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February 13, 2012

Mr. David Rigsbee
President/CEO
Chemtek/AeroGroup
Research Triangle Park, NC 27709

Re: Paverx Memorandum of Law

Dear David:

Attached is our memorandum of law regarding EPA regulation of Paverx. Thank you for the opportunity to be of service.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard", is written over a horizontal line.

Richard Edward Glaze, Jr.

REG/kp
Attachment
cc: Jim Hollis (w/attachment)



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MEMORANDUM

TO: David Rigsbee, President/CEO - Chemtek/AeroGroup
FROM: Richard Edward Glaze, Jr. *RG*
DATE: February 13, 2012
RE: Regulation of Paverx Pavement Protectant and Rejuvenator by EPA

Introduction. This memorandum evaluates whether Paverx Pavement Protectant and Rejuvenator, if applied in accordance with manufacturer recommendations, is regulated by environmental laws administered by the United States Environmental Protection Agency (EPA). In conducting the evaluation, we considered only whether the application of the product under routine conditions, in accordance with the manufacturer's specifications, would cause violations of the Federal environmental laws that would most likely apply to a chemical-based construction product like Paverx. We examined the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.* (Clean Water Act or CWA); the Clean Air Act, 42 U.S.C. § 7401, *et seq.* (CAA); the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* (RCRA); the release reporting requirements of the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. 6903(a) (CERCLA); and the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11004(a) (EPCRA). We express no opinion on state environmental laws, which vary from state to state. In conducting this evaluation, we reviewed the specifications for the Paverx product, the procedures for its application, and laboratory data showing concentrations of potentially hazardous constituents. We have not made an independent determination as to the accuracy of the manufacturer's specifications or the laboratory data, although we have not seen any evidence that they are inaccurate. Based on our review, and under the circumstances and subject to the caveats set forth below, it is our opinion that the application of Paverx in accordance with the manufacturer's specifications would not cause violations of the aforementioned statutes under normal conditions and under the current policies for the enforcement of and application of the statutes by EPA. A discussion of the relevant legal requirements and the rationale for our opinions are set forth below.

Paverx. Paverx is a product used to rejuvenate, seal and protect surfaces paved with asphalt, including airport runways and parking lots. Paverx is applied using an asphalt distributor that sprays the product onto asphalt surfaces at computer controlled rates of 0.05 to 0.075 gallons per square yard. Paverx is a coal-tar based product and, as such, contains low concentrations of certain chemicals commonly found in paving products including asphalt. The concentrations of the chemicals in Paverx, as applied, are much too low, however, to trigger regulation under laws administered by EPA.

The Clean Water Act. The Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, provides civil and criminal penalties and injunctive relief for violations of its provisions. Potential violations include those related to discharges of pollutants, infractions of permit conditions, and falsifying monitoring data or methods. Of most concern when using a chemical product are prohibited discharges of the material or its byproducts into bodies of water. It is a violation of the CWA to discharge a "pollutant," such as a chemical substance, into jurisdictional waters via a "point source" without a permit for the discharge. Jurisdictional waters include most lakes, streams, creeks and wetlands. Other potentially regulated discharge violations include improper discharges into sewer systems in violation of standards for the protection of water treatment systems. Avoiding violations of the CWA requires an applicator of Paverx to prevent the discharge of the product or constituents of the product into jurisdictional waters. This includes taking care to not discharge the product or its constituents into storm drains and sewer systems that could result in discharges into jurisdictional waters. It is our understanding that, when applied according to the manufacturer's specifications, Paverx will not escape into surrounding waters, storm drains or sewer systems and will therefore not cause violations of the CWA.

Release Reporting Statutes. The primary release reporting statutes of CERCLA and EPCRA require a person who knows of a release of a "reportable quantity" of a "hazardous substance" "into the environment" to report the "release immediately." 42 U.S.C. § 9603. *See also* 42 U.S.C. § 11004(a). The term "environment" is defined under CERCLA to include "surface water, ground water, land surface or subsurface strata, or ambient air" 42 U.S.C. § 9601(8). A 'release' under CERCLA is "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment . . ." 42 U.S.C. §9601(22). The list of "hazardous substances" under CERCLA includes certain chemicals that are contained in Paverx in very low concentrations. When used correctly, Paverx is not being "released into the environment" as defined by CERCLA because the rejuvenator/sealant is applied directly to the surface of existing pavement and not released into water, land surface or subsurface strata. Paverx remains on the asphalt it is rejuvenating and hardens into a flexible surface, penetrating the asphalt only enough for proper rejuvenation and adhesion. A discharge of materials that remains entirely off of the ground, without releasing a reportable quantity of hazardous substance into the ground, air or water is not

a "release" into the "environment" under CERCLA. Analytical testing has shown that the quantities of Paverx applied at any one time do not contain sufficient amounts of chemicals to constitute "reportable quantities" of hazardous substances even if their application were considered to be a "release into the environment."¹ It is our opinion that the proper application of Paverx does not constitute a reportable release under CERCLA or EPCRA.

Hazardous Wastes. At the federal level, hazardous wastes are regulated under RCRA. Generally speaking, to be regulated, a material must first be determined to be a "waste." To be considered a waste, a material must have been discarded. 40 C.F.R. § 261.2(a)(1). Paverx as applied is not being discarded and is therefore not a waste. Moreover, analytical data show that even if disposed of, Paverx would not be regulated as a hazardous waste because it does not contain sufficient concentrations of chemicals, or have other characteristics, that would cause it to be considered "hazardous" under RCRA. *See generally*, 40 C.F.R. § 261, Subpart C.

Clean Air Act. The federal Clean Air Act is a statute that applies to numerous sources of air pollutants. Much of the CAA is directed at geographically - oriented sources of air pollution which by law are not regulated unless they emit sufficient quantities of certain pollutants.² Although the CAA *does* regulate "mobile sources," the mobile source statutes and regulations apply primarily to modes of transportation that emit pollutants, such as cars, trucks, and airplanes and would not apply to the application of Paverx. See 42 U.S.C. § 7521 – 7628. It is our opinion that the minor air emissions caused by the application of Paverx in accordance with the manufacturer's specifications, under normal conditions, would not trigger application of the provisions of the Federal Clean Air Act.

Caveats.

1. State laws. In virtually every State, the primary federal environmental laws are to some degree also enforced by state or local agencies that have been authorized to enforce the laws by EPA. Most states also have additional environmental laws, the scope of which can vary widely, and which could impose additional obligations on users of Paverx. This memorandum does not address separate state laws, which are not within the scope of this letter.

¹ One analytical report reviewed by the undersigned was of analysis conducted by Microbac Laboratories, Inc. of Wilson, N.C. on February 22, 2011.

² For example, CAA Title V permitting requirements apply to stationary sources that emit 10 tons per year or more of a single hazardous air pollutant or 25 tons per year or more of any combination of HAP's.

2. Use of this letter. While this memorandum constitutes our independent opinion on the matters expressly discussed, the memorandum was prepared for Chemtek, Inc., which is a client of Balch & Bingham LLP. The opinions expressed in this memorandum should not be considered, and are not intended, to constitute legal advice for any other entity or person. Nothing in this memorandum should be construed to create an attorney - client relationship between Balch & Bingham LLP and any entity or person. Balch & Bingham LLP disclaims any liability for reliance upon the opinions expressed herein and encourages all entities or persons to retain their own counsel to independently evaluate the use of Paverx under Federal and state environmental laws for the specific use intended, as well as other potentially applicable laws, rules or regulations that are beyond the scope of this memorandum.

3. Scope of advice. The opinions expressed in this memorandum are limited to those statutes expressly discussed. The advice contained herein is based on application of Paverx to an asphalt surface and is not intended to address all potential applications of Paverx beyond the scope of asphalt rejuvenation. We express no opinion regarding the use of Paverx in a manner not in accordance with the manufacturers instructions provided with the product. Moreover, we disclaim any responsibility for the misunderstanding or intentional misapplication of applicable laws, rules or regulations by government agencies or other persons or entities. Finally, this memorandum contains our opinions on the applicable Federal environmental laws as those laws currently exist and are interpreted. We disclaim any responsibility for new interpretations, rules or statutory changes, or additional regulatory requirements that could arise in the future. Any entity must ensure for itself that its application of Paverx complies with applicable Federal and state environmental laws for the specific application it employs at the time it is being applied.

Conclusions. It is our opinion that if Paverx, as currently formulated, is applied to existing asphalt surfaces in accordance with the manufacturer's recommendations, employing appropriate precautions to avoid the discharge of the material onto bare earth, vegetated areas or into water, it will not under normal circumstances cause violations of the current Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act, or the release reporting requirements of the Comprehensive Environmental Response Compensation and Liability Act and the Emergency Planning and Community Right-to-Know Act.