

# **Analysis of the Complaint and Proposed Consent Order to Aid Public Comment Occidental Petroleum Corporation and Vulcan Materials Company, File No. 051-0009**

## **I. Introduction**

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Occidental Chemical Company (“OxyChem”) and Vulcan Materials Company (“Vulcan”) (collectively “Respondents”). The Consent Agreement is intended to resolve anticompetitive effects stemming from OxyChem’s proposed acquisition of the chemical assets of Vulcan. The Consent Agreement includes a proposed Decision and Order (“Order”) which requires Respondents to divest Vulcan’s facility in Port Edwards, Wisconsin and assets relating to the research, development, marketing, sales, and production of chemicals produced at the facility including chlorine, caustic soda (sodium hydroxide), KOH (potassium hydroxide), APC (anhydrous potassium carbonate), and hydrochloric acid (“Port Edwards business”). The Order calls for divestiture of the Port Edwards business to ERCO Worldwide (“ERCO”) or, in the event the Commission requires rescission of such acquisition, another approved buyer. The Consent Agreement also includes an Order to Maintain Assets, which requires Respondents to preserve the Port Edwards business as a viable, competitive, and ongoing operation until the divestiture is achieved.

The Consent Agreement, if finally accepted by the Commission, would settle charges that OxyChem’s proposed acquisition of Vulcan’s chemical assets may have substantially lessened competition in the markets for KOH, potassium carbonate, and APC. The Commission has reason to believe that OxyChem’s proposed acquisition of Vulcan’s Port Edwards business would have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

## **II. The Proposed Complaint**

According to the Commission’s proposed complaint, the relevant product markets in which to analyze the effects of OxyChem’s proposed acquisition of Vulcan’s chemical assets are the production and sale of KOH, potassium carbonate, and APC. KOH is the raw material for the production of many potassium chemicals, such as potassium permanganate, citrate, acetate, cyanide, benzoate, iodide, and sorbate. The largest end use of KOH is the production of potassium carbonate, commonly known as potash. End uses for potassium carbonate include nutrition supplements for dairy cattle, video glass for television and computer monitors, other specialty glass, potassium silicates, fertilizers, gas processing, industrial intermediaries, photographic development processes, detergents; and food products. Potassium carbonate can be produced in liquid or flake (solid) form. Over 90% of total potcarb production in the United States is of the flake form, known as APC. For most APC customers, liquid potassium carbonate is not an economically viable substitute.

The proposed complaint alleges that the markets for KOH, potcarb, and APC are highly concentrated and that OxyChem and Vulcan have been the primary competitors in these markets for many years and are the only producers of APC in the U.S. As the proposed Complaint describes, customers have relied on the competition between these companies to maintain competitive pricing

levels. The proposed complaint alleges that OxyChem's proposed acquisition of Vulcan's chemical assets would reduce competition by eliminating direct competition between these two companies. The proposed complaint further alleges that entry into the relevant markets would not be timely, likely, or sufficient to deter or offset the acquisition's adverse competitive effects.

### **III. Terms of the Proposed Order**

The proposed Order also requires that, within 10 days of OxyChem's acquisition of Vulcan's chemical assets, OxyChem divest the Port Edwards business to ERCO Worldwide (USA) Inc., an indirect subsidiary of Superior Plus, Inc., a Canadian company. The Port Edwards business will become part of ERCO Worldwide, a division of Superior Plus whose parent, Superior Plus Income Fund, is a Canadian income fund. Superior Plus, Inc. has four divisions: Superior Propane; ERCO Worldwide; Winroc; and Superior Energy Management. The market value of the fund is Cdn \$2.5 billion. ERCO's total revenues in 2004 were Cdn \$396 million.

The assets to be divested under the proposed Order include Port Edwards's manufacturing facilities, related transportation assets (including railcars and terminal contracts), raw material supply agreements, and customer contracts. Port Edwards is Vulcan's only manufacturing facility that has the capacity to produce KOH and APC. The divested assets are sufficient to allow ERCO to effectively continue the production and marketing of KOH, APC, HCl, caustic soda, and chlorine at Port Edwards in amounts, and under terms, equivalent to the historical production and sale of these chemicals from the facility.

The Order further provides that if, at the time the Commission makes this Order final, the Commission notifies Respondents that ERCO is not an acceptable acquirer of the Port Edwards business or that the manner in which the divestiture was accomplished is not acceptable, then, the divestiture to ERCO shall be rescinded and within a six-month period, OxyChem shall divest the Port Edwards business to an acquirer acceptable to the Commission. If, following this six month period, the Port Edwards Assets have not been divested, then the Commission may appoint a Divestiture Trustee to divest the assets in a manner acceptable to the Commission.

The proposed Order to Maintain Assets that is also included in the Consent Agreement requires that Respondents maintain the Port Edwards business as a viable and competitive operation until the business is transferred to ERCO or another Commission-approved acquirer. Furthermore, the order contains measures designed to ensure that no material confidential information is exchanged between Respondents and the Port Edwards business (except as otherwise provided in the Order to Maintain Assets) and measures designed to prevent interim harm to competition in the relevant markets pending divestiture.

The proposed Order also provides for the Commission to appoint a Monitor Trustee to oversee OxyChem's compliance with the terms of the order, and in the Order to Maintain Assets, the Commission appoints Richard M. Klein as Monitor Trustee. Mr. Klein has a Ph.D in Inorganic Chemistry and was the President and CEO of Sybron Chemicals from 1979 to 2001. He serves on the boards of a number of companies and has been appointed by the Commission as Monitor Trustee

or Hold Separate Trustee in other FTC matters.

Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondents have fully divested the Port Edwards business, Respondents are required to submit a verified written report describing how they are complying, have complied, and intend to comply with the terms of the Order. Further, 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, Respondent OxyChem must submit a verified written report to the Commission describing how it is complying, has complied, and intends to comply with the terms of the Order. Finally, within thirty (30) days after the date this Order is issued and annually for two (2) years on the anniversary of the date this Order is issued, Respondent Vulcan shall submit to the Commission a verified written report describing how it has complied, is complying, and will comply with this Order; however, if either Paragraph II.B or Paragraph V of the Order come into effect, Respondent Vulcan shall submit annual reports for five (5) years on the anniversary of the date this Order is issued.

#### **IV. Opportunity for Public Comment**

The proposed Order has been placed on the public record for thirty (30) days to receive comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the Consent Agreement and comments received and decide whether to withdraw its agreement or make final the Consent Agreement's proposed Order and Order to Maintain Assets.

The purpose of this analysis is to facilitate public comment on the proposed Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement, the proposed Order, or the Order to Maintain Assets, or in any way to modify the terms of the Consent Agreement, the proposed Order, or the Order to Maintain Assets.