U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 15 1993

B. Lawrence Theis, Esquire
Walters & Theis
2015 York Street
Denver, Colorado 80205

Dear Mr. Theis:

This letter responds to your request on behalf of the Colorado Asphalt Producers Association ("CAPA")[1/] for a statement, pursuant to the Department of Justice Business Review Procedure, 28 C.F.R. § 50.6, of the Department's present enforcement intentions concerning CAPA's proposal to initiate an asphalt industry advancement program ("AIAP") to engage in the research and development of a better asphalt product and to promote the advantages of asphalt cement over concrete.

To accomplish the goals of AIAP, a pro-rata membership assessment for a five-year period will be initiated. CAPA plans to use the money from the proposed assessment to (a) hire a full-time marketing person for the asphalt cement industry, (b) engage in widespread marketing and educational efforts to promote the use of asphalt cement, (c) initiate the establishment of a Flexible Pavement Chair at the University of Colorado, Denver campus to educate engineers and consultants in the new technologies, methods and properties of asphalt, (d) complete the testing tasks associated with the Strategic Research Highway Program, (e) extend and enhance the certified tester technician program by increasing times and adding new testing procedures for the new equipment, and (f) establish further research and development efforts in order to enhance asphalt's competitive position.

We understand that to fund the AIAP, beginning in 1993 and extending over a five-year period, CAPA plans to initiate a new method of assessing its members, a method that will result in a higher assessment than is currently being collected. Assessments against members have traditionally been based upon

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1/ CAPA is a non-profit industry association comprised of 65 members which are involved in the production of asphalt cement and in the construction of roads and highways, using asphalt cement, in the state of Colorado.

tonnage of hot mix asphalt produced in Colorado, plus a flat dues of $1,000. The new assessment plan would be based upon the volume of purchases of asphalt cement or polymers from producers. To ensure accuracy and fairness, the asphalt refineries and asphalt blenders, from whom members purchase asphalt cement or polymers, will collect the assessment. A cents-per-ton assessment on the purchase of asphalt cement or polymers will be held by the asphalt refineries and blenders and remitted to CAPA no less frequently than monthly. Members have the option, however, of remitting the assessment directly to CAPA, based upon their own calculations of tonnage purchases.

We further understand that participation in the program by CAPA members is voluntary and open to non-members of CAPA. Further, asphalt producers may continue to participate in the AIAP without paying annual dues to CAPA. The benefits of the research and development pursued by AIAP will be available to all CAPA members, and effectively, to any non-CAPA member asphalt producer as well.

CAPA asserts that it has always taken steps to assure that the amount of each member's assessment remains confidential and that purchase information is not disseminated among the members; the new AIAP assessment plan will continue these safeguards. Producer members of CAPA that participate through collection of the assessment by the asphalt refineries or blenders have not agreed and will not agree to add the AIAP assessment to bids or invoices that they provide to purchasers of asphalt cement or polymers for the construction of roads and highways, although, each is free to decide unilaterally whether or how it will recoup the cost of the assessment. CAPA members have also agreed that disclosure to a competitor of whether those charges will be excluded or included is strictly prohibited. Finally, each participating member of CAPA will unilaterally apprise each asphalt refinery or asphalt blender from which it makes tonnage purchases of asphalt cement or polymers whether or not that company is authorized to make collection of the CAPA assessment.

After careful consideration of the information you have provided, the Department has concluded that it has no present intention of challenging CAPA's proposed method of collecting an assessment for AIAP on antitrust grounds. The Department would be concerned if the effect of the proposed conduct were to increase the likelihood that participating members would coordinate their interactions on prices, expressly or tacitly. In this case, however, the confidential treatment afforded

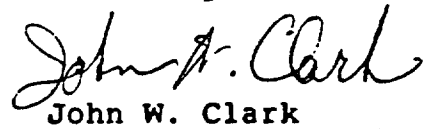
to each member's assessment and purchase information, as well as each AIAP participant's commitment not to reach uniform agreements on the treatment or disclosure of the assessment, provide safeguards that make it unlikely the program would facilitate antitrust violations among participating producers.

Moreover, the proposal has a procompetitive justification. If implemented, the program will generate funding to promote the benefits of asphalt products, to enhance the testing of new asphalt products, and to accelerate research in asphalt applications, all of which will likely increase and enhance competition between concrete producers and asphalt producers in the construction of roads and highways.

This letter expresses the Department's current enforcement intention only. It applies to the conduct described herein, and not to any other use by CAPA of the information or assessments it collects. In accordance with our normal practice, the Department reserves the right to bring whatever action or proceeding it subsequently comes to believe is required by the public interest if the actual operation of the CAPA proposal proves anticompetitive in purpose or effect.

This statement of the Department's enforcement intentions is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6, a copy of which is enclosed. Pursuant to its terms, your business review request and this letter will be made available to the public immediately. Your supporting documents will be publicly available within 30 days of the date of this letter, unless you request that any part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,



John W. Clark
Acting Assistant Attorney General
Antitrust Division

Enclosure