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November 7, 2011

BY EMAIL AND FIRST CLASS MAIL

Maximilian Boal, Esq.
Enforcement Counsel
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100
Boston, Massachusetts 02109-3912

**Re: *Benevento Bituminous Products, LLC - Docket No. EPCRA 01-2011-0077*
*Benevento Family Limited Partnership et al. - Docket No. EPCRA 01-2011-0079***

Dear Attorney Boal:

This letter relates to the Environmental Protection Agency's above-referenced Administrative Complaints against: (i) Benevento Bituminous Products, LLC ("Benevento Bituminous") for alleged violations at its site in Kingston, NH (the "Kingston Complaint"); and (ii) Benevento Family Limited Partnership, Benevento Asphalt Corp., Benevento Concrete Corp., and Benevento Sand & Stone Corp. at their site in Wilmington, Massachusetts (the "Wilmington Complaint"). Benevento believes that the penalties assessed at both sites are based on inaccurate assumptions, calculations, and other information and should, therefore, be reduced further than EPA's current offer. Benevento remains eager to cooperate in settling the Complaints and appreciates the EPA's willingness to work with Benevento in resolving this matter through negotiation.

In the Wilmington Complaint, the EPA cited Benevento Bituminous for the storage of: (i) asphalt, flyash, and petroleum oils, which are "hazardous chemicals" as defined under 40 C.F.R. § 370.66, in quantities exceeding the minimum threshold level of 10,000 pounds; and (ii) sulfuric acid, which is an "extremely hazardous substance" as defined under 40 C.F.R. § 370.66, in a quantity in excess of the minimum threshold level of 500 pounds. In the Kingston Complaint, the EPA cited the Benevento Companies for the storage of diesel fuel and asphalt, which are "hazardous chemicals" as defined under 40 C.F.R. § 370.66, in quantities exceeding the minimum threshold level of 10,000 pounds. The EPA initially assessed a penalty of \$32,000 for each Complaint, but has offered to reduce each penalty to \$20,800 based on an adjustment for attitude and resolution of the matters within 90 days.

Benevento believes, however, that EPA must consider further reductions of the penalties based on an accurate understanding of the materials and quantities present at the two sites in 2009 and the provisions of EPA's enforcement policy. Having reviewed EPA's "Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act," dated September 30, 1999 (the "Enforcement Policy"), further mitigating factors consistent with the Enforcement Policy require reduction of the proposed penalties for each site.

With regard to the Wilmington Complaint, we note that the violation was assessed for the Benevento Companies' failure to submit the annual Tier I or Tier II form on or before March 1, 2010 with respect to information for the preceding calendar year, *i.e.*, 2009. The Benevento Companies' concrete operation at the Wilmington site commenced in June 2010, so no flyash was present at that site during calendar year 2009.¹ Therefore, there was no violation for failing to report flyash for calendar year 2009.

Also at the Wilmington site, the EPA cited the Benevento Companies for storing 9,480 lbs. of sulfuric acid, a quantity more than ten times in excess of the minimum threshold level of 500 pounds. The sulfuric acid at issue was that quantity that comprised a component of batteries in vehicles based at the facility. The EPA's calculation of 9,480 lbs. represents the total weight of all batteries on the site. However, the amount of sulfuric acid in a vehicular battery represents only twenty percent of its weight. Therefore, the actual estimated quantity of sulfuric acid at the Wilmington site should have been 1,896 lbs.—a quantity that is greater than one times, but less than five times, the minimum threshold level of 500 pounds. In addition, the EPA cited the Benevento Companies for storing 18,345 lbs. of petroleum oils, a quantity that is greater than one, but less than five times the minimum threshold level of 10,000 pounds. Pursuant to Section V.B.2. of the Enforcement Policy, the "gravity" of the § 312 violation with respect to the storage of sulfuric acid and petroleum oils would be a "Level C", not a "Level A," which would call for a penalty in the range of \$6,876 - \$13,750 for those substances.

With regard to the Kingston Complaint, we note that, pursuant to Section VIII (F) of the Enforcement Policy, the EPA may consider the size of the business as an adjustment factor. Specifically, the EPA may reduce the base penalty by 15 percent for companies with 100 or fewer employees and whose annual total corporate entity sales are less than \$20,000,000. Please note that Benevento Bituminous employs less than 10 people and has total annual sales of less than \$3,000,000. An additional 15 percent reduction of the base penalty for the Kingston Complaint would reduce the penalty by another \$4,800.

Furthermore, in both Complaints, the EPA cited Benevento for the storage of asphalt. Pursuant to Section V.D. of the Enforcement Policy, the EPA may consider "actual or potential

¹ EPA issued the Complaints on September 27, 2011, following an inspection of the Wilmington site on May 13, 2010, and an inspection of the Kingston site on July 1, 2010.

consequences of the violation.” Asphalt is a stable, inert, non-volatile substance that is not susceptible to release of any of its hazardous constituents into air, water, or land. Therefore, the potential for harm to emergency personnel, the community, or the environment from the storage of asphalt at these sites is minimal. Additionally, first responders have not encountered any actual problems because of Benevento’s failure to report any of the substances cited in the Complaints.

Pursuant to Section VIII of the Enforcement Policy, the EPA may consider “other matters as justice may require” in determining appropriate penalty adjustments. Benevento has demonstrated that, for the Wilmington Complaint, the EPA’s initial evaluation of the extent of the violation was mistaken with respect to the citation for the storage of flyash in 2009. The EPA should also re-evaluate the gravity level of the violation at the Wilmington site given that the actual quantities of sulfuric acid and petroleum oils stored there were less than five times the minimum threshold levels for those substances. With respect to both Complaints, Benevento also believes that the penalties imposed by the EPA do not reflect the minimal risk posed by the storage of asphalt at both sites.

In light of the foregoing facts and also considering the size of the Benevento Bituminous business, Benevento respectfully requests that the EPA further reduce the amount of the penalties as follows:

	Wilmington	Kingston
Base Penalty	\$6,876 (Level C)	\$32,000 (Level A)
Reduction for Attitude and Expedited Resolution (35%)	(\$2406)	(\$11,200)
Reduction for Size of Business (15%)	NA	(\$4,800)
Reduction for Proximate Harm (As justice may require reduction) (25%)	(\$1,719)	(\$8,000)
Total Penalty	\$2,751	\$8,000

Maximilian Boal, Esq.
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Thank you for your attention to this matter.

Very truly yours,



Anatoly M. Darov

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cc: ✓ Ms. Wanda Santiago (By First Class Mail)
Benevento Companies
Timothy J. Famulare, Esq.