

1 **BEFORE THE STATE ENVIRONMENTAL COMMISSION**

2 **STATE OF NEVADA**

3 In Re:

4 Appeal of Nevada State Environmental
5 Commission Penalty to Tahoe Western
6 Asphalt, LLC

**NEVADA DIVISION OF
ENVIRONMENTAL PROTECTION'S
REPLY IN SUPPORT OF ITS MOTION
TO DISMISS APPEAL FILED BY
TAHOE WESTERN ASPHALT, LLC.**

7 The Nevada Division of Environmental Protection (NDEP) submits the following as its
8 Reply in Support of its Motion to Dismiss Appeal filed by Tahoe Western Asphalt, LLC (TWA).

9 **I. INTRODUCTION.**

10 In TWA's opposition brief (TWA Brief), TWA attempts to save a procedurally and
11 legally deficient filing by making overly broad and inaccurate assertions against NDEP. For
12 example, TWA states that NDEP argues that TWA has no administrative remedies. See
13 TWA brief, p. 2:9-15. This is untrue. TWA had several administrative options available for
14 review of the State Environmental Commission's (SEC) penalty assessments, but an appeal
15 of the SEC's penalty to the SEC is procedurally invalid, contrary to law, and must be
16 dismissed.

17 **II. THE SEC DOES NOT HAVE JURISDICTION TO HEAR THIS APPEAL AND THE
18 APPEAL MUST BE DISMISSED.**

19 **A. An SEC Decision is a Not a Decision of the Department or the Director
20 Appealable to the SEC.**

21 The SEC's penalty assessment is not an appealable matter as defined by NRS
22 445B.360. It states that any person aggrieved by: (a) the issuance, denial, renewal,
23 modification, suspension or revocation of an operating permit; or (b) the issuance,
24 modification or recession of any other order, by the Director may appeal to the Commission.
25 NRS 445B.360(1). The SEC's penalty assessment is neither an operating permit nor an
26 order by the Director. Since the SEC's penalty assessment fails to meet these criteria, it is
27 not an appealable matter before the SEC.

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1 As previously stated in the NDEP's Motion to Dismiss, only decisions of the
2 Department of Conservation and Natural Resources (Department) may be appealed to the
3 SEC. NAC 445B.890. The SEC is an independent, quasi-judicial board with statutory
4 authority to hear appeals of the decisions of the Department. NRS 445B.210(7). TWA
5 asserts that the SEC operates under the authority of the Director of the Department, but this
6 is incorrect.¹ See TWA brief, p.3: 18–21. The SEC and Department have distinct statutory
7 powers. See NRS 445B.210–245. While TWA is correct that pursuant to NRS 445B.200(1)
8 the SEC is created within the Department for administrative purposes, the statutes and
9 regulations consistently identify the SEC and the Department as distinct bodies with distinct
10 powers and duties. For example, the very same statute states that the Department is to
11 provide technical advice, support and assistance to the Commission. NRS 445B.200(7).

12 Not only do the statutes and regulations support the conclusion that an SEC decision
13 cannot be appealed to the SEC, but to do so is nonsensical. It's well accepted practice that a
14 body cannot review its own decisions on appeal. The impracticality of the SEC hearing its
15 own appeal is exemplified by the absence of an apparent respondent in these proceedings.

16 Because the SEC does not have legal authority to hear an appeal of its own decision,
17 the appeal must be dismissed.

18 **B. The Subject of TWA's Appeal Extends Well Beyond the Penalty Assessments**
19 **to the Underlying Violations Themselves Which are Time Barred.**

20 TWA accuses the NDEP of misguiding the SEC as to the subject matter of the appeal;
21 however, TWA clearly attempts to guise an appeal of the underlying violations as an appeal
22 of the penalties levied by SEC. TWA implicitly concedes that it failed to timely appeal the
23 Notice of Alleged Violations (NOAVs) and the NOAVs are final. Instead, TWA argues in their
24 opposition brief that the appeal is an appeal of the penalties and not the NOAVs. See TWA
25 brief, p. 6:3-8. However, not only does the appeal consistently attempt to attack the validity of
26 the underlying violations, but in the conclusion of TWA's appeal, TWA asks the SEC to

27 ¹ TWA's brief also unintelligibly asserts "the Commission identified as a branch of the Department, and
28 Commission decisions are decisions are therefore decisions of the Department." See TWA brief, p. 4:9-12.

1 reverse each violation. See TWA Appeal, p. 12. This request for relief is clearly beyond the
2 SEC's jurisdiction outside of the 10 day time-period for appealing the underlying NOAVs. To
3 the extent that TWA argues the NOAVs are invalid, the appeal must be dismissed because
4 TWA failed to meet the regulatory deadline for appealing the NOAVs.

5 **III. TWA's PERPETUAL FAILURE TO FOLLOW PROCEDURE WHEN EXERCISING**
6 **ITS RIGHTS TO DUE PROCESS CANNOT BE REMEDIED THROUGH THIS**
7 **UNLAWFUL APPEAL.**

8 **A. TWA's Right to Due Process is Not Violated by the SEC Dismissing this**
9 **Unlawful Appeal.**

10 TWA claims that the appeal is proper because TWA must appeal to the SEC before it
11 can appeal to District Court. TWA Brief, p. 3:7-10. However, TWA misapplies the
12 requirement to exhaust all administrative remedies before filing a petition for judicial review.
13 NRS 233B.130(b) states "[w]here appeal is provided within an agency, only the decision at
14 the *highest level* is reviewable unless a decision made at a lower level in the agency is made
15 final by statute" (emphasis added). In this case, by appealing the SEC's decision to the SEC,
16 TWA fails to obtain a decision at a higher level. As a result, TWA's unlawfully filed appeal
17 has no impact on TWA's obligations to exhaust all administrative remedies before filing a
18 petition for judicial review.

19 **B. TWA's appeal fails to meet the criteria for a petition for reconsideration or**
20 **rehearing pursuant to NAC 445B.899**

21 TWA seemingly acknowledges that rather than an appeal, TWA should have filed a
22 petition for reconsideration or rehearing and asks the SEC to *sua sponte* cure TWA's
23 deficiencies. See TWA Brief, p. 4:1-3. TWA not only fails to clarify whether it seeks a
24 reconsideration versus a rehearing, but TWA also relies on the SEC and the NDEP to
25 speculate as to how its appeal satisfies each element of NAC 445B.899. Just as TWA seeks
26 to transfer its responsibility for ensuring compliance with its permit to the NDEP,² TWA now

27 ² TWA asserts that it should not be penalized because NDEP allegedly did not provide notice to TWA of
28 opacity violations despite it being TWA's responsibility to assure they are operating in compliance with their permit
and there being no legal requirement that NDEP provide notice of a violation to a permittee before issuing an
NOAV. NAC 445B.275(1)(c).

1 asks the SEC to claim responsibility for developing a favorable argument for a reconsideration
2 or rehearing on its behalf.

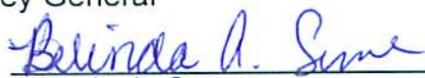
3 TWA alleges that the Form 3 fulfills the requirements that a request for reconsideration
4 or rehearing identify the decision being challenged and the basis for the challenge. See TWA
5 Brief, p. 5:3–6. However, TWA's appeal is notably lacking elements for either a petition for
6 reconsideration or a petition for rehearing as required by the SEC's regulations. NAC
7 445B.899(1) states that a petition for reconsideration may not contain additional evidentiary
8 matter or require the submission or taking of evidence, yet TWA's appeal repeatedly refers to
9 alleged materials not in the record. See TWA Appeal, pp. 8–9. A petition for rehearing under
10 NAC 445B.899(2) must specifically set forth the nature and purpose of any additional
11 evidence to be introduced and show that such evidence is not merely cumulative but also
12 could not have been introduced at the hearing. TWA's Appeal never addresses why such
13 evidence could not have been introduced at the hearing. While TWA may have been able to
14 file a petition for reconsideration or rehearing, this haphazard appeal fails to satisfy the legal
15 requirements for granting a petition for reconsideration or rehearing. Accordingly, the appeal
16 should be dismissed and TWA's request to frame the appeal as a rehearing or
17 reconsideration should be denied.

18 **II. CONCLUSION.**

19 The SEC lacks jurisdiction to hear TWA's appeal and the appeal must be dismissed.
20 TWA's appeal does not meet the legal criteria for a petition for reconsideration or rehearing
21 and as such, its appeal cannot be treated as a petition for reconsideration or rehearing. For
22 these reasons, the NDEP respectfully requests that the SEC dismiss the appeal.

23 DATED this 20th day of November, 2017.

24 ADAM PAUL LAXALT
25 Attorney General

26 By: 
27 Belinda A. Suwe
28 Deputy Attorney General
100 N. Carson Street
Carson City, Nevada 89701
Attorneys for the State of Nevada

CERTIFICATE OF SERVICE

I, Lisa Hamm, certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 20th day of November, 2017 I transmitted a true and correct copy of the foregoing **NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS APPEAL FILED BY TAHOE WESTERN ASPHALT, LLC**, via email to the following:

Valerie King
vking@ndep.nv.gov

Dawn Buoncristiani
dbuoncristiani@ag.nv.gov

Mark Simons
msimons@rssblaw.com



LISA HAMM