

**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	§ § § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**THE EXECUTIVE DIRECTOR’S SUR-REPLY TO
THE RESPONDENT’S OBJECTIONS AND RESPONSE TO
THE EXECUTIVE DIRECTOR’S REPLY TO RESPONDENT’S EXCEPTIONS**

The Executive Director (“ED”) of the Texas Commission on Environmental Quality files the following sur-reply to Advantage Asphalt Products, Ltd.’s (Respondent’s or Advantage Asphalt’s) objections and response to the ED’s reply to the Respondent’s exceptions.

The ED did not introduce new evidence.

1. The Respondent claims that in the ED’s reply to exceptions (ED’s Reply) filed on April 22, 2011, the ED introduced new evidence that was not included in the record of the evidentiary hearing. Specifically, the Respondent objects to the attachment to the ED’s Reply. The attachment is a table that summarizes the Respondent’s records, which are evidence and part of the record in this case. Anyone could recreate it from the record in this case. The information in the table was taken from exhibits admitted at the hearing. The attachment is not new evidence or information.
2. The attachment was submitted as part of the ED’s Reply to demonstrate the inconsistency between the Respondent’s First Set of records and the Respondent’s Second Set of records. The table also demonstrates the inconsistency between the Respondent’s position in this case (that it was

always authorized, within the 180 day permit limit, and merits a penalty reduction) and the Second Set of records. The Second Set suggests the Respondent did not comply with the 180 day limit of the permit, to a significant degree. The information in the ED's Reply is relevant and material on the issue of the weight to be given Respondent's Second Set of records in this case and exemplifies the violations in this case—the Respondent's records are incomplete, inconsistent, and do not demonstrate compliance with the permit limits at issue in this case. The Respondent asks the Commission to rely on a Second Set of records that if accurate, as the Respondent contends, shows that the Respondent was unauthorized for 164 days, which would subject the Respondent to significant potential penalties. This information is part of the record for this case and is relevant to the Commission's consideration of the Respondent's Second Set of records as proof of good faith.

3. The Respondent also claims that the ED referenced information outside the record by discussing a possible \$1,640,000.00 penalty. This information is within the record, specifically, the Second Set of records and section 7.052(b) of the Water Code. The Enforcement Coordinator testified at the hearing about the mandatory penalty in section 7.052 of the Water Code in the context of deterrence, which is one of the factors that the Commission considers in determining the penalty. Tex. Water Code §7.053(3)(E).

Additionally, the ED's closing argument, filed on December 15, 2010, states:

Operating a rock crusher without authorization is a mandatory \$10,000 a day penalty, which is the most severe penalty authorized by the legislature. See Tex. Water Code §7.052(b). Given the consequences of operating beyond the permit limitations, appropriate

deterrence is necessary to deter violations for failure to keep records to demonstrate compliance with the permit limitations. See Tex. Water Code §7.053(3)(E).

This information is in the record for this case. The fact that the Second Set of records demonstrates significant non-compliance with the Respondent's permit and is inconsistent with the First Set of records is relevant to the Commission's consideration of these records.

The Respondent's reliance on an affidavit is misplaced.

4. The Respondent references an affidavit that was submitted in response to one of the ED's motion's at SOAH. Respondent claims that the affidavit, signed by Mr. Scott Knutson, lends credibility to the Second Set of records. At the hearing, however, Mr. Knutson testified that he did not have personal knowledge of the contents of the Second Set of records, when they were created, or how they were created. No other testimony was provided to support the trustworthiness of the Second Set of records. After consideration of all of the evidence, the ALJ did not find that the Second Set of records merited a reduction in the penalty. The ED agrees with the ALJ's findings and proposed decision on this issue.

Prayer

For these reasons, the ED respectfully requests the ALJ consider the ED's exceptions and recommends that the Commission adopt the ALJ's proposed order with the ED's exceptions.

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

Two handwritten signatures in black ink. The signature on the left is for Jennifer Cook, and the signature on the right is for Stephanie J. Frazee.

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 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:

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