State of Nevada
Dept. of Conservation & Natural Resources
State Environmental Commission SEC.nv.gov
901 South Stewart Street, Suite 4001, Carson City, Nevada 89701

FORM 3: FORM FOR REQUESTING AN APPEAL HEARING
(Provide attachments as needed)

RECEIVED
OCT 04 2017
ENVIRONMENTAL PROTECTION

1. Name, address, telephone number, and signature of appellant:

Name: Tahoe Western Asphalt, LLC

Physical Address: 8013 US 50 East, Carson City, Nevada

E-mail Address: Msimons@rssblaw.com

Telephone Number: 775-329-7941

Signature: _____

Representative capacity (if applicable): Attorneys for Tahoe Western Asphalt, LLC

2. Attach copy of Nevada Division of Environmental Protection final decision, such as permit or notice of alleged violation, being appealed.

3. Specify grounds of appeal: (check all that apply)

- ☐ Final decision in violation of constitutional or statutory provision;
- ☒ Final decision made upon unlawful procedure;
- ☒ Final decision was affected by other error of law;
- ☒ Final decision was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;
- ☒ Final decision was arbitrary or capricious or characterized by abuse of discretion;

4. For each ground of appeal checked above, please list the constitutional, Nevada Revised Statute (NRS), and/or Nevada Administrative Code (NAC) provision allegedly violated. Also list the statutes and/or or regulations that give the State Environmental Commission jurisdiction to hear the appeal.

See Attachment 1

5. For each ground of appeal checked above, provide a brief and concise statement of the facts which provide the basis for the appeal.

See Attachment 2

Date of Request: October 2, 2017.

Send Form to: Executive Secretary, State Environmental Commission, 901 South Stewart Street, Suite 4001, Carson City, NV 89701

Attachment 1

4. For each ground of appeal checked above, please list the constitutional, Nevada Revised Statute (NRS), and/or Nevada Administrative Code (NAC) provision allegedly violated. Also list the statutes and/or or regulations that give the State Environmental Commission jurisdiction to hear the appeal.

A. Jurisdiction to hear the appeal

The State Environmental Commission has jurisdiction to hear the appeal based upon the authority granted to it in NRS 445B.340 and NAC 445B.890 (1).

B. Sections involved in appeal

Pursuant to NAC 445B.890 (2), this appeal is based on the following grounds:

1. The final decision was affected by other error of law;
2. The final decision was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
3. The final decision was arbitrary or capricious or characterized by abuse of discretion.

Attachment 2

5. For each ground of appeal checked above, provide a brief and concise statement of facts which provide the basis for the appeal.

The penalty issued by the Nevada State Environmental Commission (SEC) against Tahoe Western Asphalt (TWA) on September 22, 2017 based on the Nevada Division of Environmental Protection ("NDEP") recommendations are erroneous, arbitrary, capricious, and/or characterized by abuse of discretion for the following reasons:

1. Travis Osterhout fraudulently made misrepresentations to the SEC, causing the SEC's ruling to be clearly erroneous, arbitrary, capricious, and result in an abuse of discretion.

2. The penalty was imposed based on an error of law because it did not consider that NDEP granted TWA an extension, or that there was a lack of corrective notice to TWA.

3. The penalty was arbitrary, capricious, and/or abuse of discretion due to the margin of error in testing air quality, and the lack of notice between testing.

I. Travis Osterhout, As A Representative Of NDEP, Perpetrated Fraud By His Failure To Disclose That NDEP Granted TWA An Extension To The 180 Day Testing Requirement.

Travis Osterhout, in his position as Supervisor of the Compliance and Enforcement Branch of NDEP, perpetrated a scheme of fraud to cause undue financial hardship upon TWA. Mr. Osterhout blatantly ignored and did not disclose to the SEC that NDEP granted TWA an extension to obtain testing based on TWA's unconventional operating schedule. First, Mr. Osterhout issued a Notice of Alleged Violation for TWA's failure to obtain testing at 180 days after start up even though TWA had an extension and was not even operating at that time. Second, Mr. Osterhout failed to provide TWA notice that TWA was allegedly in violation until over 6 months after the violation. Mr.

Osterhout was motivated by complaints of nearby residents, and carried out the Notices of Alleged Air Quality Violation in an attempt to shut down operations at TWA.

A. NDEP Granted TWA an Extension for Testing

On October 13, 2016, NDEP extended the permit's requirement that TWA perform initial air quality tests 180 days after the start of operations. (*See October 13, 2016 NDEP email attached hereto as* Exhibit 2)[1]. NDEP granted the extension because TWA does not operate on a traditional year-round schedule like most businesses. (Robert Matthew's Declaration attached hereto as Exhibit 11 at ¶ 11). TWA's operating schedule follows an unusual seasonal schedule specific to the asphalt production industry. (Exhibit 11 at ¶ 5). Every year, he does not operate in winter months because the weather becomes too cool to lay asphalt. (Exhibit 11 at ¶ 7). TWA completely shuts down operations in the winter because asphalt production is necessarily tied to the ability to lay asphalt in the warm weather. (Exhibit 11 at ¶ 7). Accordingly, TWA was completely shut down between fall 2016 and spring 2017. (Exhibit 11 at ¶ 8).

TWA first began its initial operation on July 9, 2016 after obtaining its Class II Air Quality Operating Permit on May 23, 2016. (*Class II Air Quality Permit attached hereto as Exhibit 1;* Exhibit 11 at ¶ 3). The permit required that TWA do some initial testing within 180 days of the start of operation, July 9, 2017.[2] However, since the Fall of 2016, TWA was not operating without Mr. Matthews or with the cold weather. (Exhibit 11 at ¶ 6, 7). This shut down TWA's operations prior to the 180 day permit deadline for testing.

In anticipation of the TWA winter shutdown, Mr. Matthews spoke with an NDEP representative about how the shutdown would affect TWA's 180 days to test. (Exhibit 11

[1] Although not included in the original record, the Commission shall take judicial notice of the email. Judicial notice is appropriate for matters of public record. Fierle v. Perez, 219 P.3d 906, 912 (Nev. 2009); United States v. 14.02 Acres of Land More or Less in Fresno County, 547 F.3d 943, 955 (9th Cir. 2008). The email is public record because it originated from a government entity. NRS 239.010. Therefore, the email can be judicially noticed and thereby included in the record of the present matter.

[2] "Testing and sampling or either of them must be conducted and the results submitted to the director within 60 days after achieving the maximum rate of production at which the affected facility shall be operated, but not later than 180 days after initial startup of the facility." (Exhibit 1 §(I)(L).

at ¶ 10). On October 13, 2016, Mr. Matthews received written confirmation from NDEP that it granted TWA an extension to carry out its initial testing. (*See* Exhibit 2). The email explains that, "if your facility will not operate more than 180 days prior to shut down this season, testing will be required as soon as production begins again in the spring." (Exhibit 2). The email indicated that TWA was required perform when Mr. Matthews started operations in the spring 2017.[3] Clearly, NDEP provided TWA an extension to obtain testing beyond the standard 180 days from the date of operation.

TWA restarted operations in spring 2017 when the weather warmed up enough to lay asphalt and Mr. Matthews returned to Northern Nevada. (Exhibit 11 at ¶ 14). TWA arranged for its initial air quality testing soon after Mr. Matthews' return. TWA completed the initial air quality tests in spring 2017. (Exhibit 11 at ¶ 14). TWA complied with the testing requirements in its air quality permit because it had an extension to complete testing.

On June 13, 2017, Mr. Osterhout sent TWA notice that it was in violation of the 180-day initial test requirements. (*See* Draft Notices of Alleged Air Quality Violations attached hereto as Exhibit 3). The draft notices, No. 2619 and No. 2620, alleged that the 180-day testing requirements for performance and opacity were up on January 5, 2017. (Exhibit 3). Violations No. 2619 and No. 2620 state that as of January 5, 2017, TWA was in violation of its permit. (Exhibit 3). This is clearly erroneous taking into account that NDEP granted an extension until spring 2017, and TWA was not even operating on or around January 5, 2017.

During the entirety of Mr. Osterhout's testimony that TWA was in violation of its NDEP permit for failing to test within the initial 180 days, Mr. Osterhout failed to acknowledge or disclose that NDEP granted an extension. Mr. Osterhout knew or should have known about the extension when he issued the notices of alleged violations. Mr. Osterhout fraudulently misrepresented to the Commission that as of January 5, 2017, TWA was in violation of the testing requirement. TWA was not

[3] The NDEP email stated that, "if operation commences more than 180 days without testing, a notice of alleged violation will be issued." (Exhibit 2).

operating in January 2017. TWA was shut down because the asphalt industry does not operate in the winter. (Exhibit 11 at ¶ 7). Mr. Osterhout knew or should have known that TWA was not operating in January, 2017, when he decided in June, 2017 that TWA was in violation of its permit. Mr. Osterhout's blatant omission of this fact suggests that Mr. Osterhout materially misrepresented facts before the Commission. Therefore, the penalty imposed upon TWA based on this fraudulent information was clearly erroneous, arbitrary, capricious, and an abuse of discretion.

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B. The Timing of the Notices Shows the Appearance of Fraud

The following chart displays the violations and the differences between the dates of alleged violations and the dates in which TWA received notice of the violations:

TWA VIOLATIONS

	No. 2619	No. 2620	No. 2621	No. 2622	No. 2623
Type of Violation	Failure to conduct initial performance testing	Failure to conduct initial opacity testing	Failed opacity test at 22.5%	Failed opacity test at 32.08%	Failed opacity test at 28.5%
Date: Alleged Violation	1/5/2017	1/5/2017	4/25/2017	4/27/2017	4/28/2017
Date: Draft Notice of Violation	6/13/2017	6/13/2017	6/14/2017	6/15/2017	6/15/2017
Date: Final Notice of Violation	7/11/2017	7/11/2017	7/11/2017	7/11/2017	7/11/2017

The first time TWA received notice that it was in violation of its air quality permit was in June, 2017, when Mr. Osterhout concocted a plan to hit TWA with as many violations as he could think of in an effort to cause severe financial hardship on TWA. Each of the five alleged violations themselves occurred at different times, from January 2017 to April 2017. The first two violations, No. 2619 and No. 2620, alleged that TWA did not timely conduct its initial air quality tests as of January 5, 2017. (Exhibit 3).

Violation No. 2621 alleged that on April 25, 2017, TWA emitted air at 22.5% opacity which is over the 20% limit. (*See Draft Notice of Alleged Air Quality Violation and Order No. 2621* attached here to as Exhibit 5). Next, violation No. 2622 alleged that on April 27, 2017, TWA emitted air at 32.08%. (*See Draft Notice of Alleged Air Quality Violation and Order No. 2622* attached here to as Exhibit 7). Finally, violation No. 2623 alleged that on April 28, 2017, TWA emitted air at 28.5% opacity. (*See Draft Notice of Alleged Air Quality Violation and Order No. 2621* attached here to as Exhibit 9).

Appallingly, TWA received no notice of these alleged violations until June, 2017. (Exhibit 3; Exhibit 5; Exhibit 7). Even though TWA did not receive notice, Mr. Osterhout applied multipliers to the fines associated with the violations. The fine schedule multiplies a fine based on the number of previous incidences.[4] By the fifth violation, the fine was multiplied by 20% for previous violations that were actually all noticed together. It appears as though Mr. Osterhout attempted to issue violations and inflate fines that would significantly financially burden TWA.

There is no explanation why Mr. Osterhout waited between six and three months to issue these notices other than the suggestion that around that time the nearby residents repeatedly complained to Mr. Osterhout that they did not like TWA's presence in their neighborhood. TWA is zoned for industrial use, but is located next to a residential subdivision. (Exhibit 11 at ¶ 4). In late spring of 2017, the residents began pestering Mr. Osterhout to shut down TWA operations. (Exhibit 11 at ¶ 18). The residents were even heard at the penalty hearing making claims that Mr. Osterhout told them he was going to shut down TWA. (Exhibit 11 at ¶ 19). Mr. Osterhout's position is not to protect the interests of residents who purchased homes next to an industrial area; instead, it is to oversee compliance of air quality standards. TWA has great concern for Mr. Osterhout's appearance of impartiality.

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[4] See SEC penalty findings attached hereto as Exhibit 10. For each previous violation, the fine is multiplied by 5%.

Overall, the SEC's penalty relied on fraudulent information from Mr. Osterhout. The information Mr. Osterhout, as a representative of NDEP, presented to the Commission did not represent a complete picture of the facts. He did not disclose that NDEP granted TWA an extension to perform initial testing. He did not draft violations at or near the time of the alleged violations. The pending Freedom of Information Act request for Mr. Osterhout's phone and email records will show that neither he nor his employees notified TWA of its violations until June 2017. This is exactly the type of situation that Commission oversight is designed to prevent. Mr. Osterhout's fraud in itself represents strong grounds for which the Commission should overturn the penalty issued on September 22, 2017.

II. The SEC Penalties for Violations No. 2619 and No. 2620 Were Issued in Error of Law Because TWA Did Not Violate Its Permit After NDEP Granted An Extension.

TWA was never in violation of the Class II Air Quality Permit's initial testing requirements. However, NDEP issued two notices of violation, No. 2619 and No. 2620, for TWA's failure to conduct initial testing as of January 5, 2017. NDEP specifically granted TWA an extension to test beyond 180 days from initial startup based on its unique seasonal operating schedule. (Exhibit 2). TWA was not operating at all on January 5, 2017, did not restart operations until spring 2017, and was within its extended time to perform initial testing. (Exhibit 11 at ¶ 17). It was an outright error of law to issue a violation for failure to obtain testing as of that date, and then apply a multiplier for the second violation.

The strict 180-day initial testing requirement did not apply to TWA based on NDEP's own representations. NDEP granted TWA an extension to obtain testing based on TWA's seasonal operating schedule. TWA was to obtain testing in the spring when it restarted its operations because TWA shut down operations before the initial 180-day cut off. (Exhibit 2). In fact, TWA scheduled testing when it was set to restart operations spring of 2017. (Exhibit 11 at ¶ 16). Due to no fault of their own, the testing company was sold and a noncompete clause prohibited the company from performing the test

work. (Exhibit 11 at ¶ 15). TWA scheduled the next available company, which took place about a month after it began operations. (Exhibit 11 at ¶ 16). The testing was then performed at the soonest available date, April 25, 2017. (Exhibit 11 at ¶ 17). TWA complied with the extended time to test its facility's emissions.

Thus, it was an error of law to penalize TWA for a failure to test as of January 5, 2017. TWA was not required to test by January 5, 2017, because NDEP extended the time from 180 days to a general requirement that TWA test when it restarts operations. TWA performed the requisite tests once it started operations in the spring of 2017. The violation was incorrectly issued, and the accompanying penalty should be reversed.

III. The SEC Penalty was Arbitrary, Capricious, and an Abuse of Discretion Because of the Lack of Corrective Notice to TWA and the Margin of Error in Testing.

A. Lack of Corrective Notice and Fine Multipliers

Travis Osterhout issued TWA three violations in for four consecutive days, without notifying TWA of the tests or the test results.[5] While Mr. Osterhout claims to have notified TWA that it failed NDEP's emission's tests, TWA has no record of and disputes the existence of this notification. (Exhibit 11 at ¶ 20). Every TWA employee working on the test days will testify that no NDEP representative notified him or her that NDEP was conducting air quality tests and that TWA failed those tests. (Exhibit 11 at ¶ 20). TWA has a pending Freedom of Information Act public records request through which TWA will receive Mr. Osterhout's phone records and emails relating to TWA and the dates he directed the air quality tests. These phone and email records will verify that TWA had no notice of the April NDEP tests until TWA received draft notices of alleged violations in June 2017. It was arbitrary, capricious, and an abuse of discretion

[5] First, on April 25, 2017, TWA allegedly emitted air at 22.5% opacity, which is over the 20% limit. (Exhibit 5). Second, on April 27, 2017, TWA allegedly emitted air at 32.08%. (Exhibit 7). Third, on April 28, 2017, TWA emitted air at 28.5% opacity. (Exhibit 9).

to perform tests and issue violations without giving TWA an opportunity to correct any issue with its operations emissions.

If TWA received notice that it failed one emissions test, it would not have continued operations emitting air beyond the opacity limits. (Exhibit 11 at ¶ 21). The second and third violations, No. 2622 and No. 2623, would not exist but for Mr. Osterhout's failure to notify TWA that its operations may be violating the Class II Air Quality Operating Permit. TWA should not be penalized for something it had no opportunity to correct.

The lack of corrective notice further makes the fine multipliers increasing the penalties arbitrary, capricious, and an abuse of discretion. The penalty structure multiplies a fine by 5% for every past violation. (*See* Exhibit 10). Mr. Osterhout first issued the two violations for failure to do initial testing; this multiplied fine from the first test on April 25, 2017 by 10%. (Exhibit 10). Then the second, April 27, 2017, penalty was multiplied by 15%. (Exhibit 10). Finally, the third, April 28, 2017, penalty was multiplied by 20%. (Exhibit 10). Impliedly so, the multiplier exists to encourage parties to cure their violation rather than incurring another future violation. It does not serve this purpose to issue penalties months after the violations without notifying the offender or giving it a chance to fix its alleged violation.

Therefore, the lack of corrective notice made the penalties themselves arbitrary, capricious, and an abuse of discretion. Then, applying a multiplier to increase the penalties added another layer of arbitrary, capricious and an abuse of discretion decision-making. The penalties for violations No. 2622 and No. 2623 should be completely reversed because they were issued without notice of the prior violation. All penalties issued should not contain a multiplier because the violations were issued months after the alleged offending dates, on June 13-15, 2017. (Exhibit 3, Exhibit 5, Exhibit 7).

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B. Margin of Error in Air Quality Testing

NDEP cannot determine for certain that an emission was over the limit giving rise to a fine, and therefore a penalty should only be assessed for a level at which NDEP can be certain. NDEP's air quality test is an NDEP employee's subjective view of the percent of pollution within the smoke stacks emitted from a source. The test administrator then determines the percent of opacity in that smoke stack. NDEP disclosed that this test generally carries a 5% margin of error, meaning that the actual percent of opacity is plus or minus 5% of the number generated from the test. The subjective nature of the test causing the margin of error creates uncertain results, and thus the corresponding penalties are arbitrary, capricious, and an abuse of discretion.

Each violation has a base penalty of $1,000 that is multiplied based on how the percent opacity lines up to NDEP's penalty table. (*See* Exhibit 10). Between 20 - 29.99% opacity, there is a 1.5 multiplier; between 30 - 39.99% opacity there is a 2.5 multiplier. (*See* Exhibit 10). So, for example, a test might show a 31% opacity causing the fine to have a 2.5 multiplier, but NDEP can only accurately say that the actual opacity was between 26% - 36%. It is arbitrary, capricious, and an abuse of discretion to apply a larger multiplier when the test cannot definitely show that an opacity percentage was that high.

Notices of alleged violations No. 2621, 2622, and 2623 were due to TWA's alleged failure to comply with the emissions limit allowed in its permit. (*See* Exhibit 10). The emissions limit is 20% opacity, so anything above 20% is a violation of the Class II Air Quality Operating Permit. *Id.* First, No. 2621 claims that on April 25, 2017, TWA emitted air at 22.5% opacity. (*See* Exhibit 5). Second, No. 2622 claims that on April 27, 2017, TWA emitted air at 32.08% opacity. (*See* Exhibit 7). Third, No. 2623 claims that on April 28, 2017, TWA emitted air at 28.5% opacity. (*See* Exhibit 9).

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The margin of error means that at least one of TWA's violations should not have been issued at all, and the others should have been reduced according to an opacity percentage that NDEP can be certain of. Plus or minus 5%, No. 2621 is not above the emissions limit. Plus or minus 5%, No. 2622 is not in the range calling for a 2.5 multiplier. If this test is to be relied upon at all, the penalties assessed in No. 2621 and No. 2622 are arbitrary because the margin of error effectively reduces the percent opacity for which a source can be penalized for like TWA was. The lack of certainty in the testing creates arbitrary results, and TWA should not be penalized based on arbitrary results.

The Commission should adjust or reverse its penalties because the penalties were arbitrary in that TWA did not have notice to resolve the alleged violations before incurring additional violations. Also, the Commission should adjust or reverse its penalties because the margin of error for the emissions test further shows proof of the arbitrary nature of both the findings and the multipliers used to determine the penalty amounts.

IV. Conclusion

The Commission should reverse the penalties issued on September 22, 2017 because they were based on fraudulent misrepresentations, errors of law, arbitrary and capricious, and an abuse of discretion. TWA had an extension to conduct initial air quality tests, and performed those tests within the time extended to it. NDEP's independent testing that found TWA in violation of air quality standards had a margin of error so as to make those fines arbitrary and capricious. TWA was never in violation of NDEP standards, and therefore the penalties should be reversed. In sum:

- No. 2619 should be reversed because TWA had an extension to do initial tests.
- No. 2620 should be reversed because TWA had an extension to do initial tests.

- No. 2621 should be reversed because, plus or minus 5%, TWA did not fail its emissions test.
- No. 2622 should be reversed because TWA did not have corrective notice to prevent an additional violation. If not reversed, No. 2622 should be reduced to the penalty corresponding to plus or minus 5% of the test, and it should be reduced by the multiplier for previous violations given the lack of corrective notice.
- No. 2623 should be reversed because TWA did not have corrective notice to prevent an additional violation. If not reversed, No. 2623 should be reduced by the multiplier for previous violations given the lack of corrective notice.
- All penalties should be reversed because Mr. Osterhout's fraud on the Commission rendered the penalties clearly erroneous, arbitrary, capricious, and an abuse of discretion.

Exhibit List

1. Class II Air Quality Operating Permit
2. NDEP initial testing extension
3. Draft Notice of Alleged Violations No. 2619 and No. 2620
4. Notice of Alleged Violations No. 2619 and No. 2620
5. Draft Notice of Alleged Violations No. 2621
6. Notice of Alleged Violations No. 2621
7. Draft Notice of Alleged Violations No. 2622
8. Notice of Alleged Violations No. 2622
9. Notice of Alleged Violations No. 2623
10. SEC Penalty September 22, 2017
11. Declaration of Robert Matthews

Exhibit List

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EXHIBIT 1

EXHIBIT 1

Nevada Department of Conservation and Natural Resources • Division of Environmental Protection

NDEP

BUREAU OF AIR POLLUTION CONTROL
901 SOUTH STEWART STREET SUITE 4001
CARSON CITY, NEVADA 89701-5249
p: 775-687-9350 • www.ndep.nv.gov/bapc • f: 775-687-6396

Facility ID No. A1969 *Permit No.* AP1611-3748

CLASS II AIR QUALITY OPERATING PERMIT

Issued to: TAHOE WESTERN ASPHALT, LLC (HEREINAFTER REFERRED TO AS PERMITTEE)
Mailing Address: PO BOX 21645; CARSON CITY, NEVADA 89721
Physical Address: 8013 US 50 EAST; CARSON CITY, NEVADA
General Facility Location: 8013 US 50 EAST; CARSON CITY, NEVADA
General Facility Location:
SECTION 1, T 15 N, R 20 E, MDB&M
HA 104 – EAGLE VALLEY AREA/ CARSON CITY COUNTY
NORTH 4,343.05 KM, EAST 268.52 KM, UTM ZONE 11

Emission Unit List:

ASPHALT PLANT – MAIN OPERATING SCENARIO

A. System 01 – Asphalt Plant: Initial System Loading & Conveyance
PF1.001 Loader transfer to 4-compartment cold feed bins
PF1.002 4-compartment cold feed bins transfer to collecting conveyor
PF1.003 Collecting Conveyor transfer to Pugmill
PF1.004 Pugmill transfer to incline conveyor
PF1.005 Incline Conveyor transfer to Drum Dryer Mixer

B. System 02 – Asphalt Plant: Drum Dryer Mixer/Burner
S.2.001 Asphalt Drum Dryer Mixer/Burner (Manufactured by Astec; Mfg. date 1984; Propane-fired Drum Dryer Burner, 76.4 MMBtu/hr)

Ba. System 02a – Asphalt Plant: Drum Dryer Mixer/Burner (Alternate Operating Scenario)
S.2.001a Asphalt Drum Dryer Mixer/Burner (Manufactured by Astec; Mfg. date 1984; #2 Diesel-fired Drum Dryer Burner, 50.4 MMBtu/hr)

C. System 03 – Asphalt Plant: Drum Dryer Discharge & Conveyance
PF1.006 Drum Dryer Mixer transfer to Slat Conveyor
PF1.007 Slat Conveyor transfer to Surge Bin
PF1.008 Surge Bin transfer to Truck

D. System 04 – Lime Silo
S2.002 Lime Silo Loading
PF1.009 Lime Silo Unloading to Pugmill via Screw Auger

ASPHALT PLANT – ALTERNATE OPERATING SCENARIO

E. System 05 – Reclaimed Asphalt Pavement (RAP) System
PF1.010 Loader transfer to RAP bin
PF1.011 RAP bin transfer to RAP collecting conveyor
PF1.012 RAP collecting conveyor transfer to Drum Dryer Mixer

End of Emission Unit List

BUREAU OF AIR POLLUTION CONTROL

NDEP *Facility ID No.* A1969 *Permit No.* AP 1611- 3748

CLASS II AIR QUALITY OPERATING PERMIT

Issued to: TAHOE WESTERN ASPHALT, LLC

Section I. General Conditions

A. Severability (Nevada Administrative Code (NAC) 445B.315.3(c))
Each of the conditions and requirements of this Operating Permit is severable and, if any are held invalid, the remaining conditions and requirements continue in effect.

B. Prohibited Acts (Nevada Revised Statute (NRS) 445B.470))
Permittee shall not knowingly:
1. Violate any applicable provision, the terms or conditions of any permit or any provision for the filing of information;
2. Fail to pay any fee;
3. Falsify any material statement, representation or certification in any notice or report; or
4. Render inaccurate any monitoring device or method, required pursuant to the provisions of NRS 445B.100 to 445B.450, inclusive, or 445B.470 to 445B.640, inclusive, or any regulation adopted pursuant to those provisions.

C. Prohibited Conduct: Concealment of Emissions (NAC 445B.225)
Permittee shall not install, construct, or use any device which conceals any emission without reducing the total release of regulated air pollutants to the atmosphere.

D. Compliance/Noncompliance (NAC 445B.315.3(d))
Permittee shall comply with all conditions of this Operating Permit. Any noncompliance constitutes a violation and is grounds for:
1. An action for noncompliance;
2. Revising, revoking, reopening and revising, or terminating the Operating Permit; or
3. Denial of an application for a renewal of the Operating Permit.

E. NAC 445B.315.3(e)
The need to halt or reduce activity to maintain compliance with the conditions of this Operating Permit is not a defense to noncompliance with any conditions of this Operating Permit.

F. NAC 445B.315.3(f)
The director may revise, revoke and reissue, reopen and revise, or terminate the operating permit for cause.

G. NAC 445B.315.3(g)
This Operating Permit does not convey any property rights or any exclusive privilege.

H. NAC 445B.315.3(h)
Permittee shall provide the Bureau of Air Pollution Control, within a reasonable time, with any information that the Bureau of Air Pollution Control requests in writing to determine whether cause exists for revising, revoking and reissuing, reopening and revising or terminating this Operating Permit or to determine compliance with the conditions of this Operating Permit.

I. Fees (NAC 445B.315.3(i))
Permittee shall pay fees to the Bureau of Air Pollution Control in accordance with the provisions set forth in NAC 445B.327 and 445B.331.

J. Right to Entry (NAC 445B.315.3(j))
Permittee shall allow the Bureau of Air Pollution Control personnel, upon the presentation of credentials, to:
1. Enter upon the premises of Permittee where:
   a. The stationary source is located;
   b. Activity related to emissions is conducted; or
   c. Records are kept pursuant to the conditions of this Operating Permit;
2. Have access to and copy, during normal business hours, any records that are kept pursuant to the conditions of this Operating Permit;
3. Inspect, at reasonable times, any facilities, practices, operations, or equipment, including any equipment for monitoring or controlling air pollution, that are regulated or required pursuant to this Operating Permit; and
4. Sample or monitor, at reasonable times, substances or parameters to determine compliance with the conditions of this Operating Permit or applicable requirements.

K. Certification (NAC 445B.315.3(k))
A responsible official of Permittee shall certify that, based on information and belief formed after reasonable inquiry, the statements made in any document required to be submitted by any condition of this Operating Permit are true, accurate and complete.

Issued to: TAHOE WESTERN ASPHALT, LLC

Section I. General Conditions (continued)

L. Testing and Sampling (NAC 445B.252)

To determine compliance with NAC 445B.001 to 445B.3689, inclusive, before the approval or the continuance of an operating permit or similar class of permits, the director may either conduct or order the owner of any stationary source to conduct or have conducted such testing and sampling as the director determines necessary. Testing and sampling or either of them must be conducted and the results submitted to the director within 60 days after achieving the maximum rate of production at which the affected facility shall be operated, but not later than 180 days after initial startup of the facility and at such times as may be required by the director.

2. Tests of performance must be conducted and data reduced in accordance with the methods and procedures of the test contained in each applicable subsection of this section unless the director:
   a. Specifies or approves, in specific cases, the use of a method of reference with minor changes in methodology;
   b. Approves the use of an equivalent method;
   c. Approves the use of an alternative method, the results of which he has determined to be adequate for indicating whether a specific stationary source is in compliance; or
   d. Waives the requirement for tests of performance because the owner or operator of a stationary source has demonstrated by other means to the director's satisfaction that the affected facility is in compliance with the standard.
3. Tests of performance must be conducted under such conditions as the director specifies to the operator of the plant based on representative performance of the affected facility. The owner or operator shall make available to the director such records as may be necessary to determine the conditions of the performance test. Operations during periods of startup, shutdown and malfunction must not constitute representative conditions of a performance test unless otherwise specified in the applicable standard. (NAC 445B.252.3)
4. Permittee shall give notice to the director 30 days before the test of performance to allow the director to have an observer present. A written testing procedure for the test of performance must be submitted to the director at least 30 days before the test of performance to allow the director to review the proposed testing procedures. (NAC 445B.252.4)
5. Each test of performance must consist of at least three separate runs using the applicable method for that test. Each run must be conducted for the time and under the conditions specified in the applicable standard. For the purpose of determining compliance with an applicable standard, the arithmetic means of results of the runs apply. In the event of forced shutdown, failure of an irreplaceable portion of the sampling train, extreme meteorological conditions or other circumstances with less than three valid samples being obtained, compliance may be determined using the arithmetic mean of the results of the other two runs upon the director's approval. (NAC 445B.252.5)
6. All testing and sampling shall be performed in accordance with recognized methods and as specified by the director. (NAC 445B.252.6)
7. The cost of all testing and sampling and the cost of all sampling holes, scaffolding, electric power and other pertinent allied facilities as may be required and specified in writing by the director must be provided and paid for by the owner of the stationary source. (NAC 445B.252.7)
8. All information and analytical results of testing and sampling must be certified as to their truth and accuracy and as to their compliance with all provisions of NAC 445B.001 to 445B.3689, inclusive, and copies of these results must be provided to the director no later than 60 days after the testing or sampling, or both.
9. Notwithstanding the provisions of subsection 2, the Director shall not approve an alternative method or equivalent method to determine compliance with a standard or emission limitation contained in Part 60, 61 or 63 of Title 40 of the Code of Federal Regulations for:
   a. An emission unit that is subject to a testing requirement pursuant to Part 60, 61 or 63 of Title 40 of the Code of Federal Regulations; or
   b. An affected source.

M. Maximum Opacity of Emissions (NAC 445B.22017)

1. Except as otherwise provided in this section and NAC 445B.2202, Permittee may not cause or permit the discharge into the atmosphere from any emission unit opacity equal to or greater than 20 percent. Opacity must be determined by one of the following methods:
   a. If opacity is determined by a visual measurement, it must be determined as set forth in Reference Method 9 in Appendix A of 40 C.F.R. Part 60.
   b. If a source uses a continuous monitoring system for the measurement of opacity, the data must be reduced to 6-minute averages as set forth in 40 CFR § 60.13(h).
2. The provisions of this section and NAC 445B.2202 do not apply to that part of the opacity that consists of uncombined water. The burden of proof to establish the application of this exemption is upon the person seeking to come within the exemption.

N. Exceptions for Stationary Sources (NAC 445B.2202)

The provisions of NAC 445B.22017 do not apply to:

1. Smoke from the open burning described in NAC 445B.22067;
2. Smoke discharged in the course of training air pollution control inspectors to observe visible emissions, if the facility has written approval of the commission;
3. Emissions from an incinerator as set forth in NAC 445B.2207;
4. Emissions of stationary diesel-powered engines during warm-up for not longer than 15 minutes to achieve operating temperatures.

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Section I. General Conditions (continued)

O. Odors (NAC 445B.22087)
Permittee may not discharge or cause to be discharged, from any stationary source, any material or regulated air pollutant which is or tends to be offensive to the senses, injurious or detrimental to health and safety, or which in any way interferes with or prevents comfortable enjoyment of life or property.

P. Assertion of Emergency as Affirmative Defense to Action for Noncompliance (NAC 445B.326.1)
Permittee may assert an affirmative defense to an action brought for noncompliance with a technology-based emission limitation contained in the Operating Permit if the holder of the Operating Permit demonstrates through signed, contemporaneous operating logs or other relevant evidence that:
1. An emergency (as defined in NAC 445B.056) occurred and the holder of the Operating Permit can identify the cause of the emergency;
2. The facility was being properly operated at the time of the emergency;
3. During the emergency, the holder of the Operating Permit took all reasonable steps to minimize excess emissions; and
4. Permittee submitted notice of the emergency to the director within 2 working days after the emergency. The notice must contain a description of the emergency, any steps taken to mitigate emissions, and any corrective actions taken to restore the normal operation of the facility.
5. In any action for noncompliance, Permittee, by asserting the affirmative defense of any emergency, has the burden of proof.

Q. Revocation and reissuance (NAC 445B.3265)
1. This Operating Permit may be revoked if the control equipment is not operating. (NAC 445B.3265.1)
2. This Operating Permit may be revoked by the director upon determination that there has been a violation of NAC 445B.001 to 445B.3689, inclusive, or the provisions of 40 CFR § 52.21, or 40 C.F.R. Part 60 or 61, Prevention of Significant Deterioration, New Source Performance Standards, and National Emission Standards for Hazardous Air Pollutants adopted by reference in NAC 445B.221. (NAC 445B.3265.2)
3. The revocation is effective 10 days after the service of a written notice, unless a hearing is requested. (NAC 445B.3265.3)

**************End of General Conditions**************

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Section II. General Construction Conditions

The following provisions apply to PF1.001 through PF1.012, S2.001 and S2.002.

A. NAC 445B.250 (*State Only Requirement*)

Notification

The Director shall be notified in writing of the following:

1. The date construction (or reconstruction as defined under NAC 445B.247) of the affected facility is commenced, postmarked no later than 30 days after such date.
2. The anticipated date of initial startup of an affected facility, postmarked no more than 60 days and no less than 30 days prior to such date.
3. The actual date of initial startup of the affected facility, postmarked within 15 days after such date.

*************End of General Construction Conditions*************