

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 26, 2011

Melissa Chao, Acting Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC 105
Austin, Texas 78711-3087

Re: Advantage Asphalt Products, Ltd.; 2007-0768-AIR-E; 582-08-0523
Respondent's Objections and Response to Executive Director's Reply

Ms. Chao:

Because it is my understanding that the enclosed document has not been filed with the Chief Clerk's Office, I submit the enclosed Respondent's Objections and Response to Executive Director's Reply to be filed. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer Cook".

Jennifer Cook
Special Counsel
Litigation Division

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

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

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BEFORE THE STATE OFFICE

VS.

OF

ADVANTAGE ASPHALT
PRODUCTS, LTD., RESPONDENT

ADMINISTRATIVE HEARINGS

RESPONDENT'S OBJECTIONS AND RESPONSE TO EXECUTIVE DIRECTOR'S REPLY

Advantage Asphalt Products, Ltd., (Respondent) files the following objections and Response to the Reply submitted by the Executive Director.

1. Respondent objects to the Exhibit attached to the Reply filed on April 22, 2011. This Exhibit was not a part of the contested case hearing and has been submitted after the close of the record. Respondent was not given an opportunity to question and/or cross examine the person who drafted this document. There is no authentication of the exhibit and it addresses issues that are irrelevant to the matter at dispute. As such any reliance on this document is an abuse of discretion and constitutes reversible error.

2. Paragraph 9 of the ED Response ignores the terms of the permit and the regulations of the TCEQ in requiring that records be kept on a rolling 24 month basis. The clear and unambiguous terms of the statute state that a permit holder has no obligation to retain records after the conclusion of 24 months. This limitation has been a fundamental argument from Respondent since the ED decided to change tactics in mid-stream some 3 years after the initial investigation when it became clear that the ED could not prove a claim for operating without a permit.

3. Paragraphs 10-13 assert that Respondent has a fictional Tier II permit that even if issued could not be used. However, the undisputed documentary evidence submitted establishes that the TCEQ did in fact issue a Tier II permit to Respondent at the direction of the field Investigator, Joe Campa. A simple review of the documents that are maintained by the TCEQ establishes this fact. It is also important to note that the original investigation and Notice of Violation centered on allegations of operating without a permit, not failure to provide notice of Intent to move the crusher. It was in response to that allegation of operating without a permit that prompted Respondent to apply for and receive a new permit. It is clear from a review of the record that this was not a relocation permit, as alleged by the ED, but a new Tier II.

4. The ED argues in paragraphs 14-21 that there is no good faith consideration because the ED chooses not to acknowledge the records that were filed by the Respondent, under a duly executed Business Records Affidavit and submitted both to the Court and the ED for consideration. No counter-affidavit was submitted to contest the authenticity of these records and though the Judge in his discretion cast a cloud of suspicion over the records, the fact remains that the production records submitted from January 2007 through September 2007 fully complied with the requirements of the permit. It is inconceivable that the ED would push to punish the Respondent for inadequate record-keeping, yet refuse to give credit where credit is due. Had the Respondent

been in the business of "manufacturing" records for the purposes of avoiding penalties it would have been much more productive to "manufacture" an entire set of records that demonstrated full compliance over the periods covered by the permit. To the contrary, Respondent admitted its deficiencies and showed up to accept reasonable penalties for the lapses. Curiously there is no question of integrity when the ED refuses to acknowledge its own permit.

5. The ED engages in a lengthy discussion of how one could examine the records and determine that the Respondent should be fined \$1,840,000.00 (paragraph 19); however, once again this discussion reaches outside the record and demonstrates the unwillingness of the ED to discuss the actual facts in the record as opposed to contingencies and "what ifs". The fact remains that the ED went to trial and announced ready seeking to impose fines of \$46,000.00, a change from the initial charge of \$20,000.00 that the Respondent dared to deny. These veiled threats by the ED have been consistent throughout this enforcement proceeding. Respondent objects to this discussion by the ED as irrelevant and immaterial to the issues before the honorable Court and Commission.

Respectfully submitted,



ADVANTAGE ASPHALT PRODUCTS, LTD. Pro Se
By: Scotty Knutson, Partner
P. O. Box 51772
Amarillo, TX 79007-3001

Certificate of Service

This is to certify that a true and correct copy of the above and foregoing was electronically filed, on this 27th day of ~~March~~ ^{April}, 2011 as follows:

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