental effects of the violation;
- C. The actual cost to the violator, after consideration of tax benefits, must reflect a deterrent effect;
- D. The project must primarily benefit the environment rather than benefit the violator;
- E. The project must be judicially enforceable;
- F. The project must not generate positive public perception for violations of the law.

8.5 Intent Of Criteria/Information Requests. The criteria and procedures in this section are intended solely for the guidance of the State. They are not intended, and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the State.

While the intent of the foregoing criteria and procedures are intended solely for “guidance” and create no substantive rights, as provided in Section 8.5, for purposes of administrative law, decisions reached by DWQ must be fair, reasonable, and based on substantial evidence in the administrative record. We have found no information in the administrative record regarding the process or procedures DWQ applied in reaching the assessment amount of \$649 per penalty day. Consideration of relevant information in light of the guidance criteria, this penalty assessment is grossly insufficient to be fair and reasonable under the circumstances presented by this matter. In this respect, we offer the following facts and considerations.

As an introductory matter, available information supports a conclusion that the two oil spills in question were not the result of mere negligence. To the contrary, Chevron’s conduct may be deemed to be willful or criminally negligent.

Pursuant to Utah Code Ann. § 19-5-115 (3) (a): “A person is guilty of a class A misdemeanor and is subject to imprisonment under Section 76-3-204 and a fine not exceeding \$25,000 per day who with criminal negligence: (i) discharges pollutants in violation of Subsection 19-5-107(1)” Criminal negligence is defined under Section 76-2-103, Utah Code as follows: “With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor’s standpoint.”

Available information supports a conclusion that Chevron was criminally negligent in relation to the NOV's as defined under Utah law and as a result, should be subject to civil penalties of up to \$25,000 per day, as recited in both NOV's. In any event, a party's relative negligence should be considered when assessing civil penalties, as provided in R317-1-8.3 ("Degree of willfulness and/or negligence. Factors to be considered include how much control the violator had over and the foreseeability of the events constituting the violation, whether the violator made or could have made reasonable efforts to prevent the violation, whether the violator knew of the legal requirements which were violated, and degree of recalcitrance.").

In all high risk industries, accidents don't just "happen." Chevron agrees with this philosophy. For example, Dan Johnson, manager of government and public affairs for the Chevron refinery (now retired), is reported to have said in 2010: "We have a philosophy that accidents don't just happen." A copy of this newspaper article is attached hereto under **TAB 2**. The evidence relating to the NOV's agrees with Mr. Johnson's view that the incidents in questions didn't "just happen." Rather, the two oil spills were the predictable result of clear violations of laws, rules, regulations, and good industry practices and standards, conduct that, according to currently available information, Chevron either knowingly or recklessly undertook.

In response to a record number of pipeline incidents, including horrific loss of life and environmental pollution events, in 2002, Congress passed the Pipeline Safety Improvement Act of 2002. In essence, the Pipeline Safety Improvement Act of 2002 forced pipeline operators to pay extraordinary attention to the status of their pipelines in "high consequence areas" first, then focusing on other areas. As demonstrated by the public record, Chevron, in its own name and indirectly through the American Petroleum Institute, was directly involved in the promulgation of voluminous regulations following the enactment of the PSIA. For example, attached under **TAB 3** are (i) a 2002 Federal Register rulemaking response to comments for new "high consequence area" regulations proposed by the U.S. Department of Transportation under the PSIA; and (ii) a 2000 Federal Register response to comments regarding "high consequence areas," promulgated prior to the enactment of the PSIA where Chevron, in its own name, also filed comments on the proposed rule. Note that Chevron filed comments in its own name on both proposed rulemakings as well as many others, as may be demonstrated by the public record. Also for example attached hereto under **TAB 4** is a detailed presentation prepared by a leading Chevron operational manager in 2006 regarding regulatory and legal requirements for addressing "high consequence area" pipelines. Presumably this presentation was given to a trade association or other industry sector group. In short, Chevron was intimately familiar with all of the minute details and requirements imposed by existing and newly enacted statutory and regulatory provisions relating to the operation of its pipelines, dating back to 2000 and before.

In response to the June 2010 oil spill, the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (“PHMSA”) conducted a detailed investigation. Documents related to this investigation, released by PHMSA pursuant to the Freedom of Information Act, are included under **TAB 5**.

This investigation resulted in a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order dated November 1, 2010 (“PHMSA NOV”). A copy of the PHMSA NOV is included under **TAB 6**. On April 14, 2011, PHMSA issued a final Failure Investigation Report relating to this matter. A copy of the Failure Investigation Report is included here under **TAB 7**.

The Failure Investigation Report describes the background and events leading to the June 12, 2010 incident as follows:

In the early 1980’s, Williams Gas Pipeline Company built an office building up the hill from the SLC University in Red Butte Canyon. There were above ground high voltage power lines crossing Red Butte Canyon at Red Butte Creek immediately adjacent to the Chevron ROW. Because of the detrimental impact to the view, it appears that Williams Gas Pipeline requested that Rocky Mountain Power (RMP) remove the above ground high voltage power lines. The solution for RMP was to install a transition station where the lines are moved from above ground to below ground for approximately 900 feet. Unfortunately, in the early 1980’s there were no One-Call Laws in Utah and being so long ago, there is not much in the way of records. What is known is that the north transition station was built very close to the Chevron pipelines on the Chevron ROW. Subsequent to the installation of the transition station, a fence was built to keep people away from the high voltage power lines. One of the corner fence posts was installed directly over the Chevron #2 crude line. The base of the metal fence post was within approximately 3” of the top of Chevron’s line. There is no record that Chevron ever identified this transition station as something that could be detrimental to their pipelines. Chevron had installed a pipeline marker within one foot of the metal corner fence post that was installed over their #2 pipeline.

Events Leading up to the Failure

On the evening of June 11, 2010, the Salt Lake City area was experiencing a storm with gusting winds and some rain but no reported lightening. From Rocky Mountain Power Company (RMP) records, at 9:10:29 PM there was a C-Phase ground fault (short circuit) at their north underground facility. There is documentation of a family man who lived nearby to the power transition facility which solidifies the timing of this event. He even said he smelled something like natural gas but it wasn’t and since he could not identify the smell he went home and did no more about it. Also, there is a security video from the Williams Facility on the hill that shows the lights going out during the same time frame as RMP shows they experienced the ground fault. RMP submitted a report stating, “We have not determined the root cause of the short circuit and may never know for sure. That night, high winds were gusting throughout the evening. The short circuit could possibly been initiated by an electrical equipment failure, electric contact by outside debris, tree limbs making contact with electrical facilities, or by some other unknown cause.”

Before discussing the details of the PHMSA NOV, the following photograph from the PHMSA Failure Investigation Report helps explain the context and cause of the June 12, 2010 incident.



It is readily apparent from this photograph that the significant encroachments onto the Chevron Right-of-Way, including the fence post that was placed a mere three inches above the Chevron pipeline, were clearly known to Chevron for a long period of time: Note the Chevron Pipeline Right-of-Way marker that had been placed by Chevron approximately one foot away from the steel fence post that grounded the electrical fault. This incident was clearly attributable to consciously reckless conduct on the part of Chevron, as supported more fully by the PHMSA NOV itself.

As described more fully in the PHMSA NOV, the first violation related to the Pipeline Safety Regulations, Title 49, Code of Federal Regulations, providing as follows:

1. §195.402 Procedural manual for operations, maintenance, and emergencies.

(a) **General.** Each operator shall prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies...

(c) **Maintenance and normal operations.** The manual required by paragraph (a) of this section must include procedures for the following to provide safety during maintenance and normal operations:

(3) **Operating, maintaining, and repairing the pipeline system in accordance in accordance with each of the requirements of this subpart and subpart H of this part.**

According to PHMSA, Chevron failed to implement inspection procedures, as required by its procedure manual and by 49 C.F.R. § 195.412 for its pipeline rights-of-way for the conditions that were on the rights-of-way in the area where the pipeline failure occurred. Chevron used aerial patrols to inspect the surface conditions of the right of way despite the fact that the pipeline in question is located on the downstream side of a significant pipeline directly upgradient from a heavily-populated high consequence area. It was readily apparent that the rights-of-way had excessive overgrowth and nearby manmade structures at the time of the pipeline failure. The PHMSA NOV stated that as a matter of law under these circumstances, inspections should have been done by land vehicle or on foot, and that aerial patrols could not be used to adequately assess the surface conditions of the pipeline right of way.

Chevron's procedure manual also required grounding devices on underground pipelines near electrical isolation equipment locations to reduce the risk of fault currents, lightning, and electrical arcing from impacting the pipeline. However, no such protective or mitigating measures were taken despite the location of an electrical substation above Crude Lines #1 and #2.

The second violation in the PHMSA NOV of the Pipeline Safety Regulations, Title 49, Code of Federal Regulations was:

2. §195.575 Which facilities must I electronically isolate and what inspections, tests and safeguards are required?

(e) **If a pipeline is in close proximity to electrical transmission tower footings, ground cables, or counterpoise, or in other areas where it is reasonable to foresee fault currents or an unusual risk of lightning, you must protect the pipeline against damage from fault currents or lightning and take protective measures at insulating devices.**

According to PHMSA, a high voltage electric transmission line, an aboveground to belowground electric transfer station, and a security fence were all located on the right of way where Crude Oil #2 Pipeline failed. The PHMSA NOV indicated that a discharge of electric current onto the pipeline was the probable cause of the failure, which Chevron failed to protect against damage from fault currents and did not take protective measures to insulate devices. This lack of protection resulted in a hole in

the pipeline due to electrical arcing from a facility fence pole.

The third violation in the PHMSA NOV of the Pipeline Safety Regulations, Title 49, Code of Federal Regulations was:

3. § 195.452 Pipeline integrity management in high consequence areas.

(i) What preventive and mitigative measures must an operator take to protect the high consequence area?

(3) Leak detection. An operator must have a means to detect leaks on its pipeline system. An operator must evaluate the capability of its leak detection means and modify, as necessary, to protect the high consequence area. An operator's evaluation must, at least, consider, the following factors – length and size of the pipeline, type of product carried, the pipeline's proximity to the high consequence area, the swiftness of leak detection, location of nearest response personnel, leak history, and risk assessment results.

According to PHMSA, Chevron did not have an adequate way to detect leaks on the Crude Oil #2 Pipeline. The PHMSA NOV accident investigation indicates that more than ten (10) hours elapsed between the release and Chevron's notification of the release. The fire department detected the leak, resulting in 800 barrels of crude oil in Red Butte Creek, before Chevron did.

Moreover, the PHMSA NOV states that Chevron clearly had advance knowledge that its method of leak detection was inadequate for Crude Oil #1 pipeline. Specifically, Chevron stated to PHMSA that it had performed a leak detection capability study that was finalized in 2007 which concluded that Chevron needed enhancement to its leak detection capabilities on the very pipeline that ruptured. Chevron made a conscious decision to not act on the conclusions of the 2007 study until after the release at issue.

The fourth violation in the PHMSA NOV of the Pipeline Safety Regulations, Title 49, Code of Federal Regulations was:

4. § 195.250 Clearance between pipe and underground structures.

Any pipe installed underground must have at least 12 inches of clearance between the outside of the pipe and the extremity of any other underground structure, except that for drainage tile the minimum clearance may be 12 inches but not less than 2 inches. However, where 12 inches of clearance is impracticable, the clearance may be reduced if adequate provisions are made for corrosion control.

According to PHMSA, Chevron's Crude Oil #2 pipeline had a fencepost installed within three (3) inches of it. The PHMSA NOV states that the probable cause of the pipeline failure was a high-voltage electrical current that went from the fencepost to the pipeline due to their proximity.

The second pipeline rupture, on December 1, 2010, resulted in a Corrective Action Order issued by PHMSA against Chevron on December 8, 2010. A copy of this Corrective Action Order is included under **TAB 8**. The second pipeline spill resulted in the release of at least 500 barrels of crude oil, or 21,000 gallons, before the leak was detected and the system shut down. Clearly, the leak detection and monitoring improvements implemented in response to the June 12, 2010 incident were insufficient to warn Chevron of a second incident on the same pipeline before the release of an additional 21,000 gallons of crude oil.

Criminal negligence arises when the evidence shows that the actor ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. Further, the risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

As to the second element, the circumstances relating to the PHMSA NOV and Corrective Action Order clearly demonstrate that the risks are of such a nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances when viewed from Chevron's standpoint. No other conclusion would be reasonable under the circumstances and any other conclusion would render a nullity the view of the Utah legislature that releases resulting from criminal negligence as defined in the Utah Code should be subjected to civil penalties of up to \$25,000 per day.

Moreover, the first element of criminal negligence requires that Chevron ought to have been aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. This element is readily satisfied by available information, including the Chevron-authored presentation attached under **TAB 4**. In that presentation, Chevron discusses Emergency Flow Restriction Devices ("EFRDs") and their use and efficacy in pipeline systems especially in slack (downhill) flow conditions involving high consequence areas. We invite you to consider the contents of this presentation. Moreover, PHMSA expressly found that Chevron's own 2007 internal assessment of its leak detection and monitoring system on the pipeline in question found that the leak detection system was insufficient to comply with the minimum requirements of the Pipeline Safety Improvement Act of 2002 and related regulations. Yet Chevron made a choice to do nothing to attempt to comply with the law and protect the citizens of the State of Utah and the environment. Apparently, Chevron had better things to do from 2002 until June 12, 2010.

If all of this were not sufficient, the events relating to the June 12, 2010 pipeline spill, including the PHMSA NOV, were clearly sufficient to place Chevron on notice of a substantial and unjustifiable risk that the circumstances exist or the result will occur. Yet Chevron did not install adequate EFRDs or leak detection monitoring in order to

prevent the release of an additional 21,000 gallons of crude oil less than six months after the June 12, 2010 incident. The DWQ's second NOV is the subject of the December 1, 2010 incident. It defies reason that the standards for criminal negligence would not apply under these circumstances. Any other conclusion would be arbitrary and capricious under these facts.

Based on the foregoing, the \$500,000 civil penalty to settle two NOV's involving clear criminal negligence, gross negligence, and reckless conduct has no basis in fact and is grossly insufficient to satisfy the requirements of Utah law. Even if criminal negligence did not apply, according to R317-1-8, U.A.C., Category A violations, in the range of \$7,000 to \$10,000 per day involve situations of "[d]ischarges which result in documented public health effects and/or significant environmental damage." One would be hard pressed to imagine an environmental release in the history of the State of Utah that is less significant than the dual crude oil pipeline releases at issue in this proceeding. The releases clearly resulted in documented public health effects and significant environmental damage. A civil penalty amounting to \$649 per day of violation makes a mockery of Utah law and simply cannot be supported by the record, despite claims of Chevron's good will in response to the releases.

COMMENT NO. 4: Chevron's Mitigation Project Duties Are Illegal, Illusory, Arbitrary, and Capricious

The Settlement Agreement purports to include requirements for Chevron to implement and pay for "Mitigation Projects." The concept of mitigation is distinct from remediation. While a violator is responsible for removal of hazardous materials released into the environment through remediation, mitigation involves direct or ancillary project intended to restore wildlife habitat and other measures in order to indirectly mitigate environmental impacts resulting from the release.

R317-1-8, U.A.C., governs mitigation projects. It provides:

8.4 Mitigation Projects. In some exceptional cases, it may be appropriate to allow the reduction of the penalty assessment in recognition of the violator's good faith undertaking of an environmentally beneficial mitigation project. The following criteria should be used in determining the eligibility of such projects:

- A. The project must be in addition to all regulatory compliance obligations;
- B. The project preferably should closely address the environmental effects of the violation;
- C. The actual cost to the violator, after consideration of tax benefits, must reflect a deterrent effect;
- D. The project must primarily benefit the environment rather than benefit the violator;
- E. The project must be judicially enforceable;
- F. The project must not generate positive public perception for violations of the law.

The Mitigation Project provisions of the proposed Settlement Agreement do not comply with R317-1-8.4. As an initial matter, the mitigation project must be “undertaken” by the violator and the “project must be judicially enforceable.” In order to be judicially enforceable, a mitigation project must actually exist; it must be the subject of sufficient definition, including a legal duty to actually implement the project, that a court could enforce the obligation if called upon to do so.

By contrast to R317-1-8.4, the contractual provisions relating to the Mitigation Projects in the Settlement Agreement place the acceptance and funding of any project in the sole discretion of Chevron. As a result, the Mitigation Project duties imposed on Chevron are illusionary and impractical and, therefore, arbitrary and capricious. According to Paragraph 6 of the Settlement Agreement, Chevron need only entertain Mitigation Project requests that are made within 90 days of the effective date. In order to submit a request for a Mitigation Project, the “project proponent” must, in connection with the proposal, develop and submit a

mitigation plan that includes a detailed description of the mitigation project, a cost breakdown showing how the funds will be used, and a plan for implementation of the project. The implementation plan shall include a timeline for implementation and completion of the project and submission of final document(s) verifying completion of the project. The implementation plan shall also include a funding schedule which specifies who receives the mitigation funds and when (but in no event shall all mitigation funds be paid in full before completion of the project). Any mitigation project and implementation plan eligible for funding shall require approval from the Executive Secretary [of DWQ] (in consultation with the City). The parties shall agree to the process for soliciting stakeholder and public comment on the Mitigation Projects.

Settlement Agreement ¶6.i.

The Settlement Agreement is clearly illegal because it purports to shift the burden of “undertaking” Mitigation Project from the Violator to the victims of the violation and provides no legally enforceable duty by Chevron to undertake anything at all. Funding by Chevron through reimbursement is “up to” \$3 million. In the event that an insufficient number of Mitigation Projects are proposed within 90 days or are otherwise accepted to add up to \$3 million, Chevron has no further obligations under the Settlement Agreement. In fact, Chevron has no duty to pay for any single Mitigation Project at all. It is also clear that developing a sufficiently detailed Mitigation Project proposal would itself cost perhaps tens of thousands of dollars, with no guarantee that any given proposal would be accepted, much less funded. Project proponents are also fully at risk for the costs of developing Mitigation Project proposals, including construction costs which are in no event reimbursed until after

Chevron is satisfied, in its discretion, that the project has been adequately completed. Reimbursement is not guaranteed.

Based on the foregoing it is abundantly clear that the Mitigation Project provisions of the Settlement Agreement are illusory, illegal, arbitrary, and capricious and completely unenforceable by a court. Chevron has not agreed to undertake or perform a single mitigation project. It is highly unlikely that any private property owner would have sufficient technical know-how, capital, or risk tolerance in order to develop “detailed” Mitigation Project proposals, much less have access to the money to pre-fund construction of such projects in the hope that Chevron, in its discretion, will reimburse claimed costs. These circumstances render the Mitigation Project funding mechanism totally illusory, arbitrary, and capricious. DWQ’s acceptance of these terms represents a clear abuse of discretion. Moreover, there is no guarantee that a given mitigation project would not be rendered useless due to the continuing migration of residual petroleum through Red Butte Creek as described herein.

COMMENT NO. 5: The Mitigation Project Funding Cap Is Illegal, Arbitrary and Capricious

In exchange for broad liability releases highly favorable to Chevron, Chevron has agreed to fund “up to” \$3 million for undefined Mitigation Projects.¹ Settlement Agreement ¶6. Pursuant to the UAC cited above, the cost of mitigation projects “must reflect a deterrent effect” on the violator. There is nothing in the administrative record to support the \$3 million cap on reimbursement of mitigation projects proposed to be undertaken in the future by the victims of Chevron’s illegal conduct.

The potential funding for Mitigation Projects is arbitrarily capped at \$3 million. There is no evidence in the administrative record to support this cap. The release at issue involved an estimated volume of 35,000 gallons of medium crude oil, followed by an additional release of 21,000 gallons of crude oil that impacted water quality along miles of high-value, highly-used creek, directly impacting well over 100 single family residential properties, including hundreds of children who spend significant amounts of time pursuing recreational activities in Red Butte Creek. Apart from the human impacts, many references in the administrative record suggest that ecological and watershed damages are expected to take decades to recover. Nevertheless, the administrative record is devoid of any attempt to evaluate, understand, or otherwise quantify the nature and extent of ecological and watershed damages. As a result, it is impossible to know whether the \$3 million represents a fair and reasonable settlement amount for Mitigation Projects. This conclusion is further supported by the fact that the Mitigation Projects are not even defined as of this time. It is impossible to provide

¹ We note that as a matter of law, any liability release provided by the State of Utah or Salt Lake City has no legal effect on claims against Chevron asserted by the Impacted Property Owners.

meaningful comments as to projects that lack any definition. As a result, the level of funding for Mitigation Projects lacks any basis in fact and is therefore clearly arbitrary and capricious.

CONCLUSION

Based on the foregoing, we urge DWQ and Salt Lake City to refrain from entering into the Settlement Agreement until such time that they have developed sufficient information to support the same, including a comprehensive assessment of natural resource damages. Without additional factual information in the administrative record, the Impacted Property Owners are unable to provide more detailed comments on the proposed Settlement Agreement. Certainly the available evidence in the record does not support a conclusion that the Settlement Agreement is based on substantial evidence, is fair, reasonable, and consistent with the Oil Pollution Act, the Utah Water Quality Act, and other applicable laws. As a result, accepting the Settlement Agreement would be arbitrary and capricious and a clear abuse of discretion by DWQ.

DATED this 7th day of October, 2011.

DURHAM JONES & PINEGAR

By: 
BRET F. RANDALL
MATTHEW G. GRIMMER

Attorneys for Impacted Property Owners

EXHIBIT A

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Scott and Suzanne Cunningham (1102 South 900 East)
Robert and Kathryn Fowles (1455 Harvard Ave)
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Ralph Riedel (1225 Harvard Ave)
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Michael and Margaret Stack (1444 Yale Ave)
Michael and Nina Vough (1350 Yale Ave)
Neil Wursten (1096 South 1100 East)

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2011, I caused a true and correct electronic copy of the foregoing Comments By Certain Property Owners Regarding Proposed Administrative Settlement Order, together with a compact disk containing electronic copies of Exhibits 1-8 thereto and a compact disk containing Data from Chemical Quality Analysis by Boston Chemical Data Corporation to be served by mailing the same, via First Class U.S. Mail, postage prepaid, to the following:

Walter L. Baker
Executive Director
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Salt Lake City, UT 84101

I further certify that on this 7th day of October, 2011, in accordance with R317-8-1.9 U.A.C., and in accordance with the public notice relating to this proceeding, I caused the original of the foregoing Comments By Certain Property Owners Regarding Proposed Administrative Settlement Order, together with Exhibits 1-8 thereto (and a compact disk containing Data from Chemical Quality Analysis by Boston Chemical Data Corporation) to be hand delivered to the following:

John Whitehead
Assistant Director
Utah Division of Water Quality
195 North 1950 West
Salt Lake City, UT 84114

And I further certify that on this 7th day of October, 2011, I caused a true and correct copy of the foregoing Comments By Certain Property Owners Regarding Proposed Administrative Settlement Order, together with a compact disk containing electronic copies of Exhibits 1-8 thereto and a compact disk containing Data from Chemical Quality Analysis by Boston Chemical Data Corporation to be hand delivered to the following:

Administrative Proceedings Record Officer
Environment Division
Utah Attorney General's Office
160 East 300 South, 5th Floor
Salt Lake City, UT 84111

By 
Bret F. Randall