

SOAH DOCKET NO. 582-08-0523
TCEQ DOCKET NO. 2007-0768-AIR-E

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER
VS.
ADVANTAGE ASPHALT PRODUCTS,
LTD.
RN104955497,
RESPONDENT

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ALJ'S PROPOSED ORDER

The Executive Director ("ED") of the Texas Commission on Environmental Quality, after reviewing the Administrative Law Judge's Proposal for Decision, files the following exceptions.

The Caption

1. The ED respectfully recommends that "TCEQ Docket Nos." be changed to "TCEQ Docket No." to reflect that there is only one TCEQ docket number.

Introductory Paragraph

2. The ED respectfully recommends that the name of the respondent be changed from "Advantage Asphalt Products (Respondents or Advantage Asphalt)" to "Advantage Asphalt Products, Ltd. (Respondent or Advantage Asphalt)" in order to include the entire name of the respondent and indicate that there is only one respondent in this case.

Finding of Fact No. 16

3. The ED respectfully recommends that the second "of the" in the phrase "...equates to an adjusted base penalty for each violation event of 10 percent of the of the maximum \$10,000 penalty, ..." be removed as duplicative.

Conclusion of Law Nos. 9 and 10

4. The ED respectfully recommends that the term "Respondents" in Conclusions of Law Nos. 9 and 10 be changed to "Respondent" to reflect that there is only one respondent in this matter.

Ordering Provision No. 1

5. The ED respectfully requests that the following sentence be added after the first sentence:

Respondent shall pay the assessed penalty of \$46,221 within 30 days of the effective date of this Order.

This request is to clarify the due date of the assessed penalty. With this change, the first two sentences of this ordering provision would read:

Respondent Advantage Asphalt is assessed an administrative penalty in the amount of \$46,221 for violations of the above noted Commission rules. **Respondent shall pay the assessed penalty of \$46,221 within 30 days of the effective date of this Order.**

The ED also suggests that the second colon be removed in the following sentence:

Administrative penalty payments shall be sent with the notation "Re: Advantage Asphalt Products, Ltd.; TCEQ Docket No. 2007-0768-AIR-E" to: ...

Prayer

For these reasons, the ED respectfully requests the ALJ consider the ED's exceptions above. A copy of the Proposed Order with the recommended modifications is attached.

Respectfully submitted,

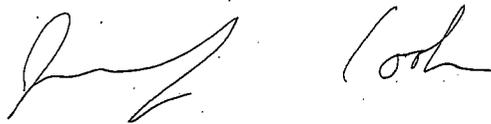
Texas Commission on Environmental Quality

Mark R. Vickery
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Director
Litigation Division

by

A handwritten signature in black ink, appearing to read "Jennifer Cook", is written over a horizontal line.

Jennifer Cook
State Bar of Texas No. 00789233
Stephanie J. Frazee
State Bar of Texas No. 24059778
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-1873
(512) 239-3434 (Fax)
Attorneys for the Executive Director

CERTIFICATE OF SERVICE

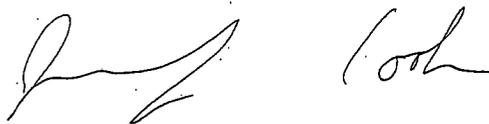
I hereby certify that on April 4, 2011, the foregoing original document and seven (7) copies were filed with the Chief Clerk, additionally the document was electronically filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day true and correct copies of the foregoing document were served to the following persons by the method of service indicated:

The Honorable Stephen J. Pacey
State Office of Administrative Hearings
William P. Clements Building
300 West 15 th Street, Suite 504
Austin, Texas 78701-1649
Via Facsimile

Mr. Scott Knutson
Advantage Asphalt Products, Ltd.
P.O. Box 51772
Amarillo, Texas 79159-1772
(806) 371-7283
(806) 372-0400 (fax)
Via Facsimile

Office of the Public Interest Counsel
Texas Commission on Environmental Quality
Mail Code 103
Via Electronic Delivery



Jennifer Cook

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
and Ordering Corrective Action by
Advantage Asphalt Products Ltd.,
RN104955497; TCEQ Docket No. 2007-
0768-AIR-E; SOAH Docket No. 582-08-0523**

On _____, 2011, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Report and Petition (FARP), which recommended that the Commission enter an order assessing administrative penalties against and requiring corrective action by Advantage Asphalt Products, Ltd (Respondent or Advantage Asphalt). A Proposal for Decision (PFD) was presented by Stephen J. Pacey, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Advantage Asphalt Ltd., (Respondent or Advantage Asphalt) owns and operates two rock crusher sites (Sites) located at:
 - a. Approximately two miles west of the intersection of Brown Road and Cemetery Road, west of the city of Canyon, Randall County, Texas (Irlbeck Site); and
 - b. 20700 Helium Road, Canyon, Randall County, Texas (BFI Site).

2. Each of the Sites consists of one or more sources as defined in TEX. HEALTH & SAFETY CODE § 382.003(12).

3. On March 1-2, 2007, Advantage Asphalt was in violation of:
 - a. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE § 116.115(c); and Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, Tier II (3)(G) by failing to notify the TCEQ prior to locating at a site. Specifically, Advantage Asphalt failed to notify the TCEQ when it moved its Rock Crusher No. 3 (Serial Number B00751049R) to the Irlbeck Site on three separate occasions; March 2, 2006, August 11, 2006, and February 27, 2007; and on one occasion to the BFI Site on September 16, 2006.
 - b. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§ 116.115(b)(2)(E)(i) and 116.615(8); and Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, General Requirement (M) by failing to keep records of operating hours as specifically required by the permit and necessary for determining compliance with the permit. Specifically, Advantage Asphalt did not have records of its operating hours at the Irlbeck Site, and consequently, TCEQ staff could not determine whether operations had exceeded the limit set by the permit.
 - c. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§ 116.115(b)(2)(E)(i) and 116.615(8); and Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, General Requirement (M) by failing to keep records of operating hours as specifically required by the permit and necessary for determining compliance with the permit. Specifically, Advantage Asphalt did not have records of its operating hours at the BFI Site, and consequently, TCEQ staff could not determine whether operations had exceeded the limit set by the permit.
 - d. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§ 116.115(B)(2)(E)(I) AND 116.615(8); Air Quality Standard Permit for Temporary Rock and Concrete Crushers, General Requirement (M); and New Source Review Portable Permit No. 81693L001, Special Condition 11 by failing to keep records containing information and data sufficient to demonstrate compliance with the permit, including specifying crusher activity and location of the crushers at the Sites, the complete date for each day at the Sites, operation start and stop times, and hours of operation for Permit No. 81693L001. Specifically, for records of both the Irlbeck and BFI Sites, Advantage Asphalt did not have records specifying location, movement and operation of crushers at each Site, specific dates in records of its operations, and consequently, TCEQ staff could not determine compliance from the records.
4. On July 7, 2007, the ED filed the Executive Director's Preliminary Report and Petition (EDPRP), in accordance with TEX. WATER CODE ANN. § 7.054.

5. Respondent did not appear at the preliminary hearing convened on December 6, 2007.
6. A default PFD and Order were submitted to the ED on January 26, 2008.
7. In order to provide Respondent a hearing, the Commission, in an August 6, 2008 open meeting, remanded the case back to SOAH at the request of the Respondent.
8. The October 21, 2008 notice of hearing:
 - a. Indicated the time, date, place, and nature of the hearing;
 - b. Stated the legal authority and jurisdiction for the hearing;
 - c. Indicated the statutes and rules the ED alleged Respondent violated.
 - d. Advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice and the previously filed ED's Preliminary Report and Petition being deemed as true and the relief sought in the notice possibly being granted by default; and
 - e. Included a copy of the ED's penalty calculation worksheet, which shows how the penalty was calculated for the alleged
9. On January 6, 2010, the ED filed a First Amended Executive Director's Preliminary Report and Petition (Amended EDPRP), which contained allegations concerning the above-noted March 1-2, 2007 violations.
10. In the Amended EDPRP, the ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$46,221.00, against the Respondent for the alleged violations. The ED also recommended that the Commission order the Respondent to take certain corrective action.
11. On April 12, 2010, the ED filed a motion for summary disposition.
12. After considering the ED's motion for summary disposition, the Respondent's response,

and the evidence, on July 21, 2010, the ALJ issued an order granting in part the ED's motion for summary disposition. The ALJ granted summary disposition as to the violations and corrective action and denied summary disposition as to the amount of the penalty.

13. On August 9, 2010, the ALJ issued an order setting the hearing on the merits as to the amount of the penalty for November 5, 2010.
14. On November 5, 2010, the ALJ convened the hearing on the merits. The ED and the Respondent appeared through their representatives. The Office of Public Interest Counsel did not appear or seek a continuance.
15. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
16. The failure to notify the TCEQ four times prior to relocating a crusher at a site is a programmatic major violation, which according to the Penalty Policy, equates to an adjusted base penalty for each violation event of 10 percent of the maximum \$10,000 penalty, or \$4,000. At the hearing, the Respondent stipulated to this violation base penalty of \$4,000.
17. The failure to keep records of operating hours at the Irlbeck Site, as specifically required by the permit and necessary for determining compliance with the 1,080 operating hours limitation in the permit, is a programmatic major violation. According to the Penalty Policy, it equates to an adjusted base penalty for each violation event of 10 percent of the maximum penalty. Because the Respondent was unable to demonstrate compliance with the 1,080 operating hours limitation throughout the term of the permit, it is a continuing violation, and according to the Penalty Policy, continuing programmatic major violations case can be assessed up to daily. At the hearing, the ED recommended that this violation be assessed monthly, for 21 monthly events based on the term of the permit from November 25, 2005, to August 3, 2007, for a total violation base penalty of \$21,000.

18. The failure to keep records of operating hours at the BFI Site, as specifically required by the permit and necessary for determining compliance with the 1,080 operating hours limitation in the permit, is a programmatic major violation. According to the Penalty Policy, it equates to an adjusted base penalty for each violation event of 10 percent of the maximum penalty. Because the Respondent was unable to demonstrate compliance with the 1,080 operating hours limitation throughout the term of the permit, it is a continuing violation, and according to the Penalty Policy, continuing programmatic major violations case can be assessed up to daily. At the hearing, the ED recommended that this violation to be assessed monthly, for 14 monthly events based on the term of the permit from June 9, 2006 to August 3, 2007, for a total violation base penalty of \$14,000
19. The failure to keep other records in addition to the records described in Finding of Fact Nos. 17 and 18 above, – including records specifying location, movement and operation of crushers at each Site and specific dates in records of its operations – is a programmatic moderate violation. According to the Penalty Policy, it equates to an adjusted base penalty for each violation event of 5 percent of the maximum \$10,000 penalty, or \$500. One single event was assessed for the Irlbeck Site and one single event was assessed for the BFI Site. At the hearing, the Respondent stipulated to these violation base penalties of \$1,000.
20. Because of the avoided costs associated with the violations in Finding of Fact Nos. 16, 17, and 18 above, there should be a \$6,221 upward adjustment to the penalty as other factors as justice may require.
21. The total administrative penalty for all of the above violations, calculated in accordance with the Penalty Policy, is \$46,221.
22. Assessing an administrative penalty of \$46,221 against the Respondent is reasonable and justified given the violations committed by the Respondent and considering the factors set forth in TEX. WATER CODE § 7.053.
23. The corrective action requested by the ED is necessary, justified, and appropriate given the violations established.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health and Safety Code within the Commission's jurisdiction, or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE § 7.052, a penalty may not exceed \$10,000 per violation, per day for the violations alleged in this proceeding.
3. In addition to imposing an administrative penalty, the Commission may order the violator to take corrective action, as provided by TEX. WATER CODE § 7.073.
4. As required by TEX. WATER CODE § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondent was notified of the violations as contained in the EDPRP and the Amended EDPRP and of the opportunity to request a hearing on the alleged violations and the proposed penalties and corrective actions.
5. As required by TEX. GOV'T CODE §§ 2001.051(1) and 2001.052; TEX. WATER CODE § 7.058; 1 TEX. ADMIN. CODE § 155.401; and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties and corrective actions.
6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ch. 2003.
7. Based on the Findings of Fact and Conclusions of Law, Respondent violated:
 - a. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE § 116.115(c); and Air Quality Standard Permit for Temporary Rock Crushers and

Temporary Concrete Crushers, Tier II (3)(G) by failing to notify the TCEQ prior to relocating to the Irlbeck Site and BFI Site.

- b. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§116.115(b)(2)(E)(i) and 116.615(8); and Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, General Requirement (M) by failing to keep records of operating hours for the Irlbeck Site as specifically required by the permit and necessary for determining compliance with the 1,080 operating hour limitation in the permit.
- c. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§116.115(b)(2)(E)(i) and 116.615(8); and Air Quality Standard Permit for Temporary Rock Crushers and Temporary Concrete Crushers, General Requirement (M) by failing to keep records of operating hours for the BFI Site as specifically required by the permit and necessary for determining compliance with the 1080 operating hour limitation in the permit.
- d. TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TEX. ADMIN. CODE §§116.115(b)(2)(E)(i) and 116.615(8); Air Quality Standard Permit for Temporary Rock and Concrete Crushers, General Requirement (M); and New Source Review Portable Permit No. 81693L001, Special Condition 11 by failing to keep records containing information and data sufficient to demonstrate compliance with the permit, including specifying crusher activity and location of the crushers at the Sites, the complete date for each day at the Sites, operation start and stop times, and hours of operation for Permit No. 81693L001.

8. In determining the amount of an administrative penalty, TEX. WATER CODE § 7.053 requires the Commission to consider several factors including:

- a. Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
- b. The nature, circumstances, extent, duration, and gravity of the prohibited act;

- c. The history and extent of previous violations by the violator;
- d. The violator's degree of culpability, good faith, and economic benefit gained through the violation;
- e. The amount necessary to deter future violations; and
- f. Any other matters that justice may require.

- 9. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE § 7.053, and the Commission's Penalty Policy, the ED correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$46,221 is justified and should be assessed against Respondent.
- 10. Based on the above Findings of Fact, Respondent should be required to take the corrective action that the ED recommends.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

- 1. Respondent Advantage Asphalt is assessed an administrative penalty in the amount of \$46,221 for violations of the above noted Commission rules. Respondent shall pay the assessed penalty of \$46,221 within 30 days of the effective date of this Order. The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order in this section. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Advantage Asphalt Products, Ltd.; TCEQ Docket No. 2007-0768-AIR-E" to:

Financial Administration Division, Revenues Section

Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Within 10 days after the effective date of the Commission Order, Advantage Asphalt shall:
 - a. Implement improvements to notification requirement procedures that will prevent the failure to request relocation or change of location authorization and the failure to obtain written approval prior to moving a rock crusher to a new site; and
 - b. Implement improvements to record keeping procedures that will prevent the failure to create and maintain all of the records required by New Source Review Portable Permit No. 81693L001, Special Condition 11.

3. Within 25 days after the effective date of this order, Respondent shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision No. 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations."

Advantage Asphalt shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

with a copy to:

Manager, Air Section
Amarillo Regional Office
Texas Commission on Environmental Quality
3918 Canyon Drive

Amarillo, Texas 79109-4933

4. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
6. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE § 2001.144.
7. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

BRYAN W. SHAW, Chairman
For the Commission