

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN THE MATTER OF:

Case No. 14-51667-KMS

**MISSISSIPPI PHOSPHATES
CORPORATION, et al.**

Debtors

**RESPONSE AND OBJECTION OF MISSISSIPPI DEPARTMENT OF
ENVIRONMENTAL QUALITY TO DEBTORS' MOTION FOR APPROVAL OF
FOURTH AMENDED PROPOSED BUDGET FOR PROPOSED FINANCING AND USE
OF CASH COLLATERAL
(Relates to Docket Nos. 826 and 841)**

COMES NOW, the Mississippi Department of Environmental Quality ("MDEQ"), on behalf of the Mississippi Commission on Environmental Quality ("Commission"), and files this Response and Objection to the Debtors' Motion for Approval of Fourth Amended Proposed Budget for Proposed Financing and Use of Cash Collateral (Docket Nos. 826 and 841) ("Debtors' Motion"), stating as follows:

I. INTRODUCTION

1. MDEQ files this objection related to the allocation of funds in the budget specified in Exhibit "A" to Debtors' Motion. This Objection does not apply to the Settlement Agreement proposed in this matter (Dkt. No. 818) as the MDEQ supports the proposed Settlement Agreement. MDEQ has no objection to the amount of financing provided by the Lenders included in Exhibit "A" to Debtors' Motion, but submits herewith its arguments in opposition to the proposed allocation of available funds in Debtors' Motion in accordance with the Supplementary Affidavit of Richard J. Sumrall, which is attached as Exhibit "A" hereto. MDEQ's objection is that the required financial assurance for closure and post-closure care of the East Stack at the MPC facility as listed in the Debtors' budget is not proposed to be funded.

2. As discussed in the Affidavit of Richard J. Sumrall, which was previously filed by MDEQ as Docket No. 174-1 in this case, Debtor, Mississippi Phosphates Corporation (“MPC”), holds State of Mississippi Solid Waste Management Permit SW0300040452, which is attached as Exhibit “B” hereto. This permit authorizes and imposes conditions, requirements, and limitations upon the disposal of solid wastes (phosphogypsum) into a 263 acre onsite landfill. Financial Assurance for closure and post closure care is required by MPC’s Solid Waste Management Permit at Section E.1.f.6, and Commission Agreed Order No. 4716-04, which was previously agreed to by MPC and filed by MDEQ as Docket No. 174-2 in this case. Miss. Code Ann. § 17-17-27 provides statutory support and 11 Miss. Admin. Code Pt. 4, R. 1.4.F. provides regulatory support for the required financial assurance.

3. In accordance with Exhibit “C” attached hereto, MPC proposed, and MDEQ accepted, quarterly payments in the amount of \$199,000 each quarter, to a Trust Fund established to assure the proper closure and post-closure of the East Stack located at MPC’s facility. MPC maintains financial assurance in the form of a trust fund at Regions Bank to assure closure and /or post-closure care of the landfill at its facility in Pascagoula, Mississippi. The sole beneficiary of the trust fund is MDEQ, and its purpose is to assure payment for the costs of closure and/or post-closure care of the East Gyp Stack covered by the Trust Agreement in the event that MPC fails to do so, whether as a result of bankruptcy or for any other reason. The Trust Fund value currently stands at approximately \$11,100,000. MPC’s current estimate for the costs associated with closure and post-closure at the facility is approximately \$80,000,000, and the actual costs could potentially exceed this amount.

4. To fund the Trust, MPC had been making quarterly payments of \$200,000 into the fund since 2002. However, MPC failed to make the required quarterly payments due on March 31, 2015, and June 30, 2015. Lenders have funded and continue to fund waste water treatment

which includes chemicals, utilities, and staffing (including Allen Engineering) to assist in protection of human health and the environment at the MPC facility (Dkt. Nos. 66, 575, 717, 802, 826 and 841).

II. ARGUMENT

5. Debtors moved to cease making payments of certain property and casualty insurance premiums (Dkt. No. 725), and if this Motion is approved, Debtors will have at least \$179,828 of additional funds (Dkt. No. 841). These additional funds should be used to pay the overdue March 31, 2015, and June 30, 2015, trust fund quarterly payments as required.

6. Debtors continue an ongoing business with Trammo related to ammonia terminaling operations, in which they estimate bringing in \$724,000 (Dkt. Nos. 826 and 841, Exhibit “A”). These funds should be used, in part, to pay the overdue trust fund quarterly payments as required.

7. Debtors also received an additional \$349,859 from Mazzuma and other refunds as specified in the corrected budget (Dkt. No. 841). These funds should be used, in part, to pay the overdue quarterly payments to the Trust Fund as required.

8. Debtors’ counsel has spent over \$1,140,000 in fees and expenses from October 27, 2014, until Feb. 28, 2015. In a fee application filed on June 29, 2015, Debtors’ counsel is seeking an additional \$516,560.97 in fees and expenses from March 1, 2015, to May 31, 2015 (3 months) (Dkt. No. 834). Debtors’ Counsel indicates it incurred another \$410,000 in legal fees in the month of June alone (Dkt. No. 841). The proposed budget would allow Debtors’ counsel another \$275,000 in legal fees which would bring their fees and expenses to over \$2.34 million for the bankruptcy for a little over 9 months work (Dkt. Nos. 302, 586, 826, Exhibit “A” 834 and 841). In the meantime, the financial assurance trust fund has been funded only \$200,000

(paid in December 2014) throughout the bankruptcy, and \$398,000 which is due to the trust fund has not been timely paid.

9. MDEQ expressed concerns to Debtors' counsel about the high professional fees and the failure to make or budget for the required financial assurance payments in an e-mail dated June 16, 2015 (Exhibit "D"). MDEQ requested details (budgets, supporting documentation, etc.) of legal and other professional fees proposed for the future.

10. In response to MDEQ's e-mail dated June 16, 2015, Debtors' Counsel provided rough estimates for legal fees with no supporting documentation and claimed the quarterly financial assurance payments for 2015 were requested by the Debtors from the Lenders (Exhibit "E").

11. Further, Lenders, Debtors and MDEQ agree and prefer that the MPC facility should be sold as a "going concern", which requires ongoing financial assurance payments to satisfy the permit (Dkt. No. 818). In this Chapter 11 Bankruptcy, financial assurance is required by statute, regulation and through MPC's active permit.

12. To date, a purchaser of the MPC facility has not surfaced which makes a sale uncertain.

13. If a sale does not occur, liquidation of the assets (property and equipment) of the MPC facility will likely occur and it is highly likely that citizens of the U.S. and Mississippi will be burdened with enormous environmental clean-up costs (including closure and post closure care costs).

14. Unfortunately, Debtors' Motion ignores financial assurance requirements of the existing permit and is unfairly weighted towards professional fees with no provision to contribute towards closure and post-closure of the MPC facility when a "going concern" sale may never occur.

III. CASELAW RELEVANT TO OBJECTIONS AND PRAYER FOR RELIEF

15 . A debtor-in-possession must comply with all federal and state environmental laws regulating its operations and property. 11 U.S.C. §§ 362(b)(4) (police and regulatory exception to automatic stay); 28 U.S.C. § 959(b) (debtors-in-possession must manage and operate their property in accordance with applicable non-bankruptcy law). In enacting the regulatory exception, Congress wanted "[t]o combat the risk that the bankruptcy court would become a sanctuary for environmental wrongdoers." *United States v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d Cir. 1988). "Bankruptcy does not insulate a debtor from environmental regulatory statutes." *United States v. Hansen*, 262 F.3d 1217, 1238 (11th Cir. 2001); *see also In re Commerce Oil Co.*, 847 F.2d 291, 297 (6th Cir. 1998) ("[W]e decline to adopt [debtor's] premise that preservation of the debtor's estate is of greater priority in the statutory scheme set forth by Congress in Title 11 than is the enforcement of environmental protection laws explicitly intended to be excepted from the automatic stay."). The Debtor and its lenders should thus not be permitted to use bankruptcy as a safe haven from compliance with Debtor's environmental obligations. The public should not be exposed to such risks and the bankruptcy system should not be misused to seek such a result.

16. Financial assurance is an important protection for public health and safety which applies to debtors and non-debtors alike. *See generally Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846 (4th Cir. 2001). *Safety Kleen* found in part that the bankruptcy stay did not apply to South Carolina's financial assurance regulations which were a clear exercise of the state's regulatory power. *Id. at 866*.

IV. PRAYER FOR RELIEF

WHEREFORE, MDEQ, acting on behalf of the Commission, requests of the Court to include in its Final Order the following relief:

Require the Debtors to reallocate such funds in the proposed budget as may be necessary to pay the overdue March 31, 2015, and June 30, 2015, quarterly payments to the Trust Fund; as required, to protect human health and the environment and to continue to allow MDEQ to utilize its police and regulatory powers, pursuant to 11 U.S.C. 362 (b)(4); and, Any such other relief deemed appropriate by the Court.

RESPECTFULLY SUBMITTED, this the 1st day of July, 2015

By: /s/ Roy Hendee Furrh
Roy Hendee Furrh, MSB No. 4321
Theodore Lampton, MSB No. 101199
Attorneys for MDEQ and the Commission

Mississippi Department of
Environmental Quality
Legal Division
P.O. Box 2261
Jackson, MS 39225-2261
Telephone: 601-961-5260
Facsimile: 601-961-5349

Email: tlampton@mdeq.ms.gov
rfurrh@mdeq.ms.gov

CERTIFICATE OF SERVICE

I certify that the foregoing pleading was filed electronically through the Court's ECF system and served electronically on all parties enlisted to receive service electronically.

SO CERTIFIED, this the 1st day of July, 2015.

/s/ Roy Hendee Furrh
Roy Hendee Furrh