UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	Chapter 11
EXIDE TECHNOLOGIES,	:	Case No. 13-11482
Debtors.	:	

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S OBJECTION TO DEBTOR'S MOTION FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING DEBTOR (A) TO OBTAIN POST-PETITION FINANCING PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), AND 364(e) AND (B) TO UTILIZE CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363, (II) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED PARTIES PURSUANT TO 11 U.S.C. §§ 361, 362, 363 AND 364 AND (III) SCHEDULING FINAL HEARING PURSUANT TO BANKRUPTCY RULES 4001(b) AND (c)
Relates to Dkt. 17 and 79

Comes now the Texas Commission on Environmental Quality ("TCEQ"), by and through the Texas Attorney General's Office, and respectfully objects to the Debtor's Motion styled "Motion for Interim and Final Orders (I) Authorizing Debtor (A) to Obtain Post-petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), and 364(e) and (B) to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363, (II) Granting Adequate Protection to Pre-petition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364 and (III) Scheduling Final Hearing Pursuant to Bankruptcy Rules 4001(b) and (c)" ("the Motion") (Dkt. 17).[1] As set forth in more detail below, the TCEQ asserts that the Motion is overreaching and TCEQ objects to the extent that the

[1]Debtor's Motion, including exhibits, is 677 pages long. The Court entered the 51 page Interim Order (Dkt. 79) on Day 2 of the case. Aggregate fees paid to underwriters, arrangers, and lenders for making the DIP Facility available total approximately $23.69 million. (Motion at pg 18).

Motion limits, or might limit, the Debtor's ongoing or future environmental obligations. TCEQ respectfully contends that the Court should not be asked to preordain the entire case at the outset because of the Debtor's contractual agreements with its lenders. Specifically, TCEQ objects to the budgeting restrictions on the use of cash collateral and the fact that there is no carve out for environmental expenditures; the broad security interests granted to the lenders (which could be read to extend to financial assurance of the Debtor provided to the government or any right of set off of any governmental unit); the Section 506(c) waiver and the appointment of a Trustee or Examiner being an Event of Default. In support of its Objection to the Motion, TCEQ states as follows:

Background

TCEQ's concerns in this bankruptcy case revolve largely around the Debtor's ongoing environmental obligations at a facility in Frisco, Texas.[2] The Debtor owns real property within the city limits of Frisco, which includes the Exide Technologies Battery Recycling Facility ("the Facility") and about 170 acres of surrounding undeveloped buffer property (collectively, "the site"). The facility, a secondary lead smelter, was active from 1964 through November 2012 and processed used lead-acid batters and other lead-bearing materials. Product of the process included a slag which was processed and disposed of in an on-site Class II landfill, and waste acid, which was treated through an on-site wastewater treatment system. In October, 2012 Exide advised the TCEQ that it intended to cease operations at the facility effective November 30, 2012. Cleanup and closure of the facility began in December 2012. The Debtor has proposed plans describing the decontamination

[2]There are two environmental orders pertaining to this site: EPA Docket No. RCRA 06-2011-0966 and TCEQ Agreed Order, Docket No. 2011-1712-IWH-E. Soil and groundwater investigations ordered by the TCEQ are underway. An Affected Property Assessment Report ("APAR"), due to TCEQ on July 10, 2013, is being developed documenting the extent of contamination in the areas required by the Order.

and demolition of the facility to which TCEQ voiced no opposition. Decontamination and demolition is ongoing.

In addition to the work at the facility, Exide has agreed to sell the buffer property to the Frisco Economic Development Corporation ("EDC") and the Frisco Community Development Corporation ("CDC"). The agreement requires Exide to clean up the buffer property to risk-based residential standards under TCEQ's Voluntary Cleanup Program ("VCP").[3] On October 25, 2012, Exide, the City of Frisco, the EDC and the CDC submitted an application to the VCP to remediate this undeveloped buffer property. TCEQ accepted the application on December 8, 2012 and entered into an agreement with the applicants on March 29, 2013. The VCP site is currently undergoing investigation, with an Affected Property Assessment Report ("APAR") due to be submitted to TCEQ on or before September 13, 2013.

Objection

1. TCEQ objects to the extent that the Motion seeks to limit the Debtor's ongoing environmental obligations, including those obligations imposed by the Debtor's active permits, any existing environmental orders or by the Debtor's status as the owner or operator of any facility.

2. TCEQ is concerned by the budgetary restrictions on the use of cash collateral and the fact that there is no Carve Out for environmental expenditures. To ensure that the Debtor's obligations to manage and operate its property in accordance with applicable state and federal laws pursuant to 28 U.S.C. § 959(b) remain clear, TCEQ requests that the following language be added to any Order approving the Motion:

[3]The Texas VCP provides administrative, technical and legal incentives to encourage the cleanup of contaminated sites in Texas.

> Notwithstanding anything to the contrary in this Order or the DIP Credit Agreement, nothing in this Order or the DIP Credit Agreement relieves the Debtor of any obligations under federal, state or local police or regulatory laws or under 28 U.S.C. § 959(b). The Debtor shall be authorized to utilize funds to comply with ongoing obligations under 28 U.S.C. § 959(b).

3. TCEQ objects to the broad security interest the Debtor seeks to provide to the DIP Lenders and respectfully requests that any financial assurance of the Debtor provided to the government, any insurance proceeds or insurance coverage for liabilities to the government, and any right of setoff of any governmental unit be carved out from the grant of the security interest. To obviate its objection on this point, TCEQ requests that the following language be added to any Order approving the Motion:

> Notwithstanding anything to the contrary in this Order or the DIP Credit Agreement, nothing in this Order or the DIP Credit Agreement extends the DIP Liens to any Financial Assurance of the Debtor provided to the government, any insurance proceeds or insurance coverage for liabilities to the government, or any right of setoff of any governmental unit.

4. TCEQ further objects to the broad language contained at paragraph 8(d) of the Interim Order and respectfully contends that it is overreaching to declare the DIP Liens and Adequate Protection liens senior to any future lien of a governmental unit at the outset of a bankruptcy case. TCEQ requests that the language reading, "(ii) any liens arising after the Petition Date including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other domestic or foreign governmental until (including any regulatory body), commission, board or court for any liability of the Debtor" be deleted from this provision in the Final Order.

5. TCEQ objects to the requested 506(c) waiver as it pertains to the government and

respectfully contends that such a waiver is inappropriate at the outset of the case.[4] In the event that taxpayer dollars are later used to remediate or clean up the Debtor's property, TCEQ's obligation to preserve the public fisc would require it to seek to surcharge[5] those parties who directly benefit from such action– in this case the lenders holding liens on the remediated property. If the Debtor is permitted to waive Section 506(c) claims, any postpetition cleanup by the government would arguably be entitled to treatment as an administrative expense claim of the estate and thus paid ahead of general unsecured creditors, who would bear the cost of cleanup by the diminution of funds available for distribution to them. TCEQ asserts that this result is inequitable.[6]

6. TCEQ requests that governmental units be carved out from the 506(c) waiver in order to protect against the lenders later receiving a windfall (through the cleanup of their collateral) at the expense of taxpayers. To obviate its objection on this point TCEQ requests the inclusion of the following language into any Order approving the Motion:

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[4] Some courts have held that principles of res judicata may apply when a party does not timely object to such insulating language. *See, e.g.*, *In re Intelliquest Media Corporation*, 26 B.R. 825 (B.A.P. 10th Cir. 2005); *see also National Westminster Bank USA v. Zindler* (*In re Film Equipment Rental Co., Inc.*), 1991 WL 274464 (S.D.N.Y. Dec. 12, 1991).

[5]The issue of whether third parties have standing to bring 506(c) claims is an open issue. *See Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000).

[6]Further, some courts have held that such a waiver would impermissibly alter the Code. For example, in *In re The Colad Group, Inc.*, the Court explained that by denying the trustee the ability to seek to surcharge collateral for costs that have benefitted the secured creditor, such language shifts the costs to the unsecured creditors. 324 B.R. 208, 224 (W.D.N.Y. 2005); *see also In re Ridgeline structures, Inc.*, 154 B.R. 831 (Bankr. D.N.H. 1993) (explaining that the provision in proposed stipulation for cash collateral usage which prohibited the charging of any administrative expense against the secured creditor was "against public policy and unenforceable per se."); *McAlpine v. Comercia Bank-Detroit* (*In re Brown Bros., Inc.*), 136 B.R. 470, 474 (W.D. Mich. 1991) (holding that waiver of 506(c) claim in cash collateral order is unenforceable *per se*); *see also In re Willingham Invs., Inc.*, 203 B.R. 75, 80 (Bankr. M.D. Tenn. 1996) (holding that cash collateral order improperly attempted to grant lender immunity from surcharge).

> Notwithstanding anything to the contrary in this Order or the DIP Credit Agreement, nothing in this Order or the DIP Credit Agreement nothing shall preclude any subsequently appointed Trustee from asserting any claim under 11 U.S.C. § 506(c), nor shall anything preclude any governmental unit (as defined under 11 U.S.C. § 101(27) from seeking leave to assert a section 506(c) claim against any secured creditor for any collateral which that governmental unit has expended funds to satisfy the Debtor's obligations pursuant to 28 U.S.C. § 959(b).

7. TCEQ objects to the inclusion as an "Event of Default" the appointment of a Trustee under Chapter 7 or Chapter 11 of the Bankruptcy Code, or a responsible officer or an Examiner. (Credit Agreement at Sec. 8, Motion, Exhibit B). While the lenders should be free to determine whether to lend to any later appointed officer of the court, TCEQ respectfully contends that it is inappropriate to seek to divest this Court of the ability to freely determine whether the appointment of such an officer is necessary or appropriate.

WHEREFORE, TCEQ respectfully requests that the Court sustain its objection to the Motion and include its requested language into any Final Order approving the Motion and for such other relief as is just and proper.

Respectfully submitted,

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Certificate of Service

I certify that a true and correct copy of the foregoing Objection was served on all parties who receive notice by the Court's Electronic Filing System on July 2, 2013 and that a copy was sent by overnight carrier (FedEx) to the parties listed below on July 2, 2013.

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