

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

IN THE MATTER OF AN ENFORCEMENT ACTION AGAINST ADVANTAGE ASPHALT PRODUCTS, LTD.; RN104955497	§ § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$20,000.00 in administrative penalties against Advantage Asphalt Products, LTD., (Respondent) for violations of TEX. HEALTH & SAFETY CODE §§ 382.0518(a) and 382.085(b) and 30 TEX. ADMIN. CODE (TAC) § 116.110(a). The ED alleges that Respondent failed to obtain authorization prior to operating a rock crusher.

After being properly notified, Respondent failed to appear at the preliminary hearing concerning the ED's allegations and recommendations. Therefore, as set out below, the Administrative Law Judge (ALJ) recommends that the Commission enter a default judgment against Respondent, deem as true the facts alleged by the ED, and assess a penalty of \$20,000.00 against Respondent.

II. JURISDICTION AND VIOLATIONS

At the time of the violations, Respondent owned and operated a rock crusher at the Irlbeck pit which is two miles west of the intersection of Brown Road and Cemetery Road and west of the City of Canyon, Randall County, Texas (Plant). The plant consists of one or more sources as defined in Code section 382.003(12). On March 2 and 3, 2007, a TCEQ Amarillo Regional Office investigator conducted an inspection and reported that Respondent had violated statutes within the Commission's jurisdiction and/or the Commission's rules by operating a rock crusher without first obtaining authorization.

Under TEX. WATER CODE ANN. § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the TEX. HEALTH & SAFETY CODE within the Commission's jurisdiction or a rule adopted or an order or permit issued thereunder. The Commission is required by TEX. WATER CODE § 7.052(b) to assess an administrative penalty in the amount of \$10,000 for each day a rock crusher operates without the required permit. Each day that a continuing violation occurs is a separate violation.

In this case, Respondent is alleged to have violated TEX. HEALTH & SAFETY CODE §§ 382.0518(a) and 382.085(b) and 30 TAC § 116.110(a), which are statutes or rules within the Commission's authority. Thus, the Commission has jurisdiction over Respondent and authority to assess the penalties requested by the ED. Further, the State Office of Administrative Hearings has jurisdiction over this matter as reflected in the Conclusions of Law that are in the attached Default Order.

III. DEFAULT JUDGMENT

Default judgment in this case is entered pursuant to 1 TAC § 155.55 and 30 TAC §§70.106(b) and 80.113(d). Those rules specify that any default judgment entered under the rule shall be issued only upon adequate proof that proper notice has been provided to the defaulting party. As set forth in the Findings of Fact and Conclusions of Law, the ALJ finds that the requisite notice has been provided to Respondent in this proceeding, in accordance with TEX. GOV'T CODE ANN. § 2001.052; 1 TAC §§ 155.27 and 155.55; and 30 TAC §§ 1.11 and 39.25. Therefore, the ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law set forth in the attached Default Order assessing an administrative penalty of \$20,000.00 against Respondent for the violations in issue and directing Respondent to take the specified corrective actions.

SIGNED January 22, 2008.

STEPHEN J. PACEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



DEFAULT ORDER Assessing Administrative Penalties Against Advantage Asphalt Products, Ltd; TCEQ Docket No. 2007-0768-AIR-E; SOAH Docket No. 582-08-0523

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against Advantage Asphalt Products, Ltd. (Respondent). A Proposal for Decision (PFD) was presented by Stephen J. Pacey, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a preliminary hearing concerning the EDPRP on December 6, 2008, in Austin, Texas.

The Executive Director, represented by Kathleen Decker, appeared at the hearing. Respondent was not present at the hearing nor represented by counsel and did not request a continuance. The Executive Director requested that a default judgment be entered against Respondent. The ALJ agreed with the Executive Director's request.

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

I. FINDINGS OF FACT

1. At the time of the violations, Respondent owned and operated a rock crusher at the Irlbeck pit which is two miles west of the intersection of Brown Road and Cemetery Road and west

of the City of Canyon, Randall County, Texas (Plant). The plant consists of one or more sources as defined in the rules of the Commission.

2. On March 2 and 3, 2007, a TCEQ Amarillo Regional Office investigator conducted an inspection and reported that Respondent had violated statutes within the Commission's jurisdiction and/or the Commission's rules adopted thereunder.
3. On July 23, 2007, the Executive Director filed his EDPRP, in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Respondent violated TEX. HEALTH & SAFETY CODE §§ 382.0518(a) and 382.085(b) and 30 TEX. ADMIN. CODE § 116.110(a). The ED alleged that Respondent failed to obtain authorization prior to operating a rock crusher. For these violations the Executive Director recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$20,000.00 against Respondent.
4. The total administrative penalty sought in the EDPRP is the total of base penalty amounts for the two violations consisting of one violation for each day. The base penalty amounts were neither adjusted by enhancement nor by the environmental, property, and human health matrices.
5. The Executive Director seeks a penalty of \$20,000 for Respondent's alleged violation of TEX. HEALTH & SAFETY CODE §§ 382.0518(a) and 382.085(b) and 30 TEX. ADMIN. CODE § 116.110(a), based on Respondent's failure to obtain authorization to operate a rock crusher for two days of operation.
6. The Executive Director mailed a copy of the EDPRP to Respondent's last address known to the TCEQ on the same date that the EDPRP was filed.

7. Respondent filed an answer to the EDPRP requesting a hearing, and the matter was referred to SOAH for hearing.
8. On October 26, 2007, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to Respondent.
9. The notice of hearing:
 - Indicated the time, date, place, and nature of the hearing;
 - Stated the legal authority and jurisdiction for the hearing;
 - Indicated the statutes and rules the Executive Director alleged Respondent violated;
 - Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the Executive Director;
 - Advised Respondent, in at least 12-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 EDPRP being deemed as true and the relief sought in the notice possibly being granted by default; and
 - Included a copy of the Executive Director's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.
10. On December 6, 2007, the ALJ convened the preliminary hearing. Respondent did not appear, nor did a representative of Respondent appear.
11. Based on Respondent's failure to appear at the hearing, the Executive Director moved for a default judgment against Respondent in which all of the Executive Director's allegations would be deemed admitted as true, the penalties the Executive Director sought would be assessed against Respondent, and Respondent would be ordered to take corrective action recommended by the Executive Director. The ALJ granted the motion.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. § 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 & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052(b), the penalty is \$10,000 per violation, per day for the violations at issue in this case.
3. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.
4. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. § 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 1.11, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties. Additionally, Respondent was notified, in accordance with 1 TEX. ADMIN. CODE §155.55and 30 Tex. Admin. Code §§ 70.106(b) and 80.113(d), that if Respondent failed to appear at the hearing, a default judgment could be rendered against Respondent in which all the allegations contained in the notice of hearing would be deemed admitted as true.
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 ANN. ch. 2003.

7. Based on the above Findings of Fact and Conclusions of Law:
 - a. A default judgment should be entered against Respondent in accordance with 1 TEX. ADMIN. CODE § 155.55 and 30 TEX. ADMIN. CODE § 70.106(b); and
 - b. The allegations contained in the notice of the hearing, including those in the EDPRP attached thereto, are admitted as true.
8. Based on the above Findings of Fact and Conclusions of Law, Respondent violated TEX. HEALTH & SAFETY CODE §§ 382.0518(a) and 382.085(b) and 30 TEX. ADMIN. CODE § 116.110(a)
9. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
 - Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
10. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
11. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$20,000 is justified and should be assessed against Respondent.

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

1. Within 30 days after the effective date of this Commission Order, Advantage Asphalt Products, LTD., shall pay an administrative penalty in the amount of \$20,000 for violations of TEX. HEALTH & SAFETY CODE §§ 382.0518(a) and 382.085(b) and 30 TEX. ADMIN. CODE § 116.110(a). The payment of this administrative penalty will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." 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. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) 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.

3. 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.
4. 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 ANN. § 2001.144.
5. As required by TEX. WATER CODE § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
6. 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

BUDDY GARCIA, Chairman
For the Commission