

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:)
)
USA SPRINGS, INC.) **Chapter 7**
) **Case No. 08-11816-JMD**
Debtor.)
)

**RESPONSE TO CREDITORS' REQUEST FOR DISMISSAL OF BANKRUPTCY
AND TO OPPOSITION OF THE CHAPTER 7 TRUSTEE**

The State of New Hampshire Department of Environmental Services (“Environmental Services”), by its attorneys, the Office of the Attorney General, hereby responds to the Creditors’ Request For Dismissal of Bankruptcy (the” Motion to Dismiss”), doc. no. 1049, and to the Trustee’s Opposition, doc. no. 1054, , for the limited purpose of addressing the status of the large groundwater withdrawal permit (“LGWP”). Environmental Services takes no position on whether the Motion to Dismiss ought to be granted. Moreover, in light of that and because counsel has an unavoidable family obligation on the day of the hearing, Environmental Services will not be present at the hearing. Environmental Services nevertheless asks the Court to consider the information contained herein and excuse counsel’s presence. In support hereof, Environmental Services respectfully represents as follows:

1. Environmental Services issued the Debtor a 10-year LGWP in accordance with various State laws in 2004. The decisions of whether to grant, deny or renew a particular permit or to suspend or revoke it are questions for the technical and administrative expertise of State officials. *See, e.g.*, N.H. Rev. Stat. Ann. 485-C:21 (procedure and standards for reviewing application for large groundwater withdrawals); N.H. Admin. R.

Env-Wt 300 *et seq.* to 800, *et seq.*; N.H. Admin. R. Env-Wq 403 *et seq.* (criteria and procedures for permitting groundwater withdrawals); *Appeal of Town of Nottingham*, 153 N.H. 539, 555 (2006) (agency interpretations of rules and law accorded deference). If the State determines to deny or not renew a permit, in general the applicant is entitled to seek rehearing and to make an appeal of that decision in accordance with State law. *E.g.* N.H. Rev. Stat. Ann. 541:6; 541-A:29-30, 482-A:10, 482:14, 21-O:14, 483-B:14; and 485-C:21 (VI); N.H. Admin. R. Env-Wq 403.19 & 403.33 (procedures for revoking or suspending groundwater withdrawal permit and appeals); N.H. Admin. R. Env-Wt 202.03. *See Nottingham*, 153 N.H. at 552 (discussing appeals for groundwater withdrawal permit).

2. In the Motion to Dismiss, in referring to the LGWP, the Creditors assert that “no significant action has been taken to preserve this valuable asset for the benefit of creditors. USA Springs cannot renew this permit while the estate is in bankruptcy and while in the control of the appointed Trustee.” Motion to Dismiss ¶ 3. The Creditors suggest by this that if the case were dismissed, they *could* get the LGWP renewed.

3. In his Opposition, the Trustee alleges: “The Request states as another reason is that the Large Groundwater Withdrawal Permit (the “Permit”) which is an asset of the bankruptcy estate cannot be renewed while the Debtor is in bankruptcy. Nothing could be further from the truth.” While the Trustee acknowledges that the LGWP has expired, he then asserts (without citing any particular authority for it) that he believes that “the equitable powers of the Court can[] be employed to renew the Permit.” Trustee’s Opposition ¶¶10-11.

4. Environmental Services believes that neither of these parties’ positions on this issue is sustainable.

5. According to its terms, the LGWP expires on July 1, 2014. Under applicable State law (and the terms of the LGWP itself), a complete application for renewal must have been filed with Environmental Service not later than April 2, 2014. *See* N.H. Admin. R. Env-Ws 388.26(a) (permittee shall submit application at least 90 days prior to expiration) (effective in 2004 but superseded by Env-Wq 403 which requires application 1 year before expiration). No renewal application of any kind was received before that date or since. The consultant retained by the Trustee agreed and acknowledged that the deadline for a renewal application was April 2, 2014.

6. In addition, Environmental Services informed the Trustee's consultant nearly a year ago that there were a number of very significant technical obstacles to renewing the LGWP. To date none of those issues has been addressed.

A. Section 105 Cannot Be Used to Alter the Renewal Process

It is, of course, widely held, including by this Court, that section 105 cannot be used in a manner inconsistent with the demands of the Bankruptcy Code and does not anoint the Bankruptcy Court with "a roving commission to do equity." *In re Perrotta*, 406 B.R. 1, 15-16 (Bankr. D.N.H. 2009) (section 105 may be invoked when an equitable remedy is "necessary to preserve a right elsewhere provided in the Code, is consistent with the Code, and does not alter the Code's distribution of other substantive rights."). The Trustee has not identified any provision of the Code that authorizes the Court to control State administrative agency action concerning the LGWP. In addition, the equitable relief being sought is actually inconsistent with the Code and will alter the State's substantive rights provided in the Code.

B. The Bankruptcy Code Does Not Enhance Property Rights

The Bankruptcy Code does not create or enhance property rights of a debtor. *In re Gull Air, Inc.*, 890 F.2d 1255, 1261-62 (1st Cir. 1989); *see, e.g., Winthrop Old Farm Nurseries, Inc. v. New Bedford Institution for Savs. (In re Winthrop Old Farm Nurseries, Inc.)*, 50 F.3d 72, 76 (1st Cir 1995) (a bankruptcy court cannot allow debtors to obtain value of property which “would have been completely beyond reach save for the filing...”); *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir.) (“whatever rights a debtor has in property at the commencement of the case continue in bankruptcy – no more, no less”), *cert. denied*, 469 U.S. 982 (1984). It is clear that under State law the debtor’s interest in the permits was limited by the laws in place providing for their grant, revocation and renewal, as well as the complex regulatory enforcement programs that the permits represent. *See In re Gull Air*, 890 F.2d at 1260 (debtor’s “interest in the slots, however, is a limited interest encumbered by conditions that the FAA imposed in its regulations”). If the Trustee has or had an issue with how those programs are administered he has State law rights to notice, hearing and appeals. Having not proceeded in a timely way, he will lack standing to register any challenge.

C. 28 U.S.C. § 959(b) Requires Compliance With State Law.

Federal law requires every trustee to manage the estate property “according to the requirements of the valid laws of the State.” 28 U.S.C. § 959(b). Neither the Creditors nor the Trustee has alleged that any law concerning the permits is not valid. Therefore, the Trustee cannot by injunction or declaration of this Court supplant the valid laws of the State to keep its permits if there is some reason for the State to determine not to renew them. *E.g. Midlantic Nat’l Bank v. New Jersey Dept. of Env’tl. Protect.*, 474 U.S. 494, 501 (1986) (bankruptcy does not provide general exemption from state environmental laws);

Cumberland Farms, Inc. v. Florida Dept. of Env'tl. Protection, 116 F.3d 16 (1st Cir. 1997)

(“It is by now abundantly clear that in state-regulated areas such as protection of the environment, a bankruptcy court must comply with the laws of the state involved. Debtors in possession . . . do not have carte blanche to ignore state and local laws protecting the environment against pollution.”); *see Wilner Wood Prods. v. Maine*, 128 B.R. 1, 2 (D. Me. 1991) (debtor cannot use bankruptcy proceeding to avoid requirement of obtaining environmental permit); *In re Stevens*, 68 B.R. 774, 783 (D. Me. 1987)(Cyr, J.) (bankruptcy’s priorities give way to environmental laws designed to protect public health and safety); *In re Lauriat's Inc.*, 219 B.R. 648 (Bankr. D. Mass. 1998) (no exception to requirement to follow law for administrative convenience or cost savings); *Grace Coal Co. v. Kentucky (In re Grace Coal Co.)*, 155 B.R. 5, 6-7 (Bankr. E.D. Ky. 1993) (debtor cannot use bankruptcy to avoid obtaining state mining permit); *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D.P.R. 1979) (holding under 28 U.S.C. § 959(b) that bankruptcy debtor cannot operate quarry without air pollution permit).

Respectfully submitted,

STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL
SERVICES

By its attorneys,

JOSEPH A. FOSTER
ATTORNEY GENERAL

Date: June 19, 2014

/s/ Peter C.L. Roth
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Certificate of Service

I, Peter C.L. Roth, do hereby certify that the foregoing was served on June 19, 2014, by the court's ECF system upon those parties requesting ECF service.

Dated: June 19, 2014

/s/ Peter C.L. Roth
Peter C.L. Roth