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10 **STATE ENVIRONMENTAL COMMISSION**  
11 **STATE OF NEVADA**

12 In Re:

13 Tahoe Western Asphalt, LLC Penalty  
14 Appeal

15 **APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL**

16 Appellant Tahoe Western Asphalt, LLC (TWA), by and through its counsel,  
17 hereby opposes the Motion to Dismiss Appeal filed by the Nevada Division of  
18 Environmental Protection ("NDEP"). This opposition is based upon the pleadings and  
19 papers on file herein, the attached points and authorities and such other and further  
20 evidence as the State Environmental Commission ("Commission") deems appropriate  
21 for review.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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3 **I. THE MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE COMMISSION**  
4 **HAS AUTHORITY TO REVIEW THE DECISION.**

5 There are three parties involved in the subject matter of this dispute: TWA, the  
6 Commission, and the NDEP. TWA is an asphalt company with an air quality permit to  
7 operate its facility. The NDEP issued TWA's air quality permits and oversees permit  
8 compliance. The Commission administers fines based on permit violations, and reviews  
9 final decisions within the agency.

10 In this instance, the NDEP pursued alleged violations against TWA. Thereafter,  
11 the Commission rendered a decision ordering TWA to pay fines based on alleged  
12 permit violations. NDEP argues that there is no review mechanism for the Commission  
13 to review a penalty decision. NDEP therefore argues that TWA has no remedy and that  
14 the Commission cannot review its penalty order, leaving TWA with no administrative  
15 remedies. The Motion is contrary to Nevada law and applicable Nevada Administrative  
16 Code ("NAC") provisions.

17 **A. PROCEDURAL HISTORY**

18 TWA purchased an asphalt plant with the intent to operate in the industrial  
19 Moundhouse area of Carson City, Nevada. Nevada law requires facilities to have an  
20 operating permit when they emit contaminated air. See NRS 445B. Following the law,  
21 TWA applied to NDEP for a Class II Air Quality Permit (Permit) on April 5, 2016. NDEP  
22 issued the Permit on May 23, 2016.

23 Thereafter, in June, 2017, NDEP ambushed TWA with four Draft Notices of  
24 Alleged Violations (NOAV), alleging that TWA did not comply with the permit between  
25 January, 2017 and April, 2017. NDEP emailed copies of these drafts to TWA shortly  
26 after issuing them. In July, 2017, NDEP then issued four final NOAVs. Relying on  
27 NDEP's representations, the Commission issued penalties for the alleged violations.  
28 Thereafter on September 22, 2017, the Commission then rendered its decision  
imposing an order requiring TWA to pay fines for the alleged violations.



1 On October 2, 2017, TWA initiated an "appeal" of the Commission's September  
2 22, 2017 asking the Commission to reconsider the penalties imposed due to the false  
3 representations undermining the NDEP's actions and the erroneous conclusions  
4 rendered leading to the penalties imposed.

5  
6 **B. THE APPELLATE STRUCTURE OF AGENCY DECISIONS ALLOWS THE  
7 COMMISSION TO REVIEW ITS PENALTY DECISION**

8 Nevada law follows a hierarchy for appeals of agency decisions: an individual  
9 must appeal first within the agency before it can appeal to District Court. NRS  
10 233B.130. A person must extinguish its rights within an agency in order to move up the  
11 hierarchy. Id. The NAC contains regulations for agencies to carry out NRS provisions.  
12 When the law of the NRS allows for one thing, the corresponding NAC explains how to  
13 carry out that law.

14 NRS 445B.360 provides that a person aggrieved by "the issuance, modification  
15 or rescission of any other order by the Director may appeal to the Commission." The  
16 term "Director" is defined as the "Director of the Department" (NRS 445B.130) and the  
17 "Department" is defined as the "State Department of Conservation and Natural  
18 Resources. NRS 445.125. NRS 445B.200 further states that the Commission is a part  
19 of the Department. These provisions create a right of appeal to the Commission from a  
20 decision issued by the Commission since the Commission operates under the authority  
21 of the Director.

22 The NAC itself does not directly correspond to the provisions of NRS 445B.360,  
23 other than requiring that the appeal forms be obtained from the Director, i.e. the  
24 Commission. NAC 445B.279. The NAC instead identifies two separate provisions for  
25 appeals and rehearings. NAC 445B.899; NAC 445B.890. The first is for an appeal of a  
26 final decision of the Department using Form 3. NRS 445B.890. The second is for a  
27 rehearing or reconsideration allowing the Commission to rehear or reconsider a  
28 decision by the Commission. NAC 445B.899. Both avenues review decisions on  
similar grounds: error of law, unlawful, unreasonable, or clear error. NAC 445B.899;

1 NAC 445B.890. To the extent the present “appeal” is more appropriately framed as a  
2 rehearing or reconsideration of the Commission’s September 22, 2017 decision, TWA  
3 requests such relief. The NAC appellate and rehearing and/or reconsideration  
4 provisions are discussed in more detail below.

5 **i. NAC 445B.890 Appeal**

6 The NAC allows a person to appeal a decision of the Department to the  
7 Commission. NAC 445B.890. Under the NAC, the “Department” is also identified as  
8 the State Department of Conservation and Natural Resources. NAC 445B.881. The  
9 Commission itself is also “created within the Department.” NRS 445B.200. Therefore,  
10 the Commission identified as a branch of the Department, and Commission decisions  
11 are decisions are therefore decisions of the Department. To appeal under NAC  
12 445B.890, a party is specifically required to fill out a Form 3, specifying the grounds  
13 upon which the appeal is based when appealing a decision of the Department to the  
14 Commission. NAC 445B.890. A party must also provide legal authority and a  
15 statement of facts in support of the appeal which was included in the initial Form 3 filing.  
16 Id. The Commission also did not reject TWA’s Form 3 filing, which one would have  
17 expected if the Commission did not accept the appeal as proper.

18 **ii. NAC 445B.899 Reconsideration and Rehearing**

19 The NAC also allows for reconsideration and rehearings of a Commission  
20 decision by the Commission. NAC 445B.899. A party can request that the Commission  
21 can rehear or reconsider its decision. Id. The request must “identify each portion of the  
22 challenged decision which the petitioner deems to be unlawful, unreasonable, or based  
23 on erroneous conclusions of law.” Id. The request must be filed within fifteen days of  
24 the effective date of the decision. NAC 445B.899(3). Then, the Commission will decide  
25 whether to reconsider or rehear the order, and then “reexamine the record and decision  
26 with regard to the issues.” NAC 445B.899(7).

27 *///*  
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1 The Commission's decision pursuant a request for rehearing and/or  
2 reconsideration is then given the legal effect of a final decision, which final decision  
3 would then allow TWA a direct right of appeal to the District Court. Id. A request for  
4 reconsideration and rehearing does not require a specific form, but the Form 3 fulfills all  
5 the requirements that the request identify the decision being challenged and the basis  
6 for challenge. See NAC 445B.899; NAC 445B.890.

7 **iii. TWA's Request to the Commission**

8 Here, TWA appealed to the Commission requesting it to reconsider the ordered  
9 penalties using the Form 3. The Commission has jurisdiction and authority to hear the  
10 appeal pursuant to NRS 445B.360, NAC 445B.890, and NAC 445B.899. The  
11 Commission is a body within the Department, allowing TWA to appeal its decision  
12 pursuant to NAC 445B.890. That appeal further meets the requirements of NAC  
13 445B.899 through which the Commission may reconsider or rehear its decision. TWA  
14 requested the relief of an appeal, a reconsideration and/or a rehearing regarding the  
15 penalty decision since that form of relief is contemplated and allowed by the NRS and  
16 NAC provisions.

17 TWA's Form 3 was sufficient to pursue the relief requested. TWA's request was  
18 based on the premise that (1) Travis Osterhout made fraudulent misrepresentations to  
19 the Commission which the Commission relied upon, (2) the Commission issued the  
20 penalty in error based on NDEP's extensions to TWA and NDEP's lack of corrective  
21 notice in issuing the penalties, and (3) the penalty was arbitrary, capricious, and/or an  
22 abuse of discretion based on the margin of error in the tests to set fines. The appeal  
23 followed the NAC requirements that TWA identify how the decision was unlawful,  
24 unreasonable, or based on erroneous conclusions of law. The appeal was timely  
25 because the decision was issued on September 22, 2017, and the appeal was filed on  
26 October 2, 2017, ten days after the decision.

27 As stated, both the NRS and the NAC allow TWA to appeal the penalties to the  
28 Commission and/or seek reconsideration and/or rehearing of the Commission's decision

1 TWA has properly complied with the regulatory scheme in filing this appeal. TWA does  
2 not yet have a final decision from the agency to appeal the matter to District Court.

3 NDEP's notion misguides the Commission, confusing the subject matter of the  
4 appeal. The appeal is not an appeal of NDEP's Notices of Alleged Violations that were  
5 drafted in June 2017 and issued in July 2017. This appeal addresses the penalties that  
6 the Commission issued on September 22, 2017. The wrongful basis of those penalties  
7 is at the center of this appeal. Again, Nevada law allows TWA to appeal and or  
8 challenge the penalties before the Commission, therefore, the appeal is valid.

### 9 10 **C. TWA HAS A DUE PROCESS RIGHT TO APPEAL THE PENALTY**

11 Both the United States Constitution and the Nevada Constitution provide certain  
12 rights, including the right to due process before the state can effectuate a taking. Due  
13 process protections apply "when government action deprives a person of liberty or  
14 property." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7, 99 S.Ct. 2100, 60  
15 L.Ed.2d 668 (1979). Due process is satisfied by giving both parties "a meaningful  
16 opportunity to present their case." J.D. Constr. v. IBEX Int'l Grp., 126 Nev. Adv. Op. 36,  
17 240 P.3d 1033, 1040 (2010) (quoting Mathews v. Eldridge, 424 U.S. 319, 349, 96 S.Ct.  
18 893, 47 L.Ed.2d 18 (1976)).

19  
20 Here, TWA has a due process right to an appeal, rehearing, and/or  
21 reconsideration of the penalties. The penalty is issued by a state agency, the  
22 Commission. The appeal is a taking of a private individual's property because it requires  
23 TWA to pay a large monetary sum. Because those two elements are met, TWA is  
24 entitled to an opportunity to be heard and present its case challenging the validity of the  
25 penalties. Due process protections in the United States and Nevada Constitutions  
26 require that TWA have an opportunity to appeal the penalties, and thus the appeal is  
27 permitted.  
28


1 **IV. CONCLUSION**

2 The Motion to Dismiss should be denied. The NRS provides a right to appeal the  
3 Commission's decision with the Commission. TWA complied with the NAC provisions  
4 to carry out this right. To the extent the appeal should be categorized as a motion for  
5 rehearing or reconsideration, such relief is requested in order for the Commission to  
6 revisit the penalties imposed. Therefore, the Commission should deny the Motion to  
7 Dismiss.

8 **AFFIRMATION:** The undersigned does hereby affirm that this document does  
9 not contain the Social Security Number of any person.

10 DATED this 6<sup>th</sup> day of November, 2017.

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15 By:   
16 MARK G. SIMONS, ESQ.



**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of ROBISON, SIMONS, SHARP & BRUST, and that on this date I caused to be served a true copy of **APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL** on all parties to this action by the method(s) indicated below:

- ☐ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:
- ☐ I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which served the following parties electronically:
- ☐ by personal delivery/hand delivery addressed to:
- ☐ by facsimile (fax) addressed to:
- ☒ By email addressed to:
  - vking@ndep.nv.gov
  - spascual@ndep.nv.gov
  - BSuwe@ag.nv.gov
  - s.simpson@ndep.nv.gov
  - k.burke@ndep.nv.gov
  - DBuoncristiani@ag.nv.gov
  - igans@cox.net

DATED: This 6<sup>th</sup> day of November, 2017.

  
Employee of Robison, Simons, Sharp & Brust