

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

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

**LIMITED OBJECTION TO MOTION OF CHAPTER 7 TRUSTEE FOR
AUTHORITY TO SELL ESTATE PROPERTY AT PRIVATE SALE
PURSUANT TO 11 U.S.C. § 363**

The State of New Hampshire Department of Environmental Services (“Environmental Services”), by its attorneys, the Office of the Attorney General, hereby objects to the Motion of Chapter 7 Trustee for Authority to Sell Estate Property At Private Sale Pursuant to 11 U.S.C. § 363 (the “Sale Motion”), doc. no. 1069. Environmental Services objects because the Sale Motion purports to sell the Debtor’s rights to a variety of State issued permits and authorization which, for the most part, no longer exist.¹ In support hereof, Environmental Services respectfully represents as follows:

1. Environmental Services issued the Debtor a 10-year large groundwater withdrawal permit (“LGWP”) in accordance with various State laws in 2004.²
2. The Debtor’s LGWP expired July 1, 2014, according to its terms and applicable non-bankruptcy law and is no longer capable of simply being renewed. A purchaser of the property would be required to seek a new permit in accordance with current standards and procedures. Under applicable State law (and the terms of the LGWP itself), a complete application for renewal must have been filed with Environmental Services not later

¹ Environmental Services does not otherwise take any position about the merits of the proposed sale.

² LGWP 2004-0003.

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 R. Env-Ws 388.26(a) (permittee shall submit application at least 90 days prior to expiration) (effective in 2004 but superseded by Env-Wq 403 which now requires application 1 year before expiration). No renewal application of any kind was received before that date or since. As a result, from Environmental Services' perspective there is no LGWP to transfer.

3. In addition to the LGWP, the Trustee purports to sell rights in several other expired State permits. *See* Sale Motion, Exhibit "B".

- The groundwater management permit (no. 2) expired but the certificate of no further action (no. 3) related to it indicate that nothing more needed to be done at that time. Hydrology of the site and regulatory requirements may have changed in the interim and the buyer would be expected to conduct all appropriate inquiry prior to purchasing the property. *See* 40 C.F.R. part 312.
- The original Alteration of Terrain (Site Specific) permit (no. 4) was amended and superseded (no. 9). As so amended and superseded, this permit expired May 11, 2014. Any additional earth disturbance at the property would require the attainment of a new Alteration of Terrain permit.
- The Wetlands and Non-Site Specific permit (no. 5) has long expired and cannot be extended or renewed. The buyer is required to reapply and conform to all current rules, including mitigation.
- The monitoring structures permit (no. 6) is only good if the structures are intact and serviceable, otherwise they will need to be re-permitted in conformance with current rules.

- Number 7 on the list, the dam permit, was for the construction of a dam. If the dam has been built there is no need to get a new dam construction permit though other regulatory requirements may apply. If the dam was not built, the permit is still valid.
- The holding tank approval (no. 8) is apparently still valid and runs with the land on which the tank is installed.
- The subsurface system construction permit (no. 10) has expired and must be applied for anew.
- Number 11 on the list appears to be a town subdivision item and not a state permit.
- Number 12, the bottled water approval, is expired and cannot be transferred. Any bottled water sources developed at the property would need to be approved in accordance with N.H. Admin. R., Env-Dw 303.

While the Sale Motion does not purport to seek judicial intervention in the State's permitting processes, the Trustee previously expressed his belief that "the equitable powers of the Court" could be "employed to renew" the large groundwater withdrawal permit. *See* Opposition of the Chapter 7 Trustee to the Creditors Request for Dismissal of Bankruptcy Filed By Ralph Fiaella, Jr., doc. 1054, at ¶11. Environmental Services opposed this, doc. 1057. Thus far, the Trustee has not taken any steps to actually invoke the Court's equitable powers in the manner he suggested. Nevertheless, Environmental Services would oppose this approach for all of the same reasons it stated in its 2014 pleading. Those arguments are summarized below but are by no means complete and Environmental Services reserves the right to fully engage on the issue should the Trustee or anyone else seek to have the Court require the renewal of the permits.

A. Section 105 Cannot Be Used to Alter the Permit 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.”). There is no provision of the Code that authorizes the Court to control State administrative agency action concerning the any of the environmental permits. Moreover, there is no provision of the Code that tolls the expiration of permits during the bankruptcy process.

B. 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). The Trustee cannot by injunction or declaration of this Court supplant the valid laws of the State with respect to the permits, their conditions, and their renewal. *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); *accord Munce's Superior Petroleum Prods., Inc. v. New Hampshire Dept. of Env'tl. Svcs. (In re Munce's Superior Petroleum Prods., Inc.)*, 736 F.3d 567 (1st Cir. 2013) (debtor's post-petition environmental compliance costs are administrative priority claims).

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 acting under applicable non-bankruptcy law. *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).

C. 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”).

Respectfully submitted,

STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL
SERVICES

By its attorneys,

ANN M. RICE
DEPUTY ATTORNEY GENERAL

Date: October 20, 2016

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Certificate of Service

I, Peter C.L. Roth, do hereby certify that the foregoing was served on October 20, 2016, by the court's ECF system upon those parties requesting ECF service.

Dated: October 20, 2016

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