

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: § CHAPTER 11
EXIDE TECHNOLOGIES § CASE NO. 13-11482
DEBTOR §

**ATTACHMENT TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S
PROOF OF CLAIM AGAINST EXIDE TECHNOLOGIES**

The Texas Commission on Environmental Quality (“TCEQ”) hereby submits this attachment in support of its timely filed unliquidated proof of claim (“Proof of Claim”) against Exide Technologies.

Background of the Frisco, Texas Site Forming the Basis of the Proof of Claim

1. Exide Technologies (“Exide”) owns real property within the city limits of the City of Frisco, Collin County, Texas, which includes Exide’s formerly operated battery recycling facility that is approximately 90 acres (the “Former Operating Area”), and about 170 acres of surrounding undeveloped buffer property (collectively, the “Site”). The facility, a secondary lead smelter, processed used lead-acid batteries and other lead-bearing materials into several lead products. The process produced a slag that was disposed of on-site. The process also produced battery-case chips, which were disposed of off-site, and waste acid, which was treated through an on-site wastewater-treatment system. The facility was active from 1964 through November 2012.

2. Cleanup and closure activities at the facility began in December 2012 and are addressed, in part, by Exide’s permit (*see* Attachment #2). The TCEQ’s Remediation Division is overseeing the cleanup and closure of the Site. To date, Exide appears to be performing its obligations, but will have potential unliquidated liabilities associated with the Site and surrounding area if Exide ceases performing its obligations. The full extent of on-site and off-site environmental impacts has not been fully characterized and delineated. Because the assessment is not complete, and only limited information has been provided to the TCEQ, the remedies can only be inferred at this time.

3. To date, contamination has been identified which affects three areas in the vicinity of the site: (1) the Former Operating Area; (2) the surrounding undeveloped buffer properties (collectively “undeveloped buffer properties”); and (3) off-site downstream reaches of Stewart Creek (“Stewart Creek”).

4. The Former Operating Area: Waste management units of concern at the former operating area include two permitted storage units, several closed landfills and an active landfill. Various wastes produced at the facility remain on site. Reports submitted to TCEQ document widespread contamination including slag and battery chips around this area. Assessment activities conducted to date have documented soil and groundwater impacts that exceed cleanup standards set forth in Title 30 Texas Administrative Code, Chapter 350 (“TRRP”). In addition, waste management units at the former operating area must be closed in a manner that is protective of human health and the environment. The TCEQ anticipates that remediation of affected areas may include excavation and proper disposal of contaminated materials, engineering controls, institutional controls and post closure care.

5. Undeveloped Buffer Properties: Environmental impacts have been documented on the surrounding undeveloped buffer properties. Remediation of the buffer properties will be required by TRRP where impacts exceed cleanup standards for commercial/industrial land use.

6. Stewart Creek: Battery chips and slag have been observed in the off-site downstream reaches of Stewart Creek. In addition, sediment impacts have been documented. Remedies for Stewart Creek may include excavation and proper disposal of waste and any impacted sediment exceeding TRRP cleanup levels.

The Basis of the Unliquidated Proof of Claim

7. Exide has, or in the future may have, environmental liabilities for these properties that are part of its bankruptcy estate and/or for the migration of hazardous substances from these properties.

8. On January 30, 2013, Exide and the TCEQ entered into an Agreed Order No. 2011-1712-IHW-E (“Agreed Order”), under which Debtor agreed to, *inter alia*, implement certain measures and undertake specified technical requirements. (See Attachment 3, Article III). TCEQ’s Proof of Claim identifies injunctive obligations under this Agreed Order for Exide to comply with work requirements and other environmental regulatory requirements that are not money judgments.

Legal Basis for the Proof of Claim

9. Pursuant to 28 U.S.C. § 959(b),¹ Exide, as a debtor-in-possession, is required to, *inter alia*, comply with work requirements arising under orders of courts, administrative orders issued by State and Federal Environmental Regulatory agencies, injunctions, as well as other environmental regulatory requirements. See 28 U.S.C. § 959(b); see also *Midlantic Nat’l Bank v. NJ Dep’t of Env’tl. Protection*, 474 U.S. 494 (1986).

¹ “[A] Trustee . . . including a debtor in possession, shall manage and operate the property in his possession as such trustee . . . according to the requirements of the valid laws of the state in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.” 28 U.S.C. § 959(b).

10. Accordingly, Exide must continue to comply with the requirements under any orders during the bankruptcy case, and upon confirmation of a Plan of Reorganization, the Reorganized Debtor must continue complying with these injunctive obligations and work requirements.

11. Upon confirmation, the legal issue will then concern not the automatic stay/police or regulatory exception, but rather whether such obligations are dischargeable monetary claims within the Code's definition of "claim," or non-dischargeable equitable remedies.² Courts making this determination consider whether: (1) the order is within the framework of what is traditionally considered a recovery of money damages for a sum certain; and (2) the order seeks performance of remedial acts to prevent potential future harm and obtain compliance with law. *See Penn Terra Ltd. v. Dep't of Env'tl. Res.*, 733 F.2d 267, 275-78 (3d Cir. 1984); *United States v. ILCO, Inc.*, 48 B.R. 1016, 1022-23 (N.D. Ala. 1985); *see also In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1186-88 (5th Cir. 1986).

12. Exide has acknowledged the above obligations in its first-day pleadings and has further acknowledged that during the bankruptcy case, the police and regulatory exception to the automatic stay permits governmental units to continue with any police or regulatory actions or proceedings "including the enforcement of a judgment other than money judgment." 11 U.S.C. § 362(b)(4).

The Proof of Claim

13. TCEQ is not required to file a proof of claim relating to property of the estate other than for: (i) response costs incurred before the petition date; and (ii) civil penalties for days of violations occurring before the petition date.

14. To date, TCEQ has not expended any funds to remediate Debtor's properties (described above) in Frisco, Texas.

15. Accordingly, TCEQ files this unliquidated proof of claim out of an abundance of caution in the event that this Honorable court finds contrary to the case authorities cited herein.³

² Section 101(5) of the Bankruptcy Code governs this dischargeability issue and specifically refers to "equitable remedies," thus making clear that the key question of when an equitable remedy is a dischargeable claim is whether a breach of the equitable remedy gives rise to a right to pay money instead of complying. A polluter does not have the right to pay money and refuse to deal with ongoing releases of its hazardous wastes threatening public health and safety, and thus, such injunctive obligations are not dischargeable claims. *See In re Torwico Electronics, Inc.*, 8 F.3d 146, 151 (3d Cir. 1993) (finding order was not a dischargeable claim because State sought cleanup rather than money and the release of hazardous wastes was "threatened and ongoing," and was "an attempt to prevent additional damage"); *see also In re Chateaugay Corp.*, 994 F.2d 997, 1007-08 (2d Cir. 1991). Although Section 101(5)(B) encourages creditors to select money damages from among alternative remedies, it does not require creditors entitled to an equitable remedy to select a suboptimal remedy of money damages.

³ This Proof of Claim is filed in a protective manner with respect to any and all compliance and injunctive obligations to comply with requirements arising under Orders of Courts, Administrative Orders, and other environmental regulatory requirements imposed by law that are not claims under 11 U.S.C. § 101(5). TCEQ is not required to file a proof of claim with respect to Debtor's compliance and injunctive obligation. Debtor and any Reorganized Debtor must comply with such mandatory requirements. TCEQ reserves the right to take future action

16. TCEQ respectfully contends that any funds that will be expended during the pendency of this bankruptcy case would be entitled to an administrative expense priority. *See In re Am. Coastal Energy Inc.*, 399 B.R. 805, 812 -13 (Bankr. S.D.Tex. 2009)(finding that the costs to bring the estate into compliance with state and federal environmental and safety laws are costs that are actual and necessary to preserve the estate, entitled to administrative expense characterization under § 503(b)(1)(A)). *See, e.g., Pa. Dep't of Envil. Res. v. Conroy*, 24 F.3d 568, 569 (3d Cir.1994); *U.S. v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 999 (2d Cir.1991); and *Lancaster v. State of Tenn. (In re Wall Tube & Metal Prods. Co)*, 831 F.2d 118, 120-21 (6th Cir.1987) (holding that post-petition expenses incurred to redress pre-petition environmental liabilities are entitled to administrative expense priority); *see also Tex. v. Lowe (In re H.L.S. Energy Co., Inc.)*, 151 F.3d 434, 437 (5th Cir.1998); *In re ASARCO LLC*, No. 05-21207, 2009 WL 8176641 *51(Bankr. S.D.Tex. June 05, 2009). TCEQ reserves the right to file an application for administrative expenses and to take other appropriate action in the future with respect to property of the estate.

17. TCEQ reserves the right to supplement this Proof of Claim to include voluminous documentation and/or additional areas of environmental concern as well as matters presently not known to the TCEQ as a result of their not having been disclosed by the Debtor.

to enforce any such obligations of Debtor. Although TCEQ believes that its position will be upheld by the appropriate court, TCEQ includes the herein stated obligations and requirements in a protective fashion, to safeguard against the possibility that Debtor will contend that it does not need to comply with such obligations and requirements, and the appropriate court finds that such obligations and requirements are dischargeable claims under 11 U.S.C. § 101(5), rather than obligations and requirements that any reorganized debtor must comply with. Nothing in this Proof of Claim constitutes a waiver of any rights by the TCEQ or an election of remedies with respect to such rights and obligations.