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File No. 27532

February 23, 2021

VIA US MAIL & EMAIL

Carson City Planning Division
108 E. Proctor St.,
Carson City, NV 89701
planning@carson.org

RE: Carson City Planning Commission Meeting of February 24, 2021
Agenda Item E.4.
FILE NO: LU-2020-0115 (SUP-10-115)

Dear Planning Department:

Tahoe Western Asphalt, LLC ("TWA") submits the following comments regarding Agenda Item E.4. ("AI E4") of the Carson City Planning Commission of February 24, 2021 (the "Meeting"). These comments were prepared by TWA's attorney with respect to this matter: Thomas M. Padian (NV Bar No. 15303), Lanak & Hanna, P.C., and David R. Johnson (NV Bar No. 006696), Law Offices of David R. Johnson, PLLC, 8712 Spanish Ridge Avenue, Las Vegas, NV 89148. Mr. Padian will represent TWA at the Meeting. Mr. Padian's telephone number is (714) 451-7921 and his email is tmpadian@lanak-hanna.com.

According to the Agenda for the Meeting with respect to AI E4, "[t]he Commission may approve the continued operation under the current Special Use Permit [SUP-10-115], amend conditions of the Special Use permit, revoke (deny) the Special Use Permit ("SUP") or take other actions pursuant to CCMC 18.02.090." According to the Staff Report for AI E4 ("SR"), the "Recommended Motion" with respect to AI E4 is to "revoke SUP-10-115 based on the evidence of failure to comply with the conditions of the permit and creating a public nuisance that is detrimental to the public health, safety, and welfare, including emitting noxious odors into surrounding neighborhoods." The SR provides no attribution for this purported statement.

I. Background and Findings Stated in Staff Report

TWA is the owner/operator of the asphalt facility that is the subject of the SUP and the owner/applicant under the SUP. The SR's "INVESTIGATION FINDINGS FOR SHOW-CAUSE HEARING," in pertinent part, states:

1. Tahoe Western Asphalt has been in violation of its NDEP permit in violation of SUP condition number 12. TWA was cited and fined by NDEP for violations between January 2017 and March 2018. TWA received a Notice of Violation from NDEP dated August 14, 2020… SUP- 10-115 condition of approval number 12 states:

12. The applicant shall comply with applicable requirements of NDEP Bureau of Air Pollution Control Air Quality Operating Permit, including days and hours of operation.The applicant shall also comply with applicable requirements for noise, odors, erosion,air pollution and dust control.

2. TWA has violated the requirement in condition number 17, which requires odors to be controlled and prohibits odors from being detected beyond the property line. Carson City Code Enforcement staff detected odors from the residential neighborhood to the east of the TWA plant on 6 of 17 site visits between February 18, 2020, and July 14, 2020… SUP-10-115 condition of approval number 17 states:

17. ~~The operator shall utilize Ecosorb in operations to suppress odors.~~ The operation of the facility shall require that odors are not detectable beyond the property line. [Note: The deleted verbiage was effective before June 4, 2020, and the revised condition became effective after the Board of Supervisors upheld the modification on appeal onJune 4, 2020.]

3. The TWA operation has created or tended to create a public nuisance to the residents tothe east of the property, in violation of CCMC 18.02.090(5), due to odors leaving the siteon an ongoing basis during hours of operations ***and when the plant is not in operation***. (emphasis added.)

The SR states "Carson City Municipal Code 18.02.090 states, in applicable part:

Any of the following reasons or occurrences are grounds for a hearing on revocation or reexamination of a variance or special use permit, pursuant to Title 18 (Show Cause Procedures):

1. A failure or refusal of the applicant to comply with any of the terms or conditions of a variance or special use permit; . . .

5. Any act or failure to act by the applicant or its agents or employees directly related to the variance or special use permit which creates or tends to create a public nuisance or is detrimental to the public health, safety, and welfare.

Attachment 1 to the SR is a Complaint and Notice of Order to Appear for Show Cause Hearing dated February 4, 2021 signed by Lee Plemel, Director, Carson City Community Development Department. Attachment 2 to the SR is the Staff Report For The Planning Commission Meeting of October 28, 2020 regarding Agenda Item: E.7 (the "10/28 SR").

<u>Factual Background Regarding Alleged SUP Violations Stated in 10/28 SR</u>

The 10/28 SR states the factual background of the SR. The 10/28 SR states, in pertinent part, the following factual background:

"On <u>January 26, 2011,</u> the Planning Commission approved a Special Use Permit (SUP-10-115) foran asphalt plant and aggregate crushing facility on the subject site. Tahoe Western Asphalt ("TWA") has been the operator of the asphalt plant under that Special Use Permit."

"On <u>November 19, 2019,</u> the Planning Commission conducted a one-year review of the Special Use Permit. During this meeting staff informed the Planning Commission of the 99 complaints that had

been received following the October 24, 2018 meeting. Ninety-eight of the complaints were about odors, and one complaint was regarding hours of operation. The City's Code Enforcement staff documented six visits to Mound House following the complaints. During one visit, there was no odor detected, during four visits there was a faint odor detected, and during one visit there was a strong odor detected. ***NDEP also received 127 complaints during the year following the October 24, 2018 meeting. Although strong odors and opacity were observed, the threshold for a violation of NDEP standards was not met***." (emphasis added.)

"On February 26, 2020, after being referred back to the Planning Commission by the Board of Supervisors, the Commission reviewed the new information pertaining to its prior decision from November 19, 2019 and the amended conditions of approval. The Planning Commission voted 7-0 to modify the conditions of approval to:

> 2) Delete the condition requiring the use of a regenerative thermal oxidizer—which was determined to be inappropriate for the use—and replaced it with a condition to prohibit asphalt odors from being detected outside the property on which the asphalt plant is operating (condition #17) ...and
>
> 4) Require periodic code enforcement monitoring of the operation for off-site odors, with the ability to review the Special Use Permit before October 2020 if code enforcement finds that violations are occurring (condition #19)."

"On August 26, 2020, a stop-work order from NDEP to TWA became effective, based on alleged violations of NDEP regulations and permit requirements… To City staff's knowledge, the TWA asphalt plant has not been in operation since the stop-work order effective date of August 26, 2020."

A. Findings in 10/28 SR

The 10/28 SR, in pertinent part, states the following findings of the Carson City Code Enforcement Staff regarding TWA's alleged violations of the SUP.

"Staff findings: TWA has been in violation of its NDEP permit in violation of Special Use Permit condition number 12.

Attached are the most recent NDEP notices to TWA, including a Notice of Violation dated August14, 2020, a stop-work order dated August 14, 2020 (which had a stop-work order effective date of August 26, 2020), and a stop-work order dated August 26, 2020. The stop-work order was enforced based on non-compliance with NDEP permit requirements…

The NDEP violations relate primarily to pollution and dust control, in addition to technical NDEP permit requirements. Despite numerous complaints regarding offensive odors and actual observations of odors by NDEP and City staff, no violations of NDEP odor requirements have been documented."

"Staff findings: TWA has been in violation of condition number 17 by not suppressing odors from the plant and allowing odors to be detectable beyond the property after June 4, 2020, the effectivedate of the amended condition.

The amended condition [Condition 17] became effective on June 4, 2020, when the Board of Supervisors upheld the Planning Commission's condition on appeal by TWA. Prior to that date, there was no specific odor standard in the conditions of approval other than complying with NDEP requirements. As noted above, ***there have been no documented violations of NDEP standards for odors.*** (emphasis added.)

However, TWA operated between June 4 and August 26, 2020 under the amended condition. While ***Code Enforcement staff made no direct observations of odors during the two inspections conducted after June 4, 2020 [the effective date of Condition 17 of the SUP],*** several complaints of odors were received from residents during that time. Since the TWA plant continued to operate with the same equipment it had used prior to June 4, 2020, ***it can be assumed that the complaints were valid*** and that odors continued to leave the property depending on weather conditions at any given time. (emphasis added.)"

"Nuisance findings: In addition to the above conditions of approval, the Planning Commission may consider whether the operation "creates or tends to create a public nuisance or is detrimental to the public health, safety and welfare" pursuant to CCMC 18.02.090(5) …

Code Enforcement staff have documented offensive odors noticeable from the neighborhood to the east of the TWA asphalt plant operation, which is approximately one-quarter mile from the operation. In addition, numerous complaints of odors have been received from those residents over the past four years."

B. Board of Supervisors Notice of Decision

The new conditions of the SUP became effective upon approval of the Board of Supervisors as set forth in the Notice of Decision dated June 4, 2020 of the Board of Supervisors (the "NOD"). The NOD is attached as Attachment 2 to the 10/28 SR. In pertinent part, it states:

"The following are associated with the use…

17. The operator of the facility shall require that odors are not detectable beyond the property line….

19. City Code Enforcement Staff will monitor off-site odors a minimum of three times a month and maintain a detailed log. The log will be presented to the Planning Commission at its October 2020 meeting."

C. Carson City Code Enforcement Staff Monitoring of the TWA Facility

The only item that is part of the SR that could possibly be seen as an attempt to comply with Condition 19 of the NOD, set forth above, is a Memorandum dated September 17, 2020 from William Kohbarger, Code Enforcement, to Lee Plemel, Community Development Director (the "CC

Memo"). It does not comply with this condition. In fact, the CC Memo identifies only 3 monitoring efforts of the TWA facility after the effective date of June 4, 2020: June 12, 2020; July 14, 2020; and September 17, 2020. With respect to each of these efforts, the CC Memo, in pertinent part, states:

"June 12, 2020	09:00 hrs., CE Officer Kohbarger conducted a site visit to Mound House (Carson Highlands subdivision) [Not in Carson City]. … No odors detected. [Based on the "Inspection Log" described below, it is not clear if this inspection occurred on June 11 or June 12.}
July 14, 2020	08:25 hrs.-08:57 hrs., CE Officer Kohbarger conducted a site visit to the Mound House (Carson Highland subdivision) area [Not in Carson City].
September 17, 2020	07:58 a.m., CE Officer Kohbarger conducted a site visit and observed no activity.

The CC Memo also includes an "Inspection Log." It includes a description of hearsay complaints of smells or odors that CE Kohbarger purportedly received after June 4, 2020 by telephone or email [no emails are attached] from an unidentified citizen(s) of "Mound House." According to the CC Memo, these complaints were received on June 4, 5, 6, 8,11; July 1, 7, 14; and August 19, 2020. CE Kohbarger investigated 2 of these complaints: a complaint of June 11, 2020 and a complaint of July 14. On both occasions, CE Kohbarger detected no odors.

D. NDEP Notices of Alleged Air Quality Violations

The SR includes three Notices of Alleged Air Quality Violations issued to TWA by the Nevada Department of Environmental Protection ("NOAQV"): NOAQV Nos. 2783, 2784, and 2786. These NOAQVs are attached as part of Attachment 4 to the 10/28 SR. Each of these NOAVs was issued on August 14, 2020. All of the NOAQVs are the subject of an appeal/petition for review filed by TWA now pending in the First Judicial District Court of Nevada, Carson City, Case No. 21OC000041B. A true and correct copy of this Petition is attached as **Exhibit 1.**

All of the NOAQVs concern alleged violations TWA's Class II Air Quality Operating Permit (Permit No. 1611-3748) that was issued on May 23, 2016 (the "AQOP"). NOAQV Nos. 2783 and 2786 concern operation of air pollution control equipment at the TWA facility. NOAQV 2783 concerns observations by NDEP staff on March 23 and 24, 2020 that "the permit-required fogging water spray (FWS) for one emission unit under System 1 (PF1.002) was installed but was not operating." This NOAQV notes that Robert Matthews of TWA advised NDEP Staff the "FWS had not been operating because they freeze in the cold weather." Therefore, the one alleged violation stated in NOAQV 2783 resulted from a weather condition beyond TWA's control.

NOAQV 2786 concerns an investigation of the TWA facility conducted by NDEP Staff of March 23, 2020. It states "On March 23, 2020, NDEP staff investigated the complaints and observed opacity emitting from the stack for System 2 - Asphalt Plant Drum Dryer Mixer/Burner (S2.001). NDEP staff conducted four six-minute Method 9 Visual Emission Observations (VEO) on S2.001 between 8:50 am and 10:00 am. The average opacities for each of the Method 9 VEOs were 62.5%, 25%, 63 .5%, and 53.5%. The AQOP and 40 CFR Part 60.92(a)(2) restrict opacity in excess of 20% to be emitted from S2.001." Therefore, NOAQV 2786 solely concerns

operations at the TWA facility on March 23, 2020 which pre-dates the effective date of Condition 17 of the SUP, June 4, 2020. TWA disputes these findings as being scientifically invalid. Further, opacity is a measurement of transparency of an object and does not directly relate to odor.

NOAQV No. 2784 solely concerns alleged violation of certain record keeping requirements of the AOQP. However, the purported absence of these records has no relationship to any alleged emissions from the TWA facility, and therefore has little relevance to an evaluation of TWA's compliance with the SUP.

II. TWA Comments Regarding the SR

A. Odor Complaints and Investigation

The SR provides no basis for modification or revocation of the SUP. The SR demonstrates that CCES's issues with TWA's compliance with the SUP are primarily based on unsubstantiated hearsay complaints of "smells" and "odors" by unidentified residents of a subdivision located outside of the boundaries of Carson City in Lyon County (the "LC Complaints"). The SR does not identify a single complaint by any person that lives or works in Carson City, let alone adjacent to the TWA facility.

According to the CCES memo, since the relevant period after Condition 17 prohibiting odors emanating from the TWA facility was added to the SUP on June 4, 2020, CCES received 9 LC Complaints and investigated 2. Both of these investigations revealed that each of the LC Complaints was false because CCES's investigation detected no odors. Despite this evidence the 10/28 SR states that "it can be assumed each of the complaints [LC Complaints made after June 4, 2020] were valid."

That conclusion is absurd. The available evidence mandates the exact opposite conclusion. Any LC Complaints not confirmed by physical investigation should be deemed false and disregarded. Since the relevant period after June 4, 2020, no LC Complaints investigated by CCES have been confirmed. Therefore, there is absolutely no evidence of any violation by TWA of Condition 17 and the finding in the SR to the contrary is erroneous and should be disregarded.

Further, on June 4, 2020, the Board of Supervisors added Condition 19 to the SUP requiring CCES to "monitor off-site odors a minimum of three times a month and maintain a detailed log." The clear purpose of this requirement was to provide CCES and the Board of Supervisors with actual evidence on which to evaluate TWA's compliance with the SUP. Despite this requirement, according to the CCES Memo, CCES only investigated or monitored the TWA facility three times. None revealed any violation of the SUP. Any modification of the SUP should be delayed until CCES complies with this requirement and monitors TWA's operations three times a month for three months. That would allow TWA's performance to be based on actual evidence rather than baseless conjecture.

B. Alleged Violations of NDEP Air Quality Permit

As set forth above, the SR identifies two NOAQVs that concern alleged failures to operate air quality equipment in compliance with the AQOP, NOAQV Nos. 2783 and 2786. The other NOAQV referenced in the SR concerns only technical alleged record keeping violations of the AQOP. As a result, NOAQV has no relevance to an evaluation of TWA's compliance with the SUP. Further, as set forth above, court review of each of the NOAQVs is pending.

To the extent they are considered, NOAQV Nos. 2783 and 2786 concern alleged failures to operate air quality equipment on two days: March 23 and 24, 2020. Further, the alleged violation set forth in NOAQV 2783 was due to inclement weather beyond TWA's control. The alleged violation described in NOAQV 2786 does not correspond to a release of odors from the TWA facility and is scientifically invalid. As a result, neither of these NOAQVs provided any grounds to modify the SUP.

C. There is no Basis for the Finding of Nuisance in the SR

The SR includes a finding that the TWA operations "has created or tended to create a public nuisance." The SR does not state the dates of this alleged nuisance or the basis for this finding. However, it seems clear that it is based primarily, if not exclusively, on the LC Complaints. As set forth above, the available evidence demonstrates that the LC Complaints are not credible and should be disregarded. As a result, there is no evidence supporting the finding of nuisance stated in the SR.

Simply stated, there is no evidence showing any need for any modification or revocation of the SUP. As a result, TWA requests that the SUP remain in place in its current form.

Sincerely,

Law Offices of David R. Johnson, PLLC

David R. Johnson
Attorney

Lanak & Hanna, P.C.

Thomas M. Padian
Attorney

Enclosure

EXHIBIT 1

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Attorneys for Plaintiff/Petitioner
TAHOE WESTERN ASPAHLT, LLC

FIRST JUDICIAL DISTRICT COURT OF NEVADA

CARSON CITY

TAHOE WESTERN ASPHALT, LLC, Petitioner, v. NEVADA STATE ENVIRONMENTAL COMMISSION, an administrative agency/department/division of the State of Nevada; STATE OF NEVADA DEPARTMENT OF CONSERVATION & NATURAL RESOURCES, an administrative department of the State of Nevada; STATE OF NEVADA DIVISION OF ENVIRONMENTAL PROTECTION, an administrative division of the State of Nevada Department of Conservation & Natural Resources, Respondents.	Case No.: Dept. No.: **VERIFIED PETITION FOR REVIEW OF ADMINISTRATIVE AGENCY FINAL DECISION BY THE NEVADA STATE ENVIRONMENTAL COMMISSION; REQUEST FOR STAY OF ADMINISTRATIVE AGENCY FINAL DECISION FINAL DECISION** **[NRS 233B.130 and NRS 233B.135]**

Petitioner TAHOE WESTERN, INC. ("TWI"). by and through its attorneys of record, Thomas M. Padian, Esq. of the law firm of Lanak & Hanna, P.C. and David R. Johnson, Esq., of The Law Offices of David R. Johnson, PLLC, for its Petition against the Respondents, and each of them, alleges and avers as follows:

JURISDICTION, VENUE AND PARTIES

1. This action presents a Petition for Judicial Review of a decision by Respondent NEVADA STATE ENVIRONMENTAL COMMISSION. Jurisdiction is conferred over this action pursuant to NRS 233B.130.

2. Venue is proper in this Court pursuant to NRS 233B.130.2.(b).

3. Petitioner TAHOE WESTERN ASPHALT, LLC ("TWA") was and at all times mentioned, and is now, a Nevada Limited Liability Company, conducting business in Carson City, Nevada.

4. Respondent NEVADA STATE ENVIRONMENTAL COMMISSION is an administrative agency/division/department of the State of Nevada ("NSEC").

5. Respondent STATE OF NEVADA DEPARTMENT OF CONSERVATION & NATURAL RESOURCES is an administrative department of the State of Nevada ("NDCNR").

6. Respondent STATE OF NEVADA DIVISION OF ENVIRONMENTAL PROTECTION is an administrative division of NDCNR, an administrative department of the State of Nevada ("NDEP"). Hereinafter, Respondents NSEC, NDCNR, and NDEP, respectively, are sometimes collectively referred to as "Respondents."

FACTUAL BACKGROUND

7. TWA operates and for a number of years has operated an asphalt plant in Carson City, Nevada (the "Plant"). 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").

8. 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. A true and correct copy of the August 14 NDEP Letter, with enclosures, is attached hereto as **Exhibit 1.**

9. 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. The August 14 NDEP Letter merely states that "NDEP makes recommendations to the [NSEC] as to what an appropriate penalty may be for an air quality violation." 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. 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.

10. On October 28, 2020, the NSEC sent a letter to Robert Matthews, Owner of TWA, regarding the NOAVs (the "October 28 NSEC Letter"). A true and correct copy of the October 28 NSEC Letter is attached hereto as **Exhibit 2.** 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]." 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.

11. "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" Prior to receipt of the October 28 NSEC Letter, TWA had not been advised of a recommended penalty for any of the NOAVs. Further, the "penalty matrix" referenced in the October 28 NSEC Letter has never been provided to TWA.

12. 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." Mr. Matthews attended the December 9 NSEC meeting referenced in the October 28 NSEC Letter. However, he was not permitted by the NDEP or NSEC to speak.

13. 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"). A true and correct copy of the NSEC Final Decision is attached hereto as **Exhibit 3.** 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." The NSEC Final Decision, 2020 Letter does 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.

14. The requirements for the content of a final decision of an administrative agency of the State of Nevada is set forth in NRS 233B.125. It states, in pertinent part, "a final decision must include findings of fact and conclusions of law, separately stated. Findings of fact and decisions must be based upon substantial evidence. Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings." The NSEC Final Decision does not meet these requirements.

15. By this Petition, TWA challenges the decisions and administrative penalties set forth in the Final Decision with respect to NOAV 2783, NOAV 2874 and NOAV 2876, pursuant to NRS 233B.130 and NRS 233B.135. Pursuant to NRS 233B.130, a party who is aggrieved by a NSEC final decision may file a petition for judicial review within 30 days after service of the NSEC's final decision. As set forth above, here, the NSEC Final Decision was served by certified mail on December 9, 2020. If an agency's decision is served by mail, rule governing computation of time adds three days to the time period for filing a petition for judicial review. *Mikohn Gaming v. Espinosa*, (2006), 137 P.3d 1150, 122 Nev. 593. Therefore, this Petition is timely.

16. Under NRS 233B.135, in response to a Petition for judicial review of an agency decision, like the one here, "the court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is: (a) In violation of constitutional or statutory provisions; (b) In excess of the statutory authority of the agency; (c) Made upon unlawful procedure; (d) Affected by other error of law; (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) Arbitrary or capricious or characterized by abuse of discretion."

FIRST CAUSE OF ACTION

ACTON TO SET ASIDE/AMEND NSEC FINAL DECISION

(NRS 233B.130 AND NRS 233B.135)

(Against all Respondents)

17. TWA repeats and re-alleges each and every allegation contained in Paragraphs 1 through 16 as if fully set forth herein.

18. Substantial rights of TWA have been prejudiced by the issuance of the NSEC Final Decision because it was issued in violation of NRS 233B.135 and applicable law.

19. The NSEC Final Decision is are not rationally calculated to further the State's legitimate interest in reducing air quality emissions. Instead, the NSEC Final Decision is made upon unlawful procedure, is arbitrary, capricious, and issued in violation of applicable law. Further, the allegations and administrative fines and penalties issued under the NSEC Final Decision are not supported by substantial evidence and constitute an abuse of discretion.

20. For these reasons, the NSEC Final Decision violates NRS 233B.135 and should be declared unlawful and enjoined and set aside.

SECOND CAUSE OF ACTION

(DENIAL OF DUE PROCESS, Nev. Const. Art. I, § 8; U.S. Const. Amd. 14, § 1)

(Against all Respondents)

21. TWA repeats and re-alleges each and every allegation contained in Paragraphs 1 through 20 as if fully set forth herein.

22. TWA has a right to be free of arbitrary imposition of State regulations and administrative fees or penalties are imposed without having first been adequately presented to TWA by authorized legal process and supported by substantial evidence.

23. The NSEC Final Decision has caused significant harm to TWA and prejudiced substantial rights of TWA and will cause serious harm to the ability of TWA to conduct its business and will have a disproportionate adverse impact on TWA.

24. The NSEC Final Decision is not rationally calculated to further the

State's interest in reducing air quality emissions. Instead, the NSEC Final Decision is made upon unlawful procedure, is arbitrary, capricious, and issued in violation of applicable law. Further, the allegations and administrative fines and penalties issued under the NSEC Final Decision are not supported by substantial evidence and constitute an abuse of discretion.

25. For these reasons, the NSEC Final Decision has been issued in violation of and constitutes substantive violation of the Due Process Clauses of the California and United States Constitutions. (Nev. Const. Art. 1 § 8; U.S. Const. Amd. 14, § 1,)

PRAYER FOR RELIEF

WHEREFORE, Petitioner Tahoe Western Asphalt, LLC requests relief from this Court as follows:

1. For an order pursuant to NRS 233B.135 setting aside the entire NSEC Final Decision, remanding the NSEC Final Decision and directing Respondents to evaluate NOAV 2783, NOAV 2784 and NOAV 2786, respectively, as required under applicable law and properly evaluate the evidence allegedly support each NOAV and properly advise TWA of the allegations against it and the potential administrative fines resulting from those alleged violations;

2. For a writ setting aside the NSEC Final Decision and staying enforcement of the NSEC Final Decision until such time as Respondents have complied with the requirements of NRS 233B.135, and the requirements of the Due Process clauses of the Nevada and United States Constitutions;

3. For all costs of suit herein incurred;

4. For reasonable attorneys' fees;

5. For such other and further relief as the Court may deem proper.

DATED: January 11, 2021

LANAK & HANNA, P.C.

By: _____
THOMAS M. PADIAN

LAW OFFICES OF DAVID R. JOHNSON, PLLC

By: _____
DAVID R. JOHNSON
Attorneys for Plaintiff/Petitioner
TAHOE WESTERN ASPHALT, LLC

AFFIRMATION

I the undersigned hereby affirm that this Petition, including any exhibits thereto, hereby submitted for filing does not contain the personal information of any person or persons.

DATED: January 11, 2021

LANAK & HANNA, P.C.

By: _____
THOMAS M. PADIAN

LAW OFFICES OF DAVID R. JOHNSON, PLLC

By: _____
DAVID R. JOHNSON

Attorneys for Plaintiff/Petitioner
TAHOE WESTERN ASPHALT, LLC

VERIFICATION

1. I, Robert Matthews, am the Owner and an Officer of Petitioner Tahoe Western Asphalt, LLC, and authorized to make this verification on its behalf.

2. I have read the foregoing Petition. All facts alleged in the Petition are true of my own personal knowledge, except as to those matters which are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct.

Executed this 11th day of January 2021 at Carson City, Nevada.

DATED: January 11, 2021

TAHOE WESTERN ASPHALT, LLC,

By: _____
ROBERT MATTHEWS