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February 12, 2020

***Via* HAND DELIVERY AND EMAIL**

Mr. John Adams, Esq.
Louisiana Office of Conservation
LaSalle Building, 9th Floor
P.O. Box 94275
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Honorable Richard Ieyoub
Commissioner of Conservation
Louisiana Department of Natural Resources
617 N. Third Street
LaSalle Building, 9th Floor
Baton Rouge, Louisiana 70802

Re: *Louisiana Wetlands, LLC and New 90, LLC v. Chevron U.S.A. and Southern Natural Gas Company, LLC*
Department of Natural Resources
State of Louisiana Division of Administrative Law
Docket No. 2021-293-DNR-OOC
Motion *in Limine* to Exclude Limited Admission Plan(s)

Dear Commissioner Ieyoub and Mr. Adams:

On behalf of the landowner, New 90, LLC ("New 90")[1], in the above-captioned case, we respectfully submit this **Motion *in Limine* to Exclude Chevron's and SNG's Limited Admission Plans** to the extent those plans call for use of any exceptions to Statewide Order 29-B ("SWO 29-B"), including the use of the Louisiana Department of Environmental Quality's ("LDEQ") Risk Evaluation Corrective Action Program ("RECAP").

INTRODUCTION

New 90 owns property known as the Shady Retreat Plantation near the Town of Franklin in St. Mary Parish. Oil and gas exploration and production operations on that property have led to extensive contamination of the property.

As evidenced by the documents produced by Chevron U.S.A. Inc. ("Chevron") in this case as well as its own corporate witness's testimony collected in this case, the contamination of the

[1] "New 90" as used herein refers to New 90, LLC and James J. Bailey, III, individually and as representative of the Successions of Willie Palfrey Foster and Fairfax Foster Bailey. Although New 90, LLC was dismissed as a plaintiff in the underlying matter pending in the 16th Judicial District Court, that decision is on appeal. New 90, LLC joins Mr. Bailey in all positions asserted in these proceedings before the Department.

property where Chevron operated is due not only to oil and gas operations generally, but more specifically to (1) Chevron's election to forgo the added expense of installing a saltwater injection well and (2) Chevron's election to instead dispose of saltwater into a pit. This is true despite the fact that as of 1960 the law was clear saltwater was to be disposed of by injection *and* despite the fact that as of 1960 there were saltwater injection wells in the Franklin Field in which New 90's property is located and of which Chevron was aware and which it was actively using.

Moreover, sometime between January 1962 and October 1963, saltwater volumes were so high that Chevron elected to enlarge its existing pit—again, instead of installing a saltwater injection well as the law dictated. Even then, pit capacity was not adequate to contain the volumes of saltwater being produced, causing pit leakage and overflow. And, attempts to inject into the well annulus proved unsuccessful because of leaks in the casing. Chevron's inadequate handling of its saltwater progressed to the point where even it recognized that its disposal methods had created a "*major pollution problem*." By 1969, at least 414,000 barrels of saltwater had been generated—none of which was properly disposed of and all of which Chevron well knew would likely contaminate the soil and groundwater. The result is highly hazardous and/or carcinogenic contaminants not only in the soil and groundwater of New 90's property, but in groundwater approximately a quarter of a mile from family homes and Franklin Junior High School.

As to Southern Natural Gas Company, LLC ("SNG"), it conducted oil and gas operations on New 90's property in the Franklin Field from 1956 to 1973. Like Chevron, SNG used pits to handle its oilfield wastes—with no evidence that SNG ever used a saltwater disposal well to accommodate the disposal of its produced water. With nearly two decades of poor stewardship over New 90's property, SNG contaminated the soil and the shallow groundwater aquifer.

In sum, the operations here were in violation of applicable rules. As such, and as set forth herein, Chevron and SNG should be made to fully comply with the regulatory standards, without exception.

Louisiana Department of Natural Resources, Office of Conservation (the "Department") has historically required operators to comply with the standards set forth in SWO 29-B[2] for the remediation of oilfield sites unless an exception is granted by the Commissioner. The Department further requires proof of landowner consent before granting an exception. Specifically, if an operator wants to apply the RECAP standards, the operator must be granted an exception by the Department and, therefore, also obtain consent from the landowner.[3] Obtaining landowner consent as a prerequisite to using RECAP standards is not only consistent with past—and best—practices, but required by Department policy as well as the Louisiana Constitution. Simply put, the Department should apply its own SWO 29-B standards, without exceptions, unless another agency standard provides greater protection for human health and the environment.

The landowner in this case, New 90, vehemently objects to the Department granting any exceptions to SWO 29-B, including the use of RECAP. The property at issue here has been held by the same family for generations. Primarily used for farming and hunting, this property has the

[2] *See* LAC 43:XIX, Subpart 1, Chapter 3.

[3] *See, e.g.*, Letter of James H. Welsh, Commissioner of Conservation, to Louis E. Buatt, Esq., attorney for BP, dated October 27, 2015 **– Attachment 1**.

potential to be converted to a variety of future uses. The property is in close proximity to both the residential and commercial areas of Franklin as well as Highway 90 and, as such, could be converted to a residential or commercial purpose. And, in fact, New 90's members have exhibited a propensity in the past to offer their family lands for new development to accommodate additional housing for the town of Franklin. The property is also in close proximity to the Bayou Teche National Wildlife Refuge ("BTNWR") and, as such, could become part of the BTNWR or a mitigation bank. New 90 will pass down this property as part of a family legacy, so that it may be used for any purpose deemed appropriate.[4] Allowing the use of cleanup standards under RECAP jeopardizes this family legacy by leaving contamination on the property and restricting its future potential use. Therefore, New 90 will not, under any circumstances, consent to the use of RECAP as an exception to SWO 29-B.

Simply put, Chevron and SNG should be made to follow SWO 29-B; and any suggestion by them that RECAP apply should be rejected outright. Any right to the use of the RECAP exception has not been earned; to the contrary. And, regardless, New 90 has objected to use of the RECAP exception here. Indeed, using RECAP would water down the standards to be applied and, as such, would be in direct contravention not only of New 90's stated position as landowner but also the Louisiana Constitution and its mandate to protect the environment. SWO 29-B is in furtherance of that constitutional mandate. That is SWO 29-B's purpose. Allowing exceptions to apply here would effectively upend SWO 29-B and the constitutional mandate in furtherance of which SWO 29-B was implemented. Even worse, allowing that result, would afford Chevron, SNG, and similarly situated operators, license to leave contamination throughout Louisiana without good cause.

In sum, t**he Department should apply its Statewide Order 29-B standards when developing any Act 312 Most Feasible Plan ("MFP") unless the landowner consents to an exception.** New 90 strongly objects to the use of an exception to SWO 29-B as the cleanup standard on its property and, therefore, moves to strike any plan, and any components of a plan, that propose to use exceptions to SWO 29-B.

ARGUMENT

1. The Department is charged with a constitutional mandate to protect, conserve, and replenish the natural resources of the state insofar as possible and consistent with the health, safety, and welfare of the people.

The Louisiana Constitution, Article IX Section 1, provides:

> "The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved and replenished insofar as possible and consistent with the health, safety and welfare of the people. The legislature shall enact laws to implement this policy."

[4] *See* Affidavit of James J. Bailey, III, dated February 12, 2021 – **Attachment 2**.

In fulfillment of this mandate, the legislature enacted Act 312 of 2006; and the Department, in accord with Act 312, applies SWO 29-B. These regulations provide standards upon which the Department relies to evaluate cleanup of oilfield wastes. As a fundamental matter, the Department must enforce SWO 29-B in a way that complies with the Constitution and Act 312—to protect the state's natural resources consistent with the health, safety, and welfare of the people of Louisiana. In order to comply with this constitutional mandate, the Department must enforce the requirements of SWO 29-B in all circumstances where SWO 29-B applies, and only look to the standards of other agencies if those other standards provide greater protection for the state's natural resources consistent with the health, safety, and welfare of the people of Louisiana. For example, if SWO 29-B does not provide guidance on a particular set of circumstances, another agency's standards can be utilized to fill in the gaps in SWO 29-B.

In formulating any MFP here, the Department may apply regulatory standards of an agency other than the Department only when *required* to do so. Act 312 provides, in part, as follows:

> C.(1) If at any time during the proceeding a party admits liability for environmental damage or the finder of fact determines that environmental damage exists and determines the party or parties who caused the damage or who are otherwise legally responsible therefor, the court shall order the party or parties who admit responsibility or whom the court finds legally responsible for the damage to develop a plan or submittal for the evaluation or remediation **to applicable regulatory standards** of the contamination that resulted in the environmental damage.
>
> ***
>
> C.(3)(a) **The department shall use and apply the applicable regulatory standards** in approving or structuring a plan that the department determines to be the most feasible plan to evaluate or remediate the environmental damage.
>
> C.(3)(b)(i) **If the department preliminarily approves or structures a preliminary plan that requires the application of regulatory standards of an agency other than the department** or that provides an exception from the department's standards, within fifteen days of such preliminary structuring or approval, the department shall submit the plan to the Department of Agriculture and Forestry, the Department of Environmental Quality, and the Department of Natural Resources for review and comment.[5]

Act 312 merely provides the Department the option to employ alternative regulatory criteria in the event the Department deems necessary to protect the public interest. Indeed, the statute makes clear that *if* the Department applies another agency's standards, it shall do so *only when required***.** Meaning that the Department should use standards of another agency only when contamination cannot be addressed within the framework of SWO 29-B.

[5] La. R.S. 30:29 (emphasis added).

SWO 29-B specifically provides restoration standards designed to adequately protect the public and the environment from substances or contaminants placed into groundwater or soil in such quantities as to render them unsuitable for their intended purposes. The overriding interest in Act 312 is the public interest. Broadly stated, the use of other agency standards may allow the Department to venture outside the bounds of SWO 29-B to address contamination that may not otherwise be addressed in SWO 29-B—to develop a plan to cleanup contamination that would remain unsafe despite the use of 29-B. Applying a different set of criteria that circumvents SWO 29-B's standards would circumvent the protections the Department has put in place to protect, conserve, and replenish the natural resources of the state, which would violate the Department's constitutionally created role.

2. Department policy should not change for Act 312 cases.

The Department has a long-standing policy to obtain landowner consent as a prerequisite to using RECAP standards in non-public hearing cases. This policy should not change merely because the court is an active participant. The court has always been a participant in cases litigated under Act 312, regardless of whether a hearing is held or not. The Supreme Court said as much in *M.J. Farms, Ltd. V. Exxon Mobil Corp*.: "Although Act 312 changes the remedy available to M.J. Farms in its efforts to obtain surface restoration of its immovable property, we do not find this denies it access to the courts. To the contrary, under the provisions of Act 312 the district court remains an active participant in the entire restoration process."[6] There is no reason to abandon that sound philosophy designed to protect the public interest merely because one case has a hearing and another does not.[7]

The Department must follow its regulations in applying the procedures outlined in Act 312. The Act does not change the Department's task, but merely sets forth a series of procedures. The Department's substantive obligations are provided for in SWO 29-B, which the agency has interpreted to require landowner consent before applying another agency's standards. Charting a course away from this long-held policy would be illogical and inconsistent with the Department's regulatory duty, not in the interest of the public, or in compliance with the Department's constitutional directive.

The Department is charged with the responsibility to ensure that any MFP is SWO 29-B compliant unless there is good cause for exception. Surely good cause cannot mean using less-stringent standards over objection from the landowner. Good cause cannot mean leaving contamination on the property and thereby preventing the land to be used in the future for all potential legal uses. Good cause cannot mean ignoring the regulations that incorporate the landowner's intended use into the formulation of an MFP. Good cause cannot mean turning a blind eye to the regulations the Department is supposed to administer—especially when those regulations explicitly require the identification of the property's intended purpose.

[6] 2007-2371 (La. 7/1/08), 998 So. 2d 16, 37.

[7] Although it is true that during a Department hearing process the landowner can put forth a competing plan and put on evidence to protect the landowner's interest, the landowner does these very same things outside of the Department hearing process in the context of litigation, which is conducted pursuant to Act 312. The Department has this evidence available to it regardless of whether a Department hearing is held. A Department hearing, or lack thereof, should not change the standards applied.

The Department should not use other regulatory standards, including RECAP, unless for some compelling reason and when such use is necessary to fully protect a public interest not adequately covered by SWO 29-B. The Department should remain consistent with its own policy. The Department has followed a policy to disallow the use of RECAP unless the subject landowner consents. The agency has remained consistent with this policy for over a decade, including after the enactment of Act 312 in 2006.[8] The rationale for this policy is justified—if the use of a less stringent regulatory standard (*i.e.* RECAP) will allow a party to leave contamination on a landowner's property, that landowner should have an opportunity to deny this request. The Department should not change its policy of fully protecting the public interest merely because a party has partially admitted responsibility for intentionally causing contamination.

Further, RECAP was never designed or intended to be used as a way to allow a polluter to leave contamination on another's property, which it would not be allowed to do otherwise. Indeed, to allow the use of a less stringent standard without the consent of the subject landowner would only serve to incentivize polluters to delay any notice of contamination to the Department and await a lawsuit. Certainly, it is not the intent of Act 312 to promote gamesmanship in litigation.

3. Landowner consent is explicitly required under SWO 29-B when passive closure is used to close a contaminated site.

Under SWO 29-B, an operator can passively close a site if certain requirements are met. While not explicitly defined in SWO 29-B, "passive closure" includes leaving contamination in soil or groundwater in excess of SWO 29-B standards.[9] To conduct this type of closure explicitly requires landowner consent.

In many oilfield contamination cases, operators propose to leave contamination on the property in excess of SWO 29-B standards. This usually involves leaving salt contamination below a certain depth in the soil. Importantly, the Department has previously opined that SWO 29-B contains no depth limitation for delineations of soil contamination:

> Generally, information provided to the Agency clearly established that soil in, around and below the former exploration and production pit locations at the Plug Road property exceeds applicable salt parameters for soil to a depth of at least 30 feet below ground surface. The plan strategy submitted to the Agency by the admitting party, Tensas Delta Exploration Company, LLC (Tensas Delta), included soil remediation to meet applicable salt parameters to a depth of approximately 3 feet below ground surface with soil that exceeds the applicable salt parameters below approximately 3 feet to remain as is. **Such conditions require compliance with Exceptions provisions of LAC 43:XIX.319 to address compliance with LAC 43:XIX.313 for soil conditions below 3 feet.** Therefore, the Tensas Delta

[8] *See, e.g.*, Letter to Sinclair Oil & Gas Co. re: Compliance Order No. E-I&E-09-0953, dated October 4, 2010 – **Attachment 3**; Letter to Charles Minyard re: September 3, 2014 HET Groundwater Monitoring and Site Investigation Report; First and Second Quarters of 2014, Betty D. Blanchard, et al. Lease, Jeanerette, St. Mary Parish, Louisiana, Compliance Order No. E-l&E-05-0233, dated September 24, 2014 – **Attachment 4**; Letter to McGowan Working Partners, Inc. re OC Legacy Project No. 031-016-001, dated October 5, 2015 – **Attachment 5**.

[9] *See, e.g.*, Letter of James H. Welsh, Commissioner of Conservation, to Louis E. Buatt, Esq., attorney for BP, dated October 27, 2015 – **Attachment 1**.

> plan soil strategy was found not in compliance with the Exceptions provisions of LAC 43:XIX.319. Furthermore, the Tensas Delta plan was not complete and in full compliance with LAC 43:XIX.Subpart I. Chapter 6 as the plan submitted did not include a separate plan as required by LAC 43:XIX.611.F.2 that addresses compliance with LAC 43:XIX.319 and other applicable requirements detailed in LAC 43:XJX.611.[10]

Leaving contamination in the soil based on some depth limitation constitutes a non-permissible passive closure.

Another example of passive closure is to leave contaminated groundwater on the site without remediation. Under SWO 29-B, "contamination of a groundwater aquifer or a USDW with E and P Waste is strictly prohibited."[11] The Department uses these regulations to apply background concentration requirements for groundwater.[12] A proposal to leave contamination in the soil or groundwater in excess of SWO 29-B standards constitutes passive closure, requiring landowner approval. New 90 does not consent to either type of passive closure on its property—soil or groundwater.

4. Chevron's proposed remediation calls for exceptions, to which New 90 does not consent.

a) Chevron proposes to leave its contamination in an otherwise useable groundwater resource.

Chevron in classifying the groundwater here as Class 3, summarily disregards the future potential use of this groundwater resource and proposes to leave its contamination on the property forever. However, multiple monitoring wells on the property produced volumes that exceed the yield for class 2 wells of 150 gallons per day and less than 10,000 mg/L, as recommended by the Environmental Protection Agency ("EPA").[13] In fact, monitor well EN-4 (where the only slug test within Chevron's disposal pit in Area 2 was performed) demonstrated a yield of 1,349 gallons per day. Despite the LDEQ's classification system, the groundwater resources on the subject property can provide enough yield to be used as a potable water source.

Chevron has contaminated the groundwater on the subject property with oilfield wastes. And pursuant to SWO 29-B, contamination of groundwater aquifers with E and P wastes is strictly prohibited.[14] In fact, the Department has explicitly recognized that SWO 29-B contains

[10] LDNR, Office of Conservation's Most Feasible Plan Developed and Submitted as Required by La. R.S. 30:29, *Agri-South, L.L.C., et al. v. Exxon Mobil Corporation, et al*., Docket No. Env-L-2013-02 (emphasis added) **– Attachment 6**.

[11] LAC 43:XIX.303(c)

[12] *See* First Amended Memorandum of Understanding Between Louisiana Department of Natural Resources Office of Conservation and Louisiana Department of Environmental Quality Regarding Approval of RECAP Groundwater Evaluation and Remediation Plans at Oilfield Sites, dated February 25, 2011 **– Attachment 7**.

[13] *See* EPA, Guidelines for Ground-Water Classification under the EPA Ground-Water Protection Strategy, December 1986 **– Attachment 8**.

[14] *See* LAC 43:XIX.303(C).

background concentration requirements for groundwater.[15] Chevron proposes an exception to this rule without obtaining landowner consent, and instead uses RECAP as an alternative to avoid any remediation of the otherwise usable groundwater resource. To use RECAP and leave behind groundwater contaminated with oilfield wastes would be to disregard the future potential use of this groundwater resource.

In fact, Chevron's proposal to leave salt contamination in the soil would ensure the continued contamination of the groundwater on New 90's property. In other words, contaminants left in the soil would serve as a continuing source of contamination for the underlying groundwater. Chevron's own experts concede that:

> Q. It's your opinion that the salt in the soil will continue to leach downward into the groundwater?
>
> A. Yeah. It's just as it's done in the last 40 years, yes, 50 years.[16]

Furthermore, LDEQ has previously found usable groundwater at nearby facilities, determining that groundwater at a nearby site in Franklin at the Franklin Fire Department met Class 2 specifications. At that facility, located on the west side of Bayou Teche and just 700 yards away from the New 90's property, the LDEQ placed the groundwater into a Groundwater Classification 2 (GW2B) based on a one-hour pumping test of a single monitoring well screened at a depth of 15 feet.[17] Chevron did not disclose to the Department these LDEQ findings and determinations for this facility located in such close proximity to the subject property, despite having previously examined these materials.

The property at issue contains a groundwater resource with potential future use. Chevron proposes to condemn this potable groundwater supply from ever being used by leaving its oilfield constituents in the soil and groundwater on the property, without landowner consent. New 90 does not consent to Chevron's proposed remediation, and requests the Department adopt an MFP that complies with SWO 29-B and remediation of this useable groundwater resource.

b) Without consent from the landowner, Chevron's proposed remediation plan violates 29B.

Chevron proposes to excavate extremely limited amounts of soil to remove environmental damage caused by its operations. In Area 2, Chevron plans to remove soil from 8 to 18 feet in a 50' x 50' area to address hydrocarbon exceedances, while offering no plans for groundwater remediation. In Area 8, Chevron offers no plans for remediation for soil or groundwater, but only offers to level existing berms. In both Areas, Chevron will leave its oilfield constituents that

[15] *See* First Amended Memorandum of Understanding Between Louisiana Department of Natural Resources Office of Conservation and Louisiana Department of Environmental Quality Regarding Approval of RECAP Groundwater Evaluation and Remediation Plans at Oilfield Sites. Office of Conservation, dated February 25, 2011 **– Attachment 7**.

[16] Deposition of Michael Pisani (Dec. 30, 2020), 127:14-18 **– Attachment 9**.

[17] *See* LDEQ No Further Action Notification, AI#75104 [LDEQ EDMS 6070854], dated October 27, 2009 **– Attachment 10**; KourCo Environmental Services, 2003 Annual Groundwater Monitoring Report AI#75104 [LDEQ EMDS 1771898], dated April 30, 2003 **– Attachment 11**.

exhibit concentrations exceeding the standards set forth in SWO 29-B. Heavy metals, salts, and hydrocarbons, all exceeding SWO 2-9B criteria, will remain on the site untouched by Chevron's proposed remedial plans.

As an example, Chevron ignores exceedances of salt parameters in Area 2. Without considering effects on sugar cane from EC levels that exceed 1.7 and with plans to leave salt parameters in the soil on New 90's property, Chevron's plans will not protect the subject property from a decline in sugar cane yields. And, even in its Hypothetical 29B Plan, Chevron ignores the environmental damages that exist below two feet, despite the fact that SWO 29-B contains no depth restrictions. It is important to note that the effective rooting depth of sugarcane in Louisiana has been documented to extend well below two feet.[18] Furthermore, in the Department's MFP in connection with the *Agri-South* case, the Department explicitly ruled that SWO 29-B contains no depth limitation for delineations of soil contamination.

> Generally, information provided to the Agency clearly established that soil in, around and below the former exploration and production pit locations at the Plug Road property exceeds applicable salt parameters for soil to a depth of at least 30 feet below ground surface. The plan strategy submitted to the Agency by the admitting party, Tensas Delta Exploration Company, LLC (Tensas Delta), included soil remediation to meet applicable salt parameters to a depth of approximately 3 feet below ground surface with soil that exceeds the applicable salt parameters below approximately 3 feet to remain as is. **Such conditions require compliance with Exceptions provisions of LAC 43:XIX.319 to address compliance with LAC 43:XIX.313 for soil conditions below 3 feet. Therefore, the Tensas Delta plan soil strategy was found not in compliance with the Exceptions provisions of LAC 43:XIX.319.** Furthermore, the Tensas Delta plan was not complete and in full compliance with LAC 43:XIX.Subpart I .Chapter 6 as the plan submitted did not include a separate plan as required by LAC 43:XIX.611.F.2 that addresses compliance with LAC 43:XIX.319 and other applicable requirements detailed in LAC 43:XJX.611.[19]

The failure to remove oilfield constituents from the soil and groundwater placed on the subject property as a result of Chevron's operations constitutes an exception from SWO 2-B, which requires landowner consent. Chevron has not, and will not, obtain such landowner consent in this case to leave its oilfield constituents on the subject property.

Chevron is using RECAP as a tool to replace SWO 29-B. However, RECAP should not be used to replace SWO 29-B, but merely supplement it where SWO 29-B does not address certain situations or contaminants. The Department should not use other regulatory standards, including RECAP, unless for some compelling reason and when such use is necessary to fully protect a public interest not adequately covered by SWO 29-B. The Department should remain consistent with its own established policy. The Department has followed a policy to disallow the use of

[18] *See* Sheffield, R.E. and D.C. Weindorf, "Louisiana Irrigation, Irrigation Scheduling Made Easy: Using the 'Look and Feel' Method," Louisiana State University, Agricultural Center – **Attachment 12**.

[19] LDNR, Office of Conservation's Most Feasible Plan Developed and Submitted as Required by La. R.S. 30:29, *Agri-South, L.L.C., et al. v. Exxon Mobil Corporation, et al*., Docket No. Env-L-2013-02 (emphasis added) – **Attachment 6**.

RECAP unless the subject landowner consents. As noted, the Department has remained consistent with this policy for over a decade, including after the enactment of Act 312 in 2006. The rationale for this policy is justified—if the use of a less stringent regulatory standard (i.e. RECAP) will allow a party to leave contamination on landowner's property, that landowner should have an opportunity to deny this request. The Department should not change its policy of fully protecting the public interest merely because a party has partially admitted responsibility for intentionally causing contamination.

Furthermore, Chevron's proposal to leave oilfield wastes on the property amounts to passive closure. However, Chevron has not obtained the requisite landowner consent, nor the lab data to demonstrate these constituents do not exceed SWO 29-B standards—both specifically required under SWO 29-B to allow for passive closure. Chevron has not complied with these regulatory requirements and good cause does not exist to justify granting of an exception to allow Chevron to forever leave its oilfield wastes on New 90's property.

c) Chevron's "Hypothetical 29B Plan" does not satisfy regulatory requirements for submitting a plan that complies with all the provisions of Statewide Order 29-B, exclusive of §319.

As part of its Limited Admission Plan, Chevron proposes to leave soil contaminated to depths of greater than 40 feet and groundwater containing those same oilfield constituents stretching across property boundaries. This proposal does not comply with SWO 29-B requirements. So, in an effort to supply a separate plan that complies with SWO 29-B requirements, Chevron offers a Hypothetical 29B Plan. However, that plan still fails to comply with SWO 29-B requirements.

Chevron's Hypothetical 29B Plan for soil proposes to clean soils from 0 to 2 feet. All other SWO 29-B constituents below that depth will remain in place. This proposal fails to fully comply with SWO 29-B requirements, which contains no depth restriction.

Chevron's Hypothetical 29B Plan for soil is based, in part, on a composite analysis of O&G constituents in soil samples taken in Area 2. Chevron's experts compiled two composite samples to evaluate O&G concentrations in Area 2—one for samples from 0 to 10 feet, and the other for samples from 0 to 18 feet. Sample results were averaged across sample locations and compared against SWO 29-B standards. According to Chevron's results, the composite results from 0 to 10 and 0 to 18 feet both fell below the SWO 29-B standard of 1% oil and grease. Based on this analysis, Chevron concludes that no remediation is required to remove O&G from Area 2 to comply with SWO 29-B. However, Chevron's analysis is flawed. Chevron, as part of its calculation, failed to consider ICON's sample results. When averaging all sample results from both parties for the 0 to 18' composite sample, O&G exceeds the SWO 29-B standard of 1%.[20] Chevron's Hypothetical 29B Plan for soil does not comply with SWO 29-B.

[20] *See* Table 1 compiling sample data collected by ICON and ERM for O&G at sample locations used by Chevron as part of its composite sample calculations; *See also* Element lab data sheets documenting composite analysis as requested by ERM – **Attachment 13**.

For groundwater, Chevron's Hypothetical 29B Plan proposes to target chlorides for remediation. This plan does not include costs for offsite disposal, but includes costs for the construction, operation, and maintenance of an on-site disposal well. This proposal flies in the face of property rights and interferes with the inherent rights of the landowner to determine how it will use the property. Chevron must include costs for offsite disposal and beg off its assumption that it can force the landowner to dispose of Chevron's waste on the subject property. New 90 does not consent to onsite disposal of Chevron's waste in the event the Department includes in a MFP a groundwater remediation component.

5. SNG's proposed remediation calls for exceptions, to which New 90 does not consent.

a) SNG's Hypothetical Plan, while containing a feasible groundwater plan, offers no SWO 29-B compliant plan for soil.

In connection with groundwater, SNG's Hypothetical Plan proposes to remediate the chloride concentrations to 25 or 250 mg/L.[21] As explained by SNG's own experts, this plan is feasible.

Q. Okay. So if you were to implement the 29-B plan that we have marked as Exhibit 7, you would agree that that would comply with the requirements of 29-B?

MR. BERTEAU:
Objection to form.

THE WITNESS:
I think we already comply with requirements of 29-B without this plan, but this plan has put forward simply to – to give a check box or give a checkmark in a box that we evaluated what can be done about constituents in groundwater. Our experience is that won't be required, but to be compliant with the – what's becoming the practice of these limited admissions and Act 312 sites, we have put this in there. Although, if you read yourself, we don't stand behind it don't stand behnd it.

BY MR. HUDDELL:
Okay.

THE WITNESS:
Don't recommend it.

BY MR. HUDDELL:

Q. And – and I understand while you don't recommend it, it could be implemented correct?

[21] 25 mg/L is background and 250 mg/L is regulatory.

A. It's technically feasible to attempt to implement it.

Q. Okay.

A. We don't have enough data to say that it would actually work, but it's technically possible.[22]

By their own admission, SNG's Hypothetical Plan is technically feasible. Thus, there is no good cause to use RECAP as an exception to SWO 29-B in attempts to leave the contaminated groundwater in place.

In contrast, SNG failed to submit a SWO 29-B compliant plan for soil. Instead of using SWO 29-B to evaluate environmental damage in the soil on New 90's property, SNG uses RECAP to support its proposed plan. SNG also submitted a Hypothetical Plan. However, its Hypothetical Plan fails to propose any plan for soil that complies with the requirements under SWO 29-B exclusive of Section 319. As SNG's expert testified:

Q. Does your hypothetical plan also incorporate RECAP as – as far as the soil evaluation?

A. Our hypothetical plan is – is a groundwater plan.

Q. Okay. Do you have a hypothetical plan that does not include RECAP as part of its soil evaluation?

A. No.

Q. Okay. So ERM does not have a hypothetical 29-B plan for soil; is that correct?

A. Well, we have a plan for soil, and that's in our most feasible plan. That's the main plan.

Q. Okay. And that includes RECAP as an exception to 29-B, correct?

MR. BERTEAU:
Objection to form.

THE WITNESS:
It includes 29-B and RECAP, correct.[23]

[22] Deposition of Michael Pisani (Oct. 6, 2020), 84:24-86:6) **– Attachment 14**.
[23] Deposition of David Angle (Oct. 6, 2020), 27:4-23 **– Attachment 15**.

As a result, SNG's Hypothetical Plan proposes to leave extensive soil contamination throughout the property in excess of SWO 29-B standards.

b) SNG violates RECAP's prohibition of injury to private property, and SNG cannot meet the basic requirements outlined in RECAP regarding the use of Management Options.

SNG proposes to use RECAP in its evaluation of the environment damage it caused to the soil and groundwater on New 90's property. The Department has previously recognized "that even the consideration of the use of RECAP by Conservation remains an exception to the applicable Conservations regulations."[24] However, just like SWO 29-B, RECAP contains certain restrictions and requirements that any submitter must meet.

First and foremost, RECAP "does not authorize injury to private or public property or any invasion of personal rights, nor any infringement of federal, state, or local laws or regulations, and does not authorize the migration of COC offsite to adjacent property." Thus, even as an exception to SWO 29-B, RECAP cannot be used to authorize SNG to injure New 90's property or infringe upon its landowner rights. But, that is exactly what SNG is proposing here by leaving environmental damage it caused on New 90's property.

Furthermore, SNG employs the Management Options of RECAP to evaluate the damages on New 90's property. RECAP outlines general data and submittal requirements for these options, including historical information related to the release, and horizontal and vertical boundaries of the area of interest. SNG has not complied with these and other RECAP requirements. Without meeting these basic objectives, SNG cannot assure the Department that the use of RECAP management options adequately protects human health and the environment.

6. The administrative process cannot be used to interfere with the contractual obligations undertaken by parties to this lawsuit.

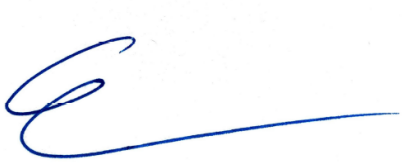
Finally, please be advised that Chevron and SNG each have a private contract relationship with New 90 whereby Chevron and SNG have contractually obligated themselves to pay for all environmental damage caused by their operations. These private contracts fit squarely into Paragraph H of Act 312 of 2006. Thus, regardless of how this Department elects to proceed given New 90's objections set forth herein, it would seem only appropriate that any decision by this Department specifically acknowledge that the decision should have no impact on the private contractual rights that exist between Chevron, SNG, and the landowner.

[24] *See*, *e.g.*, Letter of James H. Welsh, Commissioner of Conservation, to Louis E. Buatt, Esq., attorney for BP, dated October 27, 2015 – **Attachment 1**.

CONCLUSION

New 90 does not consent to the use of RECAP as the cleanup standard on its property. Given that, and for the reasons stated herein, New 90 implores the Department to require any MFP for the property be compliant with SWO 29-B. In furtherance of that aim, New 90 requests that any and all portions of Chevron's and/or SNG's respective proposed remediation plans seeking exception from SWO 29-B, including the use of RECAP, be excluded.

Respectfully submitted,



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