IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

In re:	)	
	)	
MISSISSIPPI PHOSPHATES CORPORATION, et al.	)	CASE NO. 14-51667-KMS
	)	Chapter 11
	)	Jointly Administered
Debtors	)	
	)	

UNITED STATES' RESPONSE TO DEBTORS' EMERGENCY MOTION FOR INTERIM AND FINAL ORDERS PURSUANT TO SECTIONS 105, 361, 362, 363, 364 AND 507 OF THE BANKRUPTCY CODE AND FEDERAL RULES OF BANKRUPTCY PROCEDURE 2002, 4001 AND 9014 (I) AUTHORIZING THE DEBTORS TO INCUR POST-PETITION SENIOR SECURED SUPERPRIORITY INDEBTEDNESS; (II) AUTHORIZING USE OF CASH COLLATERAL; (III) GRANTING POST-PETITION PRIMING AND SENIOR PRIORITY SECURITY INTERESTS AND SUPERPRIORITY CLAIMS; (IV) GRANTING ADEQUATE PROTECTION; (V) MODIFYING THEAUTOMATIC STAY; AND (VI) SCHEDULING A FINAL HEARING ON MOTION

The United States of America, on behalf of the Environmental Protection Agency (EPA), responds to Debtors' Motion (Docket 14) and Debtors' revised Proposed Final Order (Proposed Order) filed on November 10, 2014 (Docket 143), to obtain post-petition financing and grant security interests and superpriority administrative expense status, granting priority status to Pre-Petition Lenders, authorizing the use of cash collateral, and granting adequate protection.

1. The United States expressed objections to the Motion in letters to the Debtors and its lenders noting that without changes to the language of the Interim Order entered by the Court on October 29, 2014 (Docket 66), the Order could result in plant operations that violate applicable environmental laws and threaten public health and safety, or that otherwise improperly impair the rights of governmental units charged with protecting the public health and the environment. The Debtors and their lenders have substantially agreed to the revisions

proposed by the United States, as reflected in the Proposed Order filed on November 10, 2014 and discussed below, but the Proposed Order remains inadequate in some respects.

2. The United States, through EPA, is charged with regulatory responsibility to protect public health and the environment under several environmental statutes that pertain to Debtor's facility, including the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq., the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq., the Clean Air Act (CAA), 42 U.S.C. §§ 7401 et seq., and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq. These statutes and similar statutes under state law are designed, *inter alia*, to ensure that owners of facilities using hazardous substances or generating hazardous waste take necessary steps to protect the public and the environment from environmental hazards.

3. For example, RCRA regulates Debtor Mississippi Phosphates' (Debtor or MPC) management of the phosphogypsum stacks, sulfuric acid manufacturing waste streams, fertilizer manufacturing waste streams, and the vast quantity of contaminated process wastewater generated from its operations. As described in the Response and Objections of Mississippi Department of Environmental Quality (MDEQ), at pp. 2-7, the Debtor is also subject to extensive state regulation and permit requirements issued by MDEQ, including the management of process wastewater and management of the phosphogypsum stacks, under its environmental programs. *See also* Debtors' Motion at Paragraph 24, n. 10. There are extensive and costly requirements associated with the proper management of the process wastewater and phosphogypsum stacks to avoid and abate the release of contaminants into the environment. *See* Response and Objections of MDEQ to Debtors' Motion, at pp. 2-7.

4. MPC, which operates a fertilizer facility adjacent to Bayou Cassotte, is currently the subject of two Administrative Orders on Consent issued by EPA pursuant to its RCRA authorities: (1) a Section 7003 (Imminent Hazard) Order issued February 16, 2012, pursuant to 42 U.S.C. § 6973, requiring Debtor to mitigate risks to human health and/or the environment posed by hazardous wastes generated from its facility operations; and (2) a Section 3013 (Monitoring, Analysis and Testing) Order issued on June 8, 2007, pursuant to 42 U.S.C. § 6934, requiring Debtor to determine the extent of potential hazards that may be posed by the hazardous wastes and hazardous constituents that are or were present at the facility and that may have been released from the facility. These Administrative Orders are attached as Exhibits A and B. Debtor has not completed the requirements of these Administrative Orders.

5. 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); *Ohio v. Kovacs*, 469 U.S. 274, 285 (1985) (a debtor plainly may not maintain a nuisance, pollute the waters of the State or refuse to remove the source of such conditions); *In re H.L.S. Energy Co.*,151 F.3d 434,438 (5th Cir. 1998) (obligation to plug unproductive oils wells remained with the bankruptcy estate); *In re Commonwealth Oil Ref. Co*., 805 F.2d 1175,1182-1188 (5th Cir. 1986) (enforcement of RCRA obligations not subject to the automatic stay). 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 Debtors and their lenders thus should not be permitted to use bankruptcy as a safe haven from compliance with Debtors' environmental obligations. The public should not be exposed to such risks and the bankruptcy system should not be misused to seek such a result.

6. Therefore, the United States requested that the Debtors modify those provisions of the Interim Order that inappropriately sought to limit the environmental obligations of the Debtor under the law or that would provide a windfall to the Debtors' secured creditors, at the taxpayers' expense, should the Governments need to take action necessary to protect the public and the environment from harm. In Debtors' Proposed Order, they have substantially complied with the Government's requests for modifications as identified below.

OBJECTIONS AND DEBTORS' PROPOSED MODIFICATIONS TO ADDRESS THEM

Paragraph 28:

7. The United States was concerned that Paragraph 28 of the Interim Order seeks to alter the liability scheme under federal environmental law by declaring that "the DIP Agent and DIP Lenders shall not . . . (b) be considered to be exercising control over any operations of the Debtors or acting in any way as a responsible person, an owner or operator under any applicable law, including without limitation, any environmental law" and that neither the Order nor the loan documents could be construed "to impose or allow the imposition upon . . . [lenders or agents] of any liability for any claims arising from the pre-petition or post-petition activities of the

Debtors or any of their affiliates in the operation of their business or in connection with their restructuring efforts."

8. Federal statutes, and the body of case law interpreting them, control the designation of owners, operators and responsible persons for purposes of liability or responsibility under federal law. We do not know what actions the Pre-Petition Lenders have taken or what the post-petition lenders may take in the future.

9. The United States requested that the Debtor either strike the underlined language in Paragraph 28, or, alternatively, add the following sentence in Paragraph 28: "*This Paragraph shall apply to environmental liabilities only so long as the actions of the DIP Agent, DIP Lenders and Pre-Petition Lenders do not constitute, within the meaning of federal or state environmental law, actual participation in the management or operational affairs of a vessel or facility owned or operated by the Debtor, or otherwise cause lender liability to arise or the status of control, responsible person, owner, or operator to exist under applicable federal, state, or local law.*" The Debtors' revised Proposed Order contains a revised Paragraph 27(iii) (previously 28) that generally addresses the Government's concerns. The Government is satisfied with the revised language and respectfully requests that the Court include it in the final version of the Order.

Financial Assurance:

10. Debtors identified in their Motion a financial assurance requirement under state environmental law that is meant to ensure adequate funding for environmental obligations. Debtors' Motion at Paragraph 24, n. 10. Currently a trust fund is in place as partial financial assurance for MPC's extensive "closure" and "post-closure" obligations pursuant to an order by the MDEQ. There is also a financial assurance requirement under the federal RCRA statute that

applies to Debtors. Financial assurance is an important protection for public health and safety which applies to debtors and non-debtors alike. *See Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846 (4th Cir. 2001). The lenders should not be able to prime the Governments' interests in financial assurance (which generally is not property of the estate in any event) that is required by law to help deal with environmental obligations related to the facility.

11. Accordingly, the United States requested that a clarification be added to the Order that: "*Nothing in the Interim or Final Order or the DIP Loan Documents impairs or adversely affects any right of a governmental unit under financial assurance instruments provided by the Debtor to comply with non-bankruptcy law, including the Trust Fund established by Mississippi Phosphates Corporation pursuant to its Solid Waste Management Permit and state regulations.*"

12. The Debtors' Proposed Order contains a new Paragraph 39 that includes language protecting the financial assurance Trust Fund established by MPC pursuant to its Solid Waste Permit. Although the new language is narrower than the Government's proposed language, the Government is generally satisfied with this new language and respectfully requests that the Court include it in the final version of the Order. But the Government also advises the Court that financial assurance could potentially be provided by instruments other than a trust fund, and the Governments' rights to financial assurance should not be impaired regardless of the form it takes. Finally, the Court should be aware that the Trust Fund is underfunded and does not meet the full financial assurance requirements for closure of the facility under state law or RCRA.

Paragraph 19: Section 506(c)

13. For similar reasons, the United States requested a narrow carve out from the proposed waiver in Paragraph 19 of statutory rights under Section 506(c) of the Bankruptcy Code, 11 U.S.C. § 506(c). Section 506(c) of the Code provides that, "[t]he trustee may recover

from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c). The Debtors include in Paragraph 19 of the Interim Order a provision that disallows such surcharges by the trustee, Debtors, or any party-in interest against any of the Pre-Petition Collateral or other collateral, or against any of the lenders.

14. As the Court noted during the status conference held on November 4, 2014, neither the parties nor the Court can predict future events and necessities at this facility. Debtor operates a facility that generates hazardous wastes and pollutants, as defined under federal and state law, that, if released into the environment, pose a risk to human health, welfare and the environment. If it were to become necessary for a governmental unit to take action to address an environmental problem that the Debtor cannot or will not address despite its obligation to do so, then the Debtor-in-possession and Governments should not be precluded from exercising their rights under the Bankruptcy Code, including Section 506(c), as appropriate under the circumstances. Indeed, if the Governments expend funds to protect public health, safety, and/or the environment, the lender would reap an unfair windfall in the increased value of its collateral due to the removal of such threats.

15. Paragraph 19 of Debtors' Proposed Order includes the limited carve out requested by the United States: "*Notwithstanding anything to the contrary in this Order or the DIP Loan Documents, nothing in this Order or the DIP Loan Documents shall preclude any governmental unit from seeking leave to assert a section 506(c) surcharge against contaminated collateral where the governmental unit expends funds to satisfy the Debtor's obligations with respect to the contaminated collateral pursuant to 28 U.S.C. § 959(b).*" The United States is satisfied with this

additional language and respectfully requests that the Court include it in the final version of the Order.

Additional Language Requested to Preserve Rights:

16. Additionally, the United States requested that the Debtors add the following language to ensure that the Order does not cut off government rights to set off and recoupment, or to claims by the Governments for insurance proceeds to the extent permitted by applicable law:

(1) *"As to the United States, any State or municipality and any of the foregoing's respective agencies, departments or agents, nothing in this Final Order or the DIP Loan Documents shall discharge, release or otherwise preclude any valid right of setoff or recoupment that any such entity may have."*

(2) *"Nothing in this Final Order or the DIP Loan Documents shall impair or adversely affect any claim of any governmental unit with respect to any insurance proceeds for liabilities under environmental laws to the extent not permitted by applicable law.*"

17. Debtors' Proposed Order includes language in the second sentence of new paragraph 39 that addresses these concerns specifically as to the EPA and MDEQ, but it does not address the rights of other governmental units. The revised language should apply to any agency or department of the United States or State of Mississippi as allowed under applicable law, 11 U.S.C. § 553. The Government requests that the Court broaden Paragraph 39 to address the rights of other governmental units.

Paragraphs 9 and 16: Notice and Amendments

18. The United States requested that notice of material changes and modifications to the DIP Facility or other DIP Loan Documents, including the proposed budget, be provided to

the United States and MDEQ and be subject to approval by this Court. Debtors' Proposed Order has addressed these concerns in a manner satisfactory to the United States.

The Budget for Environmental Spending:

19. Debtors have acknowledged the need to maintain operation of the waste water treatment plant to manage the hazardous process wastewater present at the MPC facility consistent with its permit issued by the MDEQ. The wastewater treatment plant has a 1.5 million gallon per day treatment capacity. EPA shares MDEQ's concern that the Debtors' proposed budget for the purchase of chemicals used to operate the waste water treatment plant is inadequate to supply sufficient chemicals to run the waste water treatment plant at or near full capacity over the next several months. *See* Response and Objection of MDEQ at pp. 7-8. At this time the United States simply wishes to alert the Court and interested parties that additional funds may be needed in order for MPC to comply with its obligations consistent with Paragraphs 37 (Environmental Compliance, 28 U.S.C. § 959(b)) and 38 (Environmental Incident or Event).

20. Under Paragraph 21, parties in interest are given 60 days to challenge the Agent's and Pre-Petition Lender's security interests in the Pre-Petition Collateral and the amount and allowance of Pre-Petition Indebtedness. The ability of the Governments or any party in interest to evaluate and, if appropriate, challenge the Pre-Petition Lenders' interests within 60 days depends on the cooperation of Debtors and Pre-Petition Lenders in producing relevant documents and information in a timely manner upon request or in discovery. The United States has informally requested documents from Debtors' counsel, but it has not yet received them.

21. Finally, the United States reserves the right to join in any objections of other parties in interest or to file supplemental objections based on information about the budget that has not yet been disclosed.

PRAYER FOR RELIEF

For all of the above reasons, the United States does not object to the Debtors' Motion as to the revised Proposed Order provided that the Final Order includes those revisions made in the Proposed Order and discussed herein, and provided that the Government's concern noted in Paragraph 17 above is addressed. The MDEQ has authorized below-signed counsel to state that they join in this request.

DATE: 11/12/14

Respectfully submitted,

FOR THE UNITED STATES

/s/ *Kenneth G. Long*
KENNETH G. LONG
Senior Attorney
D.C. Bar No. 414791
KARL J. FINGERHOOD
Senior Counsel
PA Bar No. 63260
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Tel. (202) 514-2840
Fax (202) 616-6584
Email: kenneth.long@usdoj.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 12th day of November, 2014.

/s/ Kenneth G. Long
Kenneth G. Long
D.C. Bar No. 414791
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Tel. (202) 514-2840
Fax (202) 616-6584
Email: kenneth.long@usdoj.gov

Counsel for the United States of America