lanak&hanna

Thomas M. Padian
Attorney at Law
tmpadian@lanak-hanna.com

File No. 27532

November 16, 2021

VIA E-MAIL AND FIRST CLASS MAIL

State of Nevada
State Environmental Commission
Sheryl Fontaine
901 South Stewart St., Suite 4001
Carson City, Nevada 89701
sfontaine@ndep.nv.gov

RE: Remand of Penalty for Alleged Air Quality Violation and Order Nos. 2783, 2784, 2786 Class II Air Quality Operating Permit 1611-3748 (FIN A1969)

Dear Ms. Fontaine:

In accordance with your correspondence dated November 1, 2021 regarding the above-referenced Nevada State Environmental Commission ("SEC") meeting set for December 17, 2021 at 10:00 a.m., Tahoe Western Asphalt, LLC ("TWA") hereby submits the following brief in support of its position that the SEC should set each violation aside and impose no fines on TWA for the alleged conduct.

I. INTRODUCTION

The three alleged violations that are a topic of discussion at the December 17, 2021, State Environmental Commission ("SEC") meeting, NOAV Nos. 2783, 2784 and 2786 all arise out of Tahoe Western Asphalt, LLC's ("TWA") alleged air violations related to an asphalt plant which is no longer in use. Each violation lacks substantial evidence as will be shown below and each must be set aside.

II. FACTS

TWA operates and, for a number of years, has operated an asphalt plant in Carson City, Nevada (the "Plant"). (Respondent Nevada State Environmental Commission's Summary of Record on Appeal at NSEC 070.) The Plant operates pursuant to Class II Air Quality Operating Permit No. AP1611-3748 issued by the NDEP to TWA on or about May 23, 2016 (the "AQOP"). (NSEC 004.)

On August 14, 2020, NDEP sent TWA a letter (the "August 14 NDEP Letter") enclosing three separate notices to TWA regarding alleged violations of the AQOP: Notice of Alleged Air-Quality Violation and Order Nos. ("NOAV") 2783, 2784 and 2786, respectively. (NSEC 030-31.)

None of the NOAVs or the August 14 NDEP Letter state an anticipated, proposed, or potential administrative fine or penalty with respect to any of the alleged violations of the AOQP. *Id.* at NSEC 032-39. The August 14 NDEP Letter merely states that "NDEP makes recommendations to the

625 The City Drive South, Suite 190, Orange, CA 92868 P 714-620-2350 F 714-703-1610 lanak-hanna.com
Joseph M. Hanna (retired)

[NSEC] as to what an appropriate penalty may be for an air quality violation." (NSEC 030.) However, the August 14 NDEP letter does not state whether NDEP has made a recommendation to NSEC as to an appropriate penalty with respect to any of the NOAVs. (NSEC 030-31.) Due this failure, the August 14 NDEP Letter did not adequately advise TWA of the allegations against it or the potential penalties and, therefore, did not provide TWA with the information required for TWA to make an informed decision regarding whether NOAVs should be appealed. (NSEC 030-31.)

On October 28, 2020, the NSEC sent a letter to Robert Matthews, Owner and Managing Member of TWA, regarding the NOAVs (the "October 28 NSEC Letter"). (NSEC 045-46.) The October 28 NSEC Letter stated "[o]n April 16, 2020, the Nevada Division of Environmental Protection (NDEP) held an enforcement conference with Tahoe Western Asphalt, LLC (TWA) to discuss supporting information regarding the draft Notice of Alleged Violation and Order (NOAV) Nos. 2783, 2784, & 2786. As a result of that meeting, NDEP formally issued the above NOAVs via [the August 14 NDEP Letter]." (NSEC 045.) The October 28 NSEC Letter also stated that the NSEC "will determine the appropriate penalty for the violations contained in the above referenced NOAVs on Wednesday, December 9, 2020 at 9:00am. (NSEC 045.)

The October 28 NSEC Letter also stated that "[d]uring the December 9th meeting, NDEP will provide the SEC with a brief overview of the NOAVs and the recommendation for an administrative penalty of $870.00 for NOAV 2783, $117,450.00 for NOAV 2784, and $10,000.00 for NOAV 2786, totaling $128,320.00. These recommended penalties were calculated using a penalty matrix previously approved by the SEC." (NSEC 045.) Prior to receipt of the October 28 NSEC Letter, TWA had not been advised of a recommended penalty for any of the NOAVs. *Id.* at NSEC 070. Further, the "penalty matrix" referenced in the October 28 NSEC Letter has never been provided to TWA. (NSEC 045.)

The October 28 NSEC Letter also stated "[a]lthough your presence is not required at this meeting, you or a representative may wish to attend to speak on behalf of TWA." (NSEC 045.) Mr. Matthews attended the December 9, 2020, NSEC meeting referenced in the October 28 NSEC Letter. However, he was not permitted by the NDEP or NSEC to speak. (NSEC 069.)

On December 9, 2020, the NSEC sent Mr. Matthews of TWA by certified mail its final decision with respect to the NOAVs (the "NSEC Final Decision"). (Petitioner's Record/Transcript of Evidence ("AR"), at AR 000037.) The NSEC Final Decision states that the NSEC "held a meeting on December 9, 2020. During the meeting, the SEC upheld two proposed penalty recommendations for Tahoe Western Asphalt, LLC. NOAV 2783 was upheld for the penalty amount of $870.00 and NOAV 2786 was upheld for the penalty amount of $10,000.00. After discussion, the SEC reduced the recommended penalty amount for NOAV 2784 from $117,450.00 to $39,150, for a total penalty amount of $50,020.00." (AR 000037.) The NSEC Final Decision, 2020 Letter did not state when any of the alleged violations occurred, the purported length of any of the alleged violations or how any of the penalty amounts were determined as required under NRS 233B.125. (AR 000037.)

Pursuant to *Mikohn Gaming v. Espinosa*, 122 Nev. 593, 137 P.3d 1150 (2006), whereby a party who is aggrieved by a NSEC final decision may file a petition for judicial review within 33 days after service by mail of the NSEC's final decision (December 9, 2020), TWA filed a petition on January

11, 2021 for judicial review of the NOAV 2783, NOAV 2874 and NOAV 2876 decision with the First Judicial District Court of Nevada.

Following briefing in the matter, the First Judicial District Court remanded the matter back to the SEC and the upcoming, December 17, 2021, meeting, is the remanded hearing ordered by that Court.

III. EACH NOAV MUST BE SET ASIDE AND NO FINE IMPOSED

A. NOAV 2783 Must be Set Aside the No Fine Imposed

The basis for this NOAV is TWA's alleged, "Failure to maintain permit-required air pollution controls." (NSEC 032.) This NOAV arises out of the NDEP's observation that the fogging water spray ("FWS") was not operating on two days (March 23, 2020 and March 24, 2020). (NSEC 037.) Based on the substantial evidence in the record, the decision is clearly erroneous and the NOAV is arbitrary and capricious.

The record reflects that, on the dates NDEP staff inspected the TWA facility, NDEP staff observed that for one emission unit, the FWS was installed but not operating. (NSEC 032.) In response, TWA's owner, Robert Matthews, informed NDEP staff that the FWS was not operating because the equipment can freeze in the cold weather. (NSEC 032.)

The evidence is clear from the face of NOAV 2783: the violation is a direct result of weather (i.e. freezing temperatures freezing the water that would ordinarily be expelled from the FWS) which caused TWA's permit-required equipment to become non-operational.

At any rate, TWA proceeded to abate this issue and, in fact did so as confirmed by Andrew Tucker of NDEP, who stated at the December 9, 2020 hearing, "As far as the compliance status, TWA has provided photographic documentation that the water spray was returned to operational condition. But NDEP staff have not be back on site to verify it personally due to restrictions because of COVID-19." (NSEC 077.) Rather than confirming TWA's compliance, NSEC relied on its observation of non-operation of the FWS on two consecutive days in March, where freezing temperatures are not uncommon in Carson City, to issue a violation and impose a fine.

In addition, NOAV 2783 was issued in an arbitrary and capricious manner. The Supreme Court of Nevada has held an agency's decision, challenged as arbitrary and capricious, will be upheld, "if it is supported by evidence that a reasonable mind might accept as adequate." *United Exposition Service Co. v. State Indus. Ins. System*, 109 Nev. 421, 851 P.2d 423 (1993).

Here, no reasonable mind could accept this violation as adequate. NDEP admitted its calculation for the penalty was based on "a single-event violation." (NSEC 005.) That single event was the non-operation of a mechanism which sprays water, even though NDEP staff was advised that the equipment was not functioning properly due to inclement weather. Moreover, although TWA provided proof of its compliance, NDEP never confirmed the same and imposed a fine anyway. There

is no other conclusion than that this violation was issued in an arbitrary manner and should be set aside.

The substantial evidence in the record does not support NSEC's assessment here of a $870.00 violation where the non-operation of the required equipment was out of TWA's hands and where TWA's compliance was never confirmed by NDEP. Moreover, NOAV 2783 is also arbitrary and capricious where the violation was based on a single event and compliance, though evidence of the same was provided to NDEP, was never confirmed.

B. NOAV 2784 Must be Set Aside the No Fine Imposed

The basis for this violation is TWA's alleged, "Failure to conduct permit-required recordkeeping and monitoring." (NSEC 034.) This violation arises out of the NDEP's review of the records in TWA's possession on two days (March 23, 2020 and March 24, 2020). (NSEC 034.) Based on the substantial evidence in the record, the decision and fine assessed is violative of the Nevada and United States Constitutions and the notice of violation is arbitrary and capricious.

Both the Nevada Constitution and The United States Constitution provide for a prohibition against the imposition of excessive fines. (Nev. Const. Art. I § 6; U.S. Const. Amd. 8.) An ordinance has been found to be violative of this provision if it is oppressive and vests state actors with unlimited discretion to establish fines. *City of Las Vegas v. Nevada Industries, Inc.,* 105 Nev. 174, 178, 772 P.2d 1275 (1989).

Here, the discretion to establish a fine against TWA is nearly boundless. This discretion is clearly seen by NDEP's actions at the December 9, 2020, hearing; Andrew Tucker of NDEP stated NDEP *could have* assessed a penalty of over $3.5 million, based on the duration of the alleged non-compliance by TWA. (NSEC 078.) The duration that the NDEP claims TWA is liable for not having complete records is 45 months – from the time of 'non-compliance' though the date of inspection (March 23, 2020). (NSEC 078.) But even Danilo Dragoni of the NDEP admits that the 45-month period is arbitrary, "The 45 months as Andrew Tucker explained is a compromise or *is* an interpretation of what the penalty matrix allow us to use as a wiggle room." (NSEC 080.) And because the NDEP thought that a fine of over $3 million, estimated by using the 'per day' rather than 'per month' calculation was clearly excessive, NDEP decided to use the 45 month benchmark which Mr. Dragoni stated, "is somehow arbitrary." (NSEC 080.) The fact that NDEP could have penalized TWA in excess of $3.5 million but only penalized it $117,450.00 (and then later reduced the amount further to $39,150.00) shows precisely how arbitrary the process is and how NDEP's discretion to establish a fine is unlimited.

Further, as pointed out by TWA's former counsel at the December 9, 2020 hearing, there is no evidence in the record which shows that the penalty, based off of NDEP's apparent estimation of 45 months of non-compliance, encompasses days where TWA did not operate the plant. (NSEC 083.) The estimation by NDEP that TWA was non-compliant because of an absence of permit-required records is not adequate to a reasonable mind, particularly where the NDEP never provided proof that

TWA was in fact operating on any of the 45 months for which TWA was penalized. How is TWA to produce production records if it is not operating? It is not.

Interestingly, when asked about whether NDEP had since received production information in order to determine compliance with emissions for the permit-specific information to determine if TWA was in compliance, the following exchange between Danilo Dragoni of NDEP and Chairman of the NSEC, Tom Portia, took place:

> Dragoni: So, yes we, I mean, TWA, you know, in these five months we tried and I have to admit TWA tried to comply, but every time starting from the, you know, from the discovering of, you know, failure to comply to the first – from the first order, which was just basically requiring to submit record-keeping and after the stockholder, ever time TWA provided us something was incomplete and not enough to determine compliance of the facility…
>
> Portia: So you did not receive enough information to determine whether this facility has been in compliance based on the records that have been submitted so far. So you don't know if they're in or out of compliance with mission [*sic*] standards.
>
> Dragoni: Correct. (NSEC 080)

The fact of the matter remains that TWA did submit sufficient records. The record reflects that TWA submitted records, requested of it by NDEP, and that those records were deemed incomplete. But TWA provided exactly what NEDP requested of it and even did so on a spreadsheet provided by the NDEP. (Declaration of Matthews, ¶ 5; Exhibit 1.) TWA created a new daily reporting sheet, as requested by NDEP, and even asked NDEP for additional feedback to ensure its compliance. (Declaration of Matthews, ¶ 6; Exhibits 2, 3.) The records produced to NDEP by TWA (Declaration of Matthews, Exhibit 1) show numerous non-operating days and provide the information sought by NDEP on days in which it was operating.

As such, in addition to the penalty constituting an excessive fine, in violation of the Nevada and United States Constitutions, both the penalty amount and the calculation thereof (using an estimation of a 45-month period of alleged non-compliance) are arbitrary and capricious and therefore NOAV 2784 must be set aside.

C. NOAV 2786 Must be Set Aside the No Fine Imposed

The basis for NOAV 2786 is TWA's alleged "Failure to comply with permitted opacity limits." (NSEC 037.) NDEP, on March 23, 2020, observed opacity emitting from one of the TWA mixer/burners, which it determined was in excess of the 20% to be emitted. (NSEC 037.) NDEP conducted four six-minute tests and determined the average opacities to be 62.5%; 25%; 63.5%; and 53.5%. (NSEC 037.) Based on one day's readings by unqualified member(s) of NDEP, TWA was

fined $10,000.00, this renders NOAV 2786 invalid as an excessive fine under the Nevada and United States Constitutions and is based on a determination that is not only in excess of the statutory authority of the agency and its members, but also arbitrary and capricious as well.

This test is clearly a subjective test as explained by NDEP's Mr. Dragoni, "And this opacity is related to, even though ***not in a mathematical way***, but it's related to the amount of pollution that is emitting through the stack…Again, these are visual observation [*sic*]." (NSEC 075.)(Emphasis added.)

Here, the fine imposed, $10,000, is based on one day's observation of opacity at the TWA facility by individuals that TWA asserted were unqualified to conduct such an admittedly imprecise test as NEDP's staff's certifications to conduct EPA Method 9 VEOs were invalid. (NSEC 038.) Further, the penalty is based solely on the test results of four six-minute tests where the opacity ranges, in 75% of the tests, in a six-minute period from a higher percentage in the first minute to a significantly lower percentage in the sixth, and final, minute of the test. (NSEC 037-38.) For example: of the four tests conducted within roughly an hour period on March 23, 2020 by NDEP, the change in opacity from the first minute to the last were as follows:

Method 9 VEO # 1: First Minute: 45%	Sixth Minute: 60%
Method 9 VEO # 2: First Minute: 45%	Sixth Minute: 15%
Method 9 VEO # 3: First Minute: 75%	Sixth Minute: 15%
Method 9 VEO # 4: First Minute: 90%	Sixth Minute: 15%

(NSEC 037-38.)

Even though TWA disputes the validity of the test results, the record is clear: of the four tests conducted by NDEP compliance staff, three of those tests resulted in emissions that were ultimately **below** the 20% threshold. (NSEC 037-38.) The basis for the penalty assessed to TWA is based on a subjective test and only on one single day, not backed up by any additional inspections and thus constitutes an arbitrary and excessive fine. Further, because the opacity observations were, after a short period of time, under the approved metric, the assessment of the violation itself is patently unreasonable making the assessment both arbitrary and capricious.

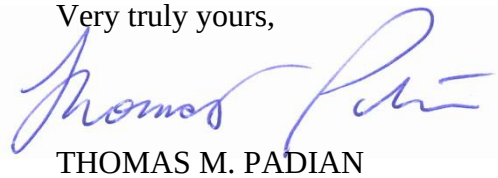
Mr. Dragoni of NEDP stated, on the record in the December 9, 2020 hearing, "In order to –to be certified for this kind of method, everyone, but in particular our compliance officer[s], have to take a class and pass a test every 6 months…And this certification guarantee [*sic*] that whoever is doing the official observation has been trained and tested to properly assess the opacity." (NSEC 075.) TWA has maintained from the beginning that the person(s) who performed the opacity tests did not have a valid certification to conduct it, at the time. (NSEC 38.) However, to date, neither proof of certification of the compliance officer, nor proof of the actual test results from the March 23, 2020 tests have been produced to TWA, despite requests therefor. Without proof of the compliance officer's valid certification to conduct the Method 9 test, NDEP was outside of its authority in issuing NOAV 2786 and renders the violation invalid on its face.

As such, NOAV 2786 must be set aside.

IV. CONCLUSION

For the foregoing reasons, TWA respectfully requests that the three NDEP violations: NOAV 2783; NOAV 2784; and NOAV 2786 each be set aside as none of them is unsupported by the facts and is prejudicial to the substantial rights of TWA and, further, that no fine be imposed.

Very truly yours,



THOMAS M. PADIAN
Attorney at Law for the Firm