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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

In the Matter of **OCCIDENTAL PETROLEUM CORPORATION,** a corporation, and **VULCAN MATERIALS COMPANY,** a corporation**.**	**Docket No. C-4139** **DECISION AND ORDER**

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Occidental Petroleum Corporation, hereinafter referred to as "Respondent Oxy," of three chemical plants and related assets from Vulcan Chloralkali, LLC and Vulcan Materials Company, hereinafter collectively referred to as "Respondent Vulcan," and Respondent Oxy and Respondent Vulcan ("Respondents") having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and thereupon having issued its Complaint and Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 1

Corporation, and the respective directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns of each.

B. "Respondent Vulcan" or "Vulcan" means Vulcan Materials Company, a corporation, its directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; its joint ventures, including Vulcan Chloralkali LLC, subsidiaries, divisions, groups and affiliates controlled by Vulcan Materials Company, and the respective directors, officers, employees, agents, attorneys, representatives, predecessors, successors, and assigns of each.

C. "ERCO" means ERCO Worldwide (USA) Inc., a corporation organized and doing business under the laws Delaware, with its executive offices at 302 The East Mall, Suite 200, Toronto, Ontario, Canada, M9B 6C7, and which is a subsidiary of Superior Holdings (USA) Inc. which is a subsidiary of Superior Plus, Inc. (a Canadian company).

D. "Commission" means the Federal Trade Commission.

E. "Acquirer" means either ERCO or any other entity that receives the prior approval of the Commission to acquire the Port Edwards Assets pursuant to Paragraphs II or V of this Order.

F. "Acquisition" means the proposed acquisition by Respondent Oxy of three chloralkali plants and related assets in Geismar, Louisiana, Port Edwards, Wisconsin, and Wichita, Kansas, from Vulcan pursuant to and as described in the A

M. “Dual Contract Customer” means an Assigned Contract Customer who, at the time this Order is issued, is supplied oo6us

3. an exclusive right to all intellectual property used solely in the operation of the facility or in the production, marketing, distribution, or sale of the products produced at the facility, and a non-exclusive right to all other intellectual property used in the operation of the facility and in the production, marketing, distribution, or sale of the products produced at the facility;

4. all licenses and permits used in the operation of the facility and in the production, marketing, distribution, or sale of the products produced at the facility;

5. at the Acquirer's option, all contracts, agreements, and understandings, other than Shared Customer Contracts and Shared Terminal Contracts, relating to the manufacture, transportation, storage, terminaling, marketing, distribution, or sale of the products produced at the facility, which includes but is not limited to:

    a. agreements under which the facility receives potassium and sodium salts, electricity, natural gas, and carbon dioxide or other inputs at or for the facility;

    b. agreements for services provided to the facility, including, but not limited to, rail, trucking, capital maintenance, and technology;

    c. agreements and contracts with customers for products produced exclusively by tnts and contracts with customer s for products produced

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S. “Potash Contract” means the Product Supply Agreement entered into on March 15, 2005, between PCS Sales (USA), Inc. and OxyChem for the supply of potassium chloride chicklets.

T. “Shared Customer Contracts” means contracts under which customers receive Hydrochloric Acid, Chlorine, or Caustic Soda produced both by the Port Edwards facility and by other chemical facilities owned by Vulcan prior to the Acquisition Date that are not subject to divestiture under this order.

U. “Shared Terminal Contracts” means contracts or agreements with terminals, including those owned by Vulcan, for storage of products produced both by the Port Edwards facility and by other chemical facilities owned by Vulcan prior to the Acquisition Date that are not subject to divestiture under this order.

V. “Terminaling Agreement” means an agreement between the Acquirer and Respondent Oxy in which the Acquirer will use a terminal or facility owned by Respondent Oxy to store or transfer products produced by the Acquirer at the Port Edwards facility.

II.

IT IS FURTHER ORDERED that:

A. Within ten (10) days after the Acquisition Date, Respondents shall divest the Port Edwards Assets in good faith to ERCO, pursuant to and in accordance with the ERCO Acquisition Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of ERCO or to reduce any obligations of Respondents under such agreements), and such agreement, if approved by the Commission as the Divestiture Agreement, is incorporated by reference into this Order and made a part hereof as Confidential Appendix B.

PROVIDED, HOWEVER, at the option of the Acquirer and with approval of the Commission, Respondent Oxy may (1) agree to a long-term lease for the real estate upon which the Port Edwards facility sits, as a substitute for an acquisition of the real estate; and (2) exclude the divestiture of the groundwater collection, monitoring, and treatment systems. *PROVIDED, FURTHER, HOWEVER,* with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the Acquirer’s option, Respondents need not divest such assets or enter into such agreements only if the Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

B. If, at the time the Commission determines to make this Order final, the Commission notifies Respondents that ERCO is not an acceptable acquirer of the Port Edwards Assets or that the manner in which the divestiture was accomplished is not acceptable, then, after receipt of such written notification:

Respondents shall require any Persons with access to Confidential Business Information to immediately enter into agreements with the Respondents and Acquirer not to disclose any Confidential Business Information to the Respondents or to any third party except for the purposes set forth this paragraph.

I. The purposes of this Paragraph are (1) to ensure the continuation of Port Edwards Assets as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, and (2) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. For Shared Customer Contracts, Respondents shall, no later than the Effective Date of Divestiture of the Port Edwards Assets and as part of the Divestiture Agreement, assign Shared Customer Contracts in whole or in part, or contribute to the Acquirer additional customer contracts held by them, or modify the Shared Customer Contracts or other customer contracts held by them, to insure that, as a result of the divestiture, the Acquirer receives:

1. customers of comparable financial strength as measured by credit rating or some other similar widely accepted measure;

2. customers requiring delivery to locations at distances similar to or shorter than the delivery distances for products from the Port Edwards facility prior to the divestiture and consistent with the historical delivery distances for products delivered by the Port Edwards facility;

3. customers requiring quantities similar to or exceeding the quantities of product delivered by the Port Edwards facility prior to the divestiture and consistent with historical amounts of product delivered by the Port Edwards facility; and

4. customer contracts of similar or longer lengths of time for the products delivered by the Port Edwards facility prior to the divestiture.

B. Respondents shall, no later than the Effective Date of Divestiture of the Port Edwards Assets, at the option of the Acquirer, and as part of the Divestiture Agreement, assign Shared Terminal Contracts in whole or in part, modify current Shared Terminal Contracts or enter into new terminal contracts to insure that, as a result of the divestiture, the Acquirer receives:

1. the same terminals as, or terminals of a quality similar to, those retained by Respondent Oxy;

2. terminal space equal to or exceeding the capacity of terminal space used for products delivered by the Port Edwards facility prior to the divestiture and consistent with historical amounts of products delivered by the Port Edwards facility;

3. terminal contracts of similar or longer lengths of time that existed for the products delivered by the Port Edwards facility prior to the divestiture; and

4. terminal capacity

IV.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order;

B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If the Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

C. Not later than ten (10) days after appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.

D. If a Monitor is appointed pursuant to this Paragraph IV, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor the Respondents's compliance with the terms of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission including, but not limited to:

    a. Assuring that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Order to Maintain Assets and the Decision and Order in this matter;

    b. Monitoring Terminaling Agreements;

    c. Monitoring any transition services agreements;

    d. Assuring that Confidential Business Information is not received or used by Respondents or Acquirer, except as allowed in the Order to Maintain Assets and the Decision and Order in this matter.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents's personnel, books, documents, records

kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents's compliance with their obligations under the Order. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents's compliance w 0.0000ness, facilities and technical information, and

H. A Monitor appointed pursuant to this Order may be the same person appointed as the monitor appointed pursuant to the Order to Maintain Assets in this matter or the Divestiture Trustee pursuant to the relevant provisions of this Order.

V.

IT IS FURTHER ORDEREDRT

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to divest the Port Edwards Assets absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period or periods may be extended by the Commission; *PROVIDED, HOWEVER*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. The Divestiture Trustee shall have the right and authority to negotiate and modify contracts to satisfy the provisions of Paragraph III of this Order. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph V in an amount equal to the delay, as determined by the Commission.

4. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order;

   PROVIDED, HOWEVER, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission;

   PROVIDED FURTHER, HOWEVER, that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the

Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability

VI.

IS FURTHER ORDERED that until December 31, 2006, Respondent Oxy, including, but not limited to, its agents and Armand Products Company, shall not solicit any Assigned Contract Customer in an attempt to sell, currently or in the future, such customer KOH (if the contract assigned to the Assigned Contract Customer was for KOH) or potassium carbonate (if the contract assigned to the Assigned Contract Customer was for potassium carbonate) including, but not limited to, making offers pursuant to a “meet or release” or “competitive price” or similar clause in customer contracts.

VIII.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order is issued, Respondent Oxy, including its joint venture, Armand Products Company, shall not, without providing advance written notification to the Commission in the manner described in this Paragraph VIII, directly or indirectly:

A. Acquire any stock, share capital, equity or other interest in any Person, corporate or non-corporate that produces, or assets used in the production or sale of, potassium hydroxide, potassium carbonate, or potash; or

B. Enter into any contracts to manage or operate any Person that produces potassium hydroxide, potassium carbonate, or potash.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent Oxy and not of any other party to the transaction. Respondent Oxy shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803 TDO.000 TD(ay)Tj90000 cm0.rI3

IX.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondents have fully complied with Paragraphs II and V of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Divestiture Trustee or the Monitor, if any Divestiture Trustee or Monitor has been appointed pursuant to this Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondents shall include in their reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

B. Within thirty (30) days after the date this Order is issued, and annually for ten (10) years on the anniversary of the date this Order is issued, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they have complied, are complying, and will comply with this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Order and copies of all written communications to and from all persons relating to this Order.

   PROVIDED, HOWEVER: Respondents Vulcan shall submit annual reports pursuant to this Paragraph IX.B for two (2) years on the anniversary of the date this Order is issued. *PROVIDED FURTHER, HOWEVER,* if either Paragraph II.B or Paragraph V come into effect, Respondent Vulcan shall submit annual reports pursuant to this Paragraph IX.B for five (5) years on the anniversary of the date this Order is issued.

X.

IT IS FURTHER ORDERED that Respondent Oxy shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondent Oxy, (2) acquisition, merger or consolidation of Respondent Oxy, or (3) any other change in the Respondent Oxy that may affect compliance obligations arising out of the order, including but not limited to assignment and the creation or dissolution of subsidiaries.

XI.

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A. access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents related to compliance with this Order; and

B. upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

XII.

IT IS FURTHER ORDERED that this Order shall terminate on July 13, 2015.

By the Commission.

C. Landis Plummer
Acting Secretary

SEAL

ISSUED: July 13, 2005

<u>CONFIDENTIAL APPENDIX A</u>

[Redacted From the Public Record Version But Incorporated By Reference]

CONFIDENTIAL APPENDIX C

[Redacted From the Public Record Version But Incorporated By Reference]