2012-06-19 CITY COUNCIL AGENDA CONSENT ITEM #9 ATTACHMENT

CONFIDENTIALITY/EVIDENCE CODE § 1152 AGREEMENT

This Confidential	ity/Evidence Code § 1152 Agreement ("Agreement") is dated and made
effective as of	, 2012, between Chevron U.S.A. Inc. ("Chevron") and the City of
El Segundo ("City").	

RECITALS

- A. WHEREAS, in or about December 2011, the City was reviewing whether Chevron should be paying more taxes to the City; and in light of this review, the City Council considered initiating a ballot measure that would substantially increase the amount of taxes paid by Chevron to the City. However, at the January 6, 2012 City Council meeting, the City and Chevron agreed to work together in good faith, rather than have the City pursue a ballot initiative that could have increased Chevron's taxes in El Segundo.
- B. WHEREAS, on or about February 1, 1994, the City and Chevron entered into an Administrative Agreement Regarding Gas Tax Collection ("1994 Agreement") regarding Chevron's payment of gas user taxes (and commonly referred to as a "UUT" tax) for its annual gas use as defined in the 1994 Agreement and the 1994 Agreement provides for a methodology for increasing or decreasing the amount of the gas user tax payment by Chevron as result of the gas used by Chevron at its El Segundo Refinery.
- c. WHEREAS, since on or about January 6, 2012, Chevron and City representatives have been engaging, and will continue to engage, in meetings and discussions for purposes of attempting to negotiate an agreement whereby Chevron may potentially pay additional amounts to the City and whether the amount of gas users tax payments paid by Chevron under the 1994 Agreement should be adjusted under the 1994 Agreement. Based upon the length of time that has elapsed since the 1994 Agreement and that the Audit (as defined below) or negotiations could result in a dispute between the parties and involve negotiating a new or amended agreement, the parties want to treat the negotiations and discussions regarding any payments by Chevron and the Audit of the 1994 Agreement as settlement communications ("Settlement Discussions"). These Settlement Discussions have and will involve Chevron providing the City with information regarding Chevron's gas consumption as defined in the 1994 Agreement and an Audit by the City of such information. There is also the potential that the City and/or Chevron will dispute the amount that Chevron should pay to the City for its gas consumption as defined and applied in the 1994 Agreement.
- **D.** WHEREAS, in connection with the Settlement Discussions, since January 3, 2012, Chevron and the City may disclose and exchange, and have disclosed and exchanged, information that is proprietary or confidential, or related to potential litigation, for purposes of facilitating the Settlement Discussions. The types of information that are being exchanged by the Parties include, but are not limited to, any and all oral and written communications, information, documents, notes, drawings, data or other material in tangible, intangible or electronic form (including, without limitation, information relating to technical, manufacturing,

operating, business, environmental, marketing, certain real estate holdings and/or restrictions, sales, tax information, financial operations, processes and designs, trade secrets, know-how, inventions, concepts, drawings, research methods and results, customer lists and supplier identities (hereinafter, "Confidential Information"). Notwithstanding the foregoing, documents that have already been made available to the public or which existed prior to the date of this Agreement and were or are not subject to an obligation of confidentiality shall not be considered Confidential Information.

- WHEREAS, the parties agree that "Tax Information", as used in this Agreement, E. shall constitute Confidential Information and shall mean any and all information or data, written, digital, oral or otherwise communicated or maintained, provided by or disclosed at any time by Chevron, or its agents or representatives to City, in connection with the determination of Chevron's payments of, or liability for, any taxes paid to any government entity, including taxes paid to the City of El Segundo, Los Angeles County, the State of California and U.S. government (including any Tax Information or data disclosed by Chevron related to the payment of such taxes) that: (i) reveals directly or indirectly the nature or amount of any gas used or other types of energy consumed by Chevron within the City of El Segundo, including the information revealed in the Audit (as defined below); (ii) may constitute a trade secret within the meaning of California Civil Code §3426.1(d); and (iii) any Tax Information disclosed pursuant to any applicable tax code that requires that certain tax information be kept confidential, including certain tax information as set forth in Revenue and Taxation Code Sections 7284.6, 7284.7 and 21002, Business and Professions Code Section 11612, Public Utilities Code Section 394.4, and El Segundo's Municipal Code Section 4-1.34, et al., and other applicable laws. Notwithstanding the foregoing and for purposes of clarity, the only Tax Information that shall not be considered Confidential Information is information that is required by law to be made available to the public or that is already in the public domain.
- F. WHEREAS, unless already public, any information exchanged by the Parties in the Settlement Discussions regarding the Reclaimed Water Agreement between the parties shall also be included within the definition of Confidential Information but not Tax Information.
- G. WHEREAS, notwithstanding the City's right to review some of Chevron's Tax Information and except as otherwise stated in Recital H below, Chevron and the City agree that: (i) the Confidential Information shall be deemed settlement communications pursuant to California Evidence Code § 1152; and (ii) any Tax Information shall be maintained in a strictly confidential manner by Chevron and the City, counsel and any consultant that either of them may retain for purposes of these Settlement Discussions to the extent required by applicable laws and the terms of this Agreement. Chevron contends that its records by which the amounts of any taxes are calculated that are paid to the City are highly proprietary and confidential, the release of which would cause Chevron competitive harm and disadvantage in the market place (and the City acknowledges that it understands Chevron's concerns).
- H. WHEREAS, notwithstanding the foregoing and unless restricted by applicable laws, Chevron and the City acknowledge that Chevron's gas consumption amounts provided to the City as defined in the 1994 Agreement can be admitted in litigation by the parties should a dispute arise between them regarding the amount of UUT that Chevron should be paying to the

City for Chevron's gas consumption (although such information may be subject to a protective order if Chevron decides to pursue such an order), provided that the parties shall fully comply with legal obligations regarding maintaining the confidentiality of such information in accordance with the above cited legal restrictions should any such litigation arise.

I. WHEREAS, the City also desires to audit (hereinafter "the Audit") Chevron's compliance under the 1994 Agreement pursuant to the scope of the Audit attached hereto as Exhibit A. Pursuant to Section 3.24.040 of the El Segundo Municipal Code and the 1994 Agreement, the City imposes upon Chevron and others a gas users tax (or again, commonly referred to herein as a "UUT" tax). The City has retained the accounting firm of as its audit consultant (the "Audit Consultant") to assist in the Audit.

NOW, THEREFORE, to facilitate a resolution of the foregoing matters, Chevron and the City are entering into this Agreement.

AGREEMENT

- 1. <u>Incorporation of Recitals</u>. The above Recitals are incorporated herein by reference and made part of this Agreement.
- 2. Parties. Where used herein the term "City" shall refer to the City of El Segundo, and each and every of the City's Council members, employees, agents, representatives or officers (including, but not limited to City's Tax Administrator/Director of Finance ("Tax Administrator"), and any consultant/auditor retained by the City such as the Audit Consultant. The term "Chevron" shall refer to Chevron U.S. A., Inc. and each and every of its directors, officers, employees, agents and representatives, including any attorney or consultant retained by Chevron.

3. **Confidentiality.** Each party agrees as follows:

- (a) Except as otherwise provided herein, Confidential Information shall not be disclosed to any third party by Chevron or the City and shall not be admissible in any litigation that arises between the parties pursuant to Evidence Code § 1152; and in addition Chevron's Tax Information will be kept confidential to the extent required by law and will not, without the prior written consent of Chevron, be disclosed by the City. However, to the extent litigation arises between the Parties regarding the Tax Information and Chevron's UUT consumption data as it relates to the 1994 Agreement, such information shall be admissible in such litigation so long as the parties protect its confidentiality in accordance with applicable legal requirements and this Agreement. The City agrees that before proposing to offer such information in litigation, Chevron shall be provided a reasonable time to seek an appropriate protective order in order to maintain any information as Confidential Information, including the Tax Information.
- (b) In the event that either party receives a legal request (by oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or

similar process, and in the City's case pursuant to the Public Records Act), or is otherwise required to disclose any Confidential Information, the party subject to the request will provide the other party with prompt written notice of such request and its intentions with regard to whether it intends to release Confidential Information. Either party shall have the right to seek a protective order or other appropriate remedy, at its own expense, and/or waive compliance with the provisions of this Agreement. In the event that a protective order or other remedy is not obtained, the party receiving the request shall only furnish only that portion of the Confidential Information and Tax Information that is legally required to be produced.

Audit. Chevron will reasonably respond to the Audit in accordance with the scope of the Audit attached hereto as Exhibit A, Section of the El Segundo Municipal Code, customary tax audit procedures, and to the reasonable requests of City's Tax Administrator for any information or records properly bearing upon Chevron's gas use as defined in the 1994 Agreement. For purposes of additional clarity, the information that will be provided by Chevron will be information that identifies the natural gas delivered through mains or pipes to the El Segundo refinery and its uses by Chevron in the City of El Segundo in a manner that is reasonably comparable to information provided by Chevron to the City as part of the negotiation of the 1994 Agreement that formed the basis of the 1994 Agreement and is consistent with the current El Segundo refinery operations and infrastructure for the audit period as identified in Exhibit A. To the extent contained in written or electronic records, this information, including but not limited to, the Tax Information, will be made reasonably available to the Tax Administrator, City Manager, Audit Consultant or the City's counsel (collectively "Audit Team") for review at the offices of Chevron or as otherwise reasonably agreed by the parties. In addition, to the extent that the Audit reasonably requires or would be facilitated by inspection of energy-related facilities at Chevron's El Segundo refinery, Chevron will arrange for such inspection(s) by the Audit Team, including the opportunity to question facility operators. Notwithstanding the foregoing and for purposes of clarity, the City's Audit shall be conducted in a manner consistent with the terms of the 1994 Agreement and shall be in strict compliance with the Scope of Audit attached hereto as Exhibit A.

The timing and duration of such review shall be subject to the reasonable agreement of City and Chevron, and shall take into account the convenience, reasonable business interests and needs, staffing and current audit load, of each of City and Chevron.

5. Chevron To Receive A Copy of the Audit Results. With reasonable promptness upon conclusion of the Audit, the City, including but not limited to, its Audit Consultant and counsel, shall share with Chevron the results and conclusions of the Audit, including the facts which underlie the same, and provide Chevron with a reasonable time to respond to any issue or alleged liability raised in the Audit. City agrees not to commence any audit assessment or legal action against Chevron for gas utility users tax due, until Chevron has had at least 45 days to review and respond to the Audit results and conclusions. Without limiting anything contained in this Agreement, the City acknowledges and agrees to exercise reasonable security measures to assure that custody, control and review of any Tax Information is strictly limited to the City Counsel, the City's auditors, the City Manager, Tax Administrator, and the City's legal counsel.

- 6. <u>No Competitor of Chevron</u>. Before obtaining any Confidential Information and Tax Information, the City shall ensure that its legal counsel and Audit Consultant do not represent any competitor of Chevron in the petroleum refining industry.
- 7. <u>Injunctive Relief.</u> Each party hereto recognizes that the other party may not have an adequate remedy at law and may be irreparably harmed in the event that any of the provisions of this Agreement are not performed in accordance with their specific terms or are otherwise breached. Accordingly, each party hereto agrees that the other party shall be entitled to seek injunctive relief to prevent breaches or threatened breaches of this Agreement and to specifically enforce the terms and provisions hereof, in addition to any other remedy that may be available, at law or in equity.
- 8. <u>No Waiver</u>. The parties understand and agree that no failure or delay by either party in exercising any right, power or privilege under this Agreement shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or future exercise of any right, power or privilege hereunder.
- 9. <u>Attorneys' Fees.</u> In the event any legal action is commenced in connection with this Agreement, including without limitation to compel compliance or for any alleged breach hereof, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs incurred therein, in addition to any other relief to which it may be entitled.
- 10. <u>Construction.</u> This Agreement shall be construed in accordance with California law. The parties to this Agreement hereby irrevocably and unconditionally consent to submit to the exclusive jurisdiction of the courts of either (a) Los Angeles County in the State of California, or (b) the federal courts of the Central District of California, for any actions, suits or proceedings arising out of or relating to this Agreement (and the Parties each agree not to commence any action, suit or proceeding relating thereto except in such courts).
- 11. **Termination.** This Agreement may be terminated by either party at any time on sixty (60) days prior written notice. Unless required otherwise by applicable law, all Confidential Information exchanged pursuant to, and during the effective period of, this Agreement shall remain fully protected in accordance with the terms of this Agreement notwithstanding its termination. Upon termination of this Agreement, each party will return or destroy all documents that constitute Confidential Information that were received from the other party and certify to the other party that all such documents have been returned and/or destroyed.
- 12. <u>Authority</u>. By their signatures below, the Mayor and City Manager of City represent that this Agreement has been duly approved by the City Council at an agendized regular meeting and the Chevron signatory below represents that he/she has the authority on behalf of Chevron to execute this Agreement.
- 13. <u>Notices</u>. All notices required or permitted to be given hereunder shall be in writing and shall be delivered by hand, certified mail or facsimile to the intended Party at the address specified below or such other address as may be specified by a Party by such a notice:

	If to Chevron:	If to City:
	Chevron Products Company	City of El Segundo
	a division of Chevron U.S.A. Inc.	
	324 West El Segundo Blvd.	
	El Segundo, CA 90266	
	2	Attn:
	Attn: Rod Spackman and/or Jake Spiering	
	espect to its subject matter, supersedes	is the entire agreement of City and Chevron all previous agreements, negotiations or y express written agreement of Chevron and
	IN WITNESS WHEREOF, the Parties hazed representations as identified below.	ave executed this Agreement through their
CITY	OF EL SEGUNDO	
By		
Dy	Greg Carpenter, City Manager	*
	Date:	
	Date.	
By		
Бу	Mayor of the City of El Segundo	
	Date:	
	Dute.	 0
CHEV	RON U.S.A. INC.	
Ву		
Printed	Name:	
Title:		

EXHIBIT A (Scope of Audit)

The City of El Segundo and Chevron agree that the City's Audit will be conducted in a manner that is in strict compliance with the following scope of the Audit:

- Use "baseline" data provided by the City regarding usage of gas as defined in the 1994 Agreement and determine if Chevron's gas use in two (2) consecutive years shows a twenty-five percent (25%) increase/decrease when compared to the baseline.
- The Audit shall cover the period of January 1, 2009 through March 31, 2012. Notwithstanding the foregoing audit period, the City and Chevron acknowledge and agree that Chevron is not waiving any statute of limitations defense and is not tolling any statute of limitations under any tax statute/ordinance or the 1994 Agreement or whether the City has right to conduct an audit or make an assessment for certain time period.
- Identify all natural gas delivered through mains or pipes to the El Segundo refinery and its uses by Chevron in the City of El Segundo in a manner that is reasonably comparable to information provided by Chevron to the City as part of the negotiation of the 1994 Agreement that formed the basis of the 1994 Agreement and is consistent with the current El Segundo refinery operations and infrastructure for the audit period.
- Audit Procedures will be as follows:
 - o Take a random sample of months and request the inventory reconciliation for each of those months;
 - o From the months selected, perform the following:
 - Trace the beginning and ending Inventory Balance to the General Ledger;
 - Trace the purchases, deliveries and consumption to the general ledger;
 - Obtain summary of purchases by vendor; select xx number to review;
 - For purchases, trace volumes, rates and total invoice price to inventory, deliveries and consumption;
 - Obtain summary of deliveries and consumption by product (Cogen, Feedstock and Fuel Utility System))
 - For each month selected, trace delivery and consumption amounts to General Ledger to ensure proper classification of delivery and consumption.

Based on the above information, prepare a report with the results of the a	audit steps performed
above. The City agrees to complete its Audit by no later than	, 2012 so long
as Chevron reasonably cooperates in making information available on a	timely basis.