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October 29, 2007

Mr. Glenn Shankle, Executive Director
Texas Commission on Environmental Quality
12100 Park 35 Circle
Austin, Texas 78753

VIA: Federal Express
Tracking Number 8613 1245 8631

RE: Criminal Enforcement Review

Dear Mr Shankle:

I am forwarding to you, as Executive Director of the Texas Environmental Commission, a peace officer's written request for review of possible criminal conduct by Asarco Incorporated, Asarco LLC, and their affiliates ("Asarco"). Based on that request, we respectfully ask you to conduct a Criminal Enforcement Review, pursuant to the provisions of Texas Water Code section 7.203.

The best predictor of future behavior is past behavior, and Asarco's past behavior is cause for alarm on behalf of the people of El Paso, for both their pocketbooks and their health. Asarco's past behavior is a constant repetition of environmental violations, failure to pay the penalties for those violations, failure to complete actions intended to correct past violations, a steady stream of excuses, and bankruptcy. Asarco must pay all past penalties and complete all Court-ordered corrective measures.

Asarco owes the taxpayers over \$30 Million to cover costs for contaminating the soil in El Paso and violating environmental laws. Asarco has been ordered to pay penalties and take certain actions because of Asarco's violations. Asarco owes to the taxpayers at least the following penalties and costs for environmental violations:

\$19.6 Million for soil contamination clean up costs ordered by the United States Environmental Protection Agency pursuant to the Comprehensive Environmental Response, Compensation and Liability Act:

\$5.5 Million plus interest owed since 1999 ordered by the United States District Court in Civil Action H-99-1136;

\$1.85 Million owed plus interest since 1999 ordered by the United States District Court in Civil Action H-99-1136;

\$3,000 per day owed since 2004 ordered by the United States District Court in Civil Action H-99-1136; and

\$1,000 per day owed since 2004 ordered by the United States District Court in Civil Action H-99-1136.

In addition, the taxpayers have paid over \$20 Million in uncompensated costs for contamination cleanup that should have been paid for by Asarco.

If Asarco cannot afford to comply with environmental regulations, as they have shown by their failures to comply, failure to pay the assessed fines, failure to complete the court-ordered actions, and bankruptcy, then they are not qualified to do business in Texas. As TCEQ's informal, administrative and judicial civil measures against Asarco have not worked, enforcement must be escalated to criminal measures, as agreed to by Asarco in the Consent Decree. It is time for criminal enforcement.

I. SUMMARY

The matter of United States of America and the State of Texas v. Encycle/Texas, Inc. and Asarco, Inc., Civil Action No. H-99-1136 in the United States District Court for the Southern District of Texas, Houston Division was initiated on April 15, 1999 (hereafter, "Enforcement Action"). On October 6, 1999, the Court granted the Government's Unopposed Motion for Entry of the Consent Decree, which Order was entered on October 7, 1999 (the 1999 Order). On August 12, 2004, the Court granted the United States' and State of Texas' Unopposed Motion for Entry of Stipulation and Order Modifying the Consent Decree, which Order was entered on August 13, 2004 (the 2004 Order) (the 1999 Order and the 2004 Order are hereafter collectively referred to as the "Consent Decree"). There is reason to believe that the terms of the Consent Decree have not been met, that certain federal and state environmental and health laws have been violated, and that criminal enforcement is appropriate in this matter.

II. ASARCO REMAINS LIABLE UNDER THE ENFORCEMENT ACTION AND CONSENT DECREE

A. *The Court retains subject matter and personal jurisdiction*

The 1999 Order, Section XXIX, and the 2004 Order, Sections 1 and 20, provide that the Court retains jurisdiction over both the subject matter of the Consent Decree and personal jurisdiction over Asarco for the duration of the performance of the terms and provisions of the Consent Decree for the purpose of enabling the United States and the State to apply to the Court at any time for such further direction or relief as may be necessary or appropriate to effectuate or enforce compliance with its terms.

B. *Binding Effect of Consent Decree.*

The 1999 Order, Part III. Binding Effect, Paragraphs 3, 4, 5, 6, and 7, set forth that the Consent Decree shall apply to, and be binding upon Asarco and its successors and assigns, jointly and severally. Asarco agrees to be bound by the Consent Decree; to not contest its validity in any subsequent proceeding to implement or enforce its terms; that no change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or property, shall alter Asarco's responsibilities under the Consent Decree; and that it shall not raise as a defense the failure of any of its agents to take actions necessary to comply with the Consent Decree. The 2004 Order reaffirmed the terms of the 1999 Order in Part 16, Effect of Stipulation and Order, Paragraphs 16.1, 16.2, and 16.3.

C. Legal Effect of Consent Decree.

The 1999 Order, Section XXIV, Effect of Decree, Paragraphs 122, 123, 124, 125, 126, 127, and 128, set forth Asarco's agreement that the United States and the State reserve all of their statutory and regulatory powers, authorities, rights, remedies, both legal and equitable, civil and criminal, which EPA or the State has under applicable, federal or State statutes or regulations, and expressly states that Asarco is not released from civil or criminal liability under said statutes and regulations. [Emphasis added] It further states that Asarco shall not assert, and may not maintain any defense or claim based on waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State should have been brought in the instant case.

D. Requirements for Termination of the Consent Decree

The 1999 Order, Paragraph 142, sets out the two-stage requirement for Termination of the Consent Decree:

Stage I requires a joint motion by the parties, provided that;

- a. Texas Natural Resource Conservation Commission [now TCEQ] or the [United States] Environmental Protection Agency has issued Encycle (Encycle, Inc., an Asarco affiliate) a new hazardous waste management permit under the federal Resource Conservation and Recovery Act (42 U.S.C. section 6901 et seq. ("RCRA")) covering Encycle's operations at the Corpus Christi Facility;
- b. Asarco is in compliance with the terms of the RCRA permit and the Consent Decree;
- c. Asarco has submitted certification to the United States and the State that conditions a. and b. above have been met; and
- d. the United States and State have concurred in writing with Asarco's contention that conditions a. and b. above have been met.

Stage II requires a joint motion of the parties after each of the following have occurred;

- a. Asarco has completed all actions required by the Consent Decree;
- b. Asarco has paid all monies and penalties due under the Consent Decree;
- c. Asarco has submitted a certification to the United States and the State that conditions a. and b. above have been met; and
- d. the United States and State have concurred in writing with Asarco's contention that conditions a. and b. above have been met.

The Court records show that as of October 25, 2007, the last filing in the Enforcement Action was the 2004 Order filed on August 14, 2004. There has been no subsequent joint motion by the parties certifying compliance by Asarco of compliance with the Consent Decree. Due to Asarco's failure to comply with the Consent Decree, particularly the requirements under Stage II referenced above for the release of liability, we respectfully request that TCEQ investigate and enforce Asarco's compliance by criminal enforcement.

E. Applicable Criminal Penalties

The Texas Solid Waste Disposal Act, Texas Health & Safety Code Ann. Chapter 361; Tex. Water Code Ann. Chapter 7; Tex. Admin Code, Title 30, Chapter 335; and the Resource Conservation and Recovery Act (RCRA) 42 U.S.C. sections 6901 et seq.

III. CRIMINAL ENFORCEMENT REVIEW

A. Texas Water Code sections 7.203 and 7.053

Under Texas Water Code section 7.203, the TCEQ Executive Director is required to consider the factors described in Texas Water Code section 7.053 in the process of conducting a criminal enforcement review. Section 7.053 reads, in pertinent part:

- (1) the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;
- (2) the result of the violation on:
 - (A) air quality of the region;
 - (B) a receiving stream or underground water reservoir;
 - (C) instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or
 - (D) affected persons
- (3) with respect to the alleged violator:
 - (A) the history and extent of previous violations;
 - (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
 - (C) the demonstrated good faith, including the actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
 - (D) economic benefit gained through the violation; and
 - (E) the necessity to deter future violations; and
- (4) any other matters that justice may require.

These factors with respect to Asarco are discussed in further detail below.

B. Analysis of Asarco Violations Pursuant to Texas Water Code sections 7.203 and 7.053

1. Texas Water Code Section 7.053 (1).The Nature, Circumstances, Extent, Duration, and Gravity of the Prohibited Act

The prohibited acts under the Enforcement Action addressed violations that extended over a period of years, in locations across the state and beyond, and was sufficient to justify a \$5.5 Million penalty due 30 days after entry of the 1999 Order; \$1.85 Million for the El Paso Particulate Matter Project; Stipulated Penalties in the amount of \$1.526 Million in Stipulated Penalties after the 1999 Order and before the 2004 Order; additional subsequent Stipulated Penalties under both the 1999 Order and 2004 Order for failure to comply with the terms of the Consent Decree in a timely fashion; and the following corrective actions (hereafter "Corrective Actions") which did not have fixed dollar amounts assessed:

- a. Corrective Action Requirements for East and West Lagoons – Closure Plan due within 90 days of the 1999 Consent Decree [1999 Consent Decree Paragraph 33 – 38.]
- b. Corrective Action for Solid Waste Management Units and Areas of Concern - [1999 Consent Decree Paragraph 39 – 53.]
- c. Final Facility Closure Requirements [1999 Consent Decree Paragraph 54.]
- d. Financial Assurance [1999 Consent Decree Paragraph 55.]
- e. Interim Unit Authorization Requirements for Storage of Hazardous Waste [1999 Consent Decree Paragraph 56.]
- f. Corrective Action and Remediation pursuant to TNRCC Agreed Order Docket No. 96-02120-MLM-E issued August 29, 1996. [1999 Consent Decree Paragraph 61.]
- g. Auditing Provisions [1999 Consent Decree Paragraph 62-64.]
- h. Environmental Management Systems Audits Provisions [1999 Consent Decree Paragraph 65-71.]
- i. Compliance Audits [1999 Consent Decree Paragraph 72-78.]
- j. Supplemental Environmental Projects – El Paso Particulate Matter Reduction Project [1999 Consent Decree Paragraph 80.] [Subject to Stipulated Penalties]
- k. Recycling Projects – El Paso Discarded Tire Recycling Project [1999 Consent Decree Paragraph 83.]
- l. Reporting [1999 Consent Decree Paragraph 86-90.][Subject to Stipulated Penalties]
- m. Penalty for Past Violations – within 30 days of entry [1999 Consent Decree Paragraph 91.]
- n. Stipulated Penalties [1999 Consent Decree Paragraph 92-101.]
- o. Complete Final Closure under the Hazardous Waste Permit [2004 Order Paragraph 5.1.1]
- p. Complete Work in Accordance with the Plan dates November 11, 1999 and revised February 4, 2000 [2004 Order Paragraph 5.1.2]
- q. Complete Work in Accordance with the Plan approved by TCEQ April 27, 2000[2004 Order Paragraph 5.1.3]
- r. Close the East and West Lagoons pursuant to the 1999 Order [2004 Order Paragraph 5.1.4]

- s. Complete All Corrective Action Requirements (Section Nos. 39 through 53) in the 1999 Order and in the Hazardous Waste Permit [2004 Order Paragraph 6.1]

The prohibited acts subsequent to the Consent Decree include Asarco's failure to pay the penalties assessed and failure to complete the required Corrective Actions.

2. Texas Water Code Section 7.053 (2)(A): The Result of the Violation on the Air Quality of the Region

a. Due in no small part to Asarco's smelter, carbon monoxide has polluted the air in El Paso so badly that it has not met the Federal Clean Air Act standards since at least 1990. The El Paso carbon monoxide is worst close to the Asarco plant. In 2006, TCEQ submitted a request to have the area redesignated as complying with the Federal Clean Air Act requirements ("CO Redesignation Request") but it was denied. See *Revisions to the State Implementation Plan (SIP) for the Control of Carbon Monoxide Air Pollution: El Paso Revised Maintenance Plan for Carbon Monoxide*, TCEQ Project Number 2007-014-SIP-NR, proposed on September 5, 2007, Executive Summary.

b. Also due in no small part to Asarco's smelter, particulate matter has polluted the air in El Paso so badly that it has not met the National Ambient Air Quality Standards (NAAQS) for particulate matter (PM), pursuant to the Federal Clean Air Act section 107 (40 U.S.C. section 7407) since at least 1990. See *The El Paso County Area Natural Events Action Plan (NEAP)*, TCEQ Project Number 2006-040-OTH-NR, adopted on February 21, 2007.

3. Texas Water Code Section 7.053 (2)(D): The Result of the Violation on Affected Persons

Asarco's violation has caused taxpayers to pay for Asarco's violations both through the pocketbook and through greater health risks.

a. As reviewed above, local, state and national taxpayers have lost \$5.5 Million plus accrued interest since 1999 due to Asarco's failure to pay the penalty due under the Consent Decree; have spent over \$1.1 Million in uncompensated costs for the partial completion of the SEP El Paso Particulate Matter Project; have lost \$1.85 Million plus accrued interest since 1999 due to Asarco's failure to pay for the the SEP El Paso Particulate Matter Project; and related stipulated penalties of \$3,000 per day and \$1,000 per day.

b. Pollution, particularly particle pollution, can aggravate heart and lung disease and is associated with premature death and a variety of serious health problems, such as asthma attacks, heart attacks, chronic bronchitis, and stroke. Children suffer more because their brains and bodies are still developing, and because they are small, the same amount of pollution affects them more severely. See Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks.

4. Texas Water Code Section 7.053 (3)(A): The History and Extent of Previous Violations

a. In 2002, the Texas Department of Health and the Agency for Toxic Substances and Disease Registry found that soils in areas of El Paso near the Asarco smelter posed an unacceptable public health hazard to children. EPA found that prior emissions of arsenic and lead from Asarco's smelters contaminated the soil, and ordered the cleanup of over 1000 residential properties. Subsequently, EPA ordered Asarco to perform cleanup of the contaminated sites pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") 42 U.S.C. 9601et seq. Asarco still owes the taxpayer \$19.6 Million for the costs paid by the taxpayers to clean up the contamination, and at least 200-300 residential properties still need to be decontaminated.

b. The Enforcement Action was based on actions taken by Asarco which included failure to notify the state of hazardous waste activity and treating and/or storing and/or disposing of hazardous waste storage without interim status or a permit.

c. Asarco committed further violations again shortly after the 1999 Order. In 2001, TCEQ conducted a compliance inspection and documented a number of alleged violations that resulted in a referral to the Texas Attorney General to collect stipulated penalties as provided in the 1999 Order exceeding \$1.5 Million.

d. In June 2002, TCEQ issued a Notice of Violation alleging that Asarco failed to maintain liability coverage in violation of 30 Texas Administrative Code section 37.404, which matter was referred to the Texas Attorney General for enforcement.

e. Asarco violated the Financial Assurances provisions of the Consent Decree. Instead, Asarco declared bankruptcy in 2005.

f. Asarco violated its promise to pay for liabilities for past environmental response costs incurred by the United States and the State of Texas prior to May 1, 2007 for the investigation and/or cleanup of soil in residential yards and community properties at the El Paso County Metals Survey Site. Asarco still owes the United States and the State of Texas \$19.6 Million for past costs incurred and approximately 200 to 300 residential properties are still awaiting cleanup.

5. Texas Water Code Section 7.053 (3) (B): Degree of Culpability and Whether the Violation Could Have Been Reasonably Anticipated and Avoided

Asarco could have reasonably anticipated and avoided further violations, but did not. Instead, Asarco correctly anticipated that it could act with impunity. Until TCEQ uses its full enforcement authority, including criminal enforcement, then like Charlie Brown, Lucy, and the football, this futile scenario will replay itself again and again.

6. Texas Water Code Section 7.053 (3) (C): Demonstrated Good Faith, Including Actions Taken By The Alleged Violator To Rectify The Cause Of The Violation And To Compensate Affected Persons.

a. Failure to Demonstrate Good Faith.

Asarco has not demonstrated good faith. Instead they have made numerous representations regarding the Enforcement Action and Consent Decree that are not accurate. Asarco's public statements in contradiction of the facts demonstrate a bad faith attempt to mislead the public.

(i). Asarco represents that the Enforcement Action was concluded nine years ago.

In a bit of wishful thinking, Asarco states "The matter was concluded nine years ago...". See Asarco Letter to El Paso City Attorney published in El Paso Inc. October 7-13, 2007, page 6a, (hereafter "Asarco Letter of October 7, 2007"), attached hereto as Exhibit A.

As stated above, the Consent Decree is still in effect. Under the terms of the Consent Decree, the Court retains jurisdiction to enforce compliance until the matter is terminated. In order to terminate the Consent Decree, Asarco must meet the conditions described above, proving compliance and the agreement of the United States and the State. As shown by the court record, not one of the prerequisites for Termination have been met.

(ii). Asarco has previously attempted to use the terms of the Consent Decree to avoid compliance with the law.

In 2002, Asarco claimed that they were excused from meeting the state requirements for permit renewal, stating in a motion to the court that "[b]y assenting to the audit provisions in the Consent Decree, Texas essentially waived any right to now impose inconsistent, more stringent provisions of state law." The court emphatically rejected this assertion by Asarco, stating "The court is not persuaded by this argument. Nothing in the Consent Decree excuses defendants from having to obtain a renewal of the hazardous waste permit or from complying with other obligations of state law. In fact, paragraphs 125, 126, 127, and 129 of the Consent Decree expressly obligate defendants to comply with all applicable state laws and regulations. See, Enforcement Action, Order of the Court dated August 15, 2001, denying Asarco's Appeal of Dispute Arising Under Consent Decree, page 2, attached hereto as Exhibit B.

(iii). Asarco misrepresents the Enforcement Action and the Consent Decree.

In a letter published on October 7, 2007, Asarco states that "The City's legal team knows that the enforcement action ...had nothing to do with 'burning' anything at the El Paso smelter." (Quotes are in original letter.) See Asarco Letter of October 7, 2007.

In a letter published a week later, October 14, 2007, Asarco reiterated this claim and added misleading language suggesting the Court had not fined Asarco and had only required the paving project (the El Paso Particulate Matter Project). According to Asarco:

"There was an allegation Asarco burned hazardous waste. False. This allegation was thoroughly investigated nine years ago by EPA and TCEQ, and a federal judge signed a federal consent decree.

...It is important to note that no wrong doing was found. The El Paso plant was not fined but rather agreed to a paving project that would help cut down on dust on El Paso's roads." See Asarco Letter to El Paso Inc. published October 14-20, 2007, page 6a, (hereafter Asarco Letter of October 14, 2007), attached hereto as Exhibit C.

To the contrary, the United States Environmental Protection Agency found that Asarco's El Paso smelter burned hazardous waste received from affiliate, Encycle, which it processed in the Asarco El Paso facility from 1992-1997. In addition, the Consent Decree required much more from Asarco than the "paving project" stated in the letter, see Section III.B.1 above.

b. Failure of Alleged Violator to Take Actions to Rectify the Cause of the Violation

Contrary to Water Code Section 7.053(3)(C), Asarco has not attempted to rectify the situation. Instead, their actions have aggravated the situation. Asarco has declared bankruptcy, pleading financial excuses to avoid penalties due, and left their Court-ordered corrective actions undone.

c. Failure of Alleged Violator to Take Actions to Compensate Affected Persons.

Asarco has not taken actions to compensate affected persons. Instead, Asarco has left the taxpayers with the expense of cleanup and corrective actions. Asarco owes the taxpayers \$5.5 Million plus interest for the penalty assessed and due under the Consent Decree; at least \$3,000 per day for Stipulated Penalties due for incomplete Corrective Actions under the Consent Decree; over \$1.85 Million plus interest and stipulated penalties for failure to complete the El Paso Particulate Matter Project; and \$19.6 Million to pay for the partial cleanup of the El Paso County Metals Survey Site.

7. Texas Water Code Section 7.053 (3)(D): Economic Benefit Gained through the Violation

a. Asarco gained considerable economic benefit by not obtaining the required interim status or permits as required, avoiding the major costs incurred by operating a compliant facility and measuring and reporting performance standards, particularly as it has not suffered significant consequences for doing so.

b. Asarco has gained significant economic benefit through the violations of the Consent Decree. Asarco has avoided paying \$5.5 Million plus interest for the penalty assessed and due under the Consent Decree; at least \$3,000 per day for Stipulated Penalties due for incomplete Corrective Actions under the Consent Decree; over \$1.85 Million plus interest and stipulated penalties for failure to complete the El Paso Particulate Matter Project; and \$19.6 Million to pay for the partial cleanup of the El Paso County Metals Survey Site.

8. Texas Water Code Section 7.053 (3) (E): The Necessity to Deter Future Violations

a. Asarco is seeking a new air quality permit.

If Asarco cannot afford to comply with environmental regulations, as they have shown by their failures to comply, failure to pay the assessed fines, failure to complete the court-ordered actions, and bankruptcy, then they are not qualified to do business in Texas

It is unclear how TCEQ deems Asarco, who is in bankruptcy, and in violation of a Consent Decree for previous environmental violations, has met the corporate integrity and financial assurance requirements for TCEQ to consider granting them a permit, particularly as there are millions of dollars of outstanding penalties which are unlikely to be paid unless TCEQ asserts its authority. Based on this lax enforcement of environmental standards, it is not surprising that, among the 50 states, Texas is *first* in air pollution violations; *first* in air emissions, *first* in amount of toxic chemicals released into the air; *first* in amount of carbon dioxide emissions; and on, and on. See Texas on the Brink, Environment, attached hereto as Exhibit D .

b. Asarco has exaggerated and misrepresented statements made by TCEQ.

Asarco Letter, paragraph 4, states that the TCEQ has determined that no adverse health effects are expected to result from the smelter's operation. However, the Executive Director's Response to Comments on Executive Director's Report to the Commission on Renewal of Asarco Incorporated's Air Quality Permit No. 20345 (hereafter "ED's Response") does not support that sweeping claim.

First, the TCEQ ED's Response, Response 2 states: "The action under consideration is the renewal of an air quality permit. While the TCEQ has responsibility for the environmental protection of all media, including water and soil, the law governing air permits specifically address air-related issues. Water and land contamination issues cannot be addressed in an air quality permit, and therefore, the scope of this air quality permit application review does not include water assessment or consideration of issues involving water quality or land contamination. [Emphasis added]

Secondly, the TCEQ ED's Response severely limits and qualifies its evaluation of the permit application as beyond the skill sets of its personnel. Response 26 states: The TCEQ staff is fully qualified to evaluate an operating facility; and determine if the operation complies with the permit. However, determining the condition of idle equipment requires a different set of skills. [Emphasis added]

Similarly, the TCEQ ED's Response severely limits and qualifies its evaluation of Asarco's permit application, expressly stating that many of the ED's statements are qualified as "based on the representations made [by Asarco] in the permit application" (See Responses 39

and 40). As far too many previous representations made by Asarco have proven unreliable, TCEQ is entitled to require more rigorous proof under Texas Water Code section 5.754(i).

c. Texas Water Code sections 5.753 and 5.754

The Sunset Commission recommended that the State Of Texas use compliance history information when administering penalties, in addition to other circumstances.

As noted, Asarco has filed an application for a new air quality permit. Under Texas Water Code section 5.753, TCEQ must take into consideration Asarco's past history. There is no reason to expect that their future actions will be any different than their past actions – violations; failure to meet required standards; failure to pay fines; and filing for bankruptcy to avoid future obligations.

Asarco's bankruptcy raises additional troubling questions in light of their application for a new permit. It is difficult to understand how TCEQ could award an air quality permit to an entity who claims to lack the financial resources even to pay past penalties. It is of even greater concern based on the fact that the permit would be based, as the ED's Response makes clear, on Asarco's representations, which have not proven trustworthy in the past.

In short, the evidence of Asarco's conduct throughout its past history raises the necessity to deter future violations through vigorous enforcement action.

9. Texas Water Code Section 7.053 (4): Any Other Matters That Justice May Require.

a. Asarco's Bankruptcy

(i) Liability for all penalties and fines under the Consent Decree survives Asarco's bankruptcy.

Asarco remains liable for all penalties and fines under the Action. Bankruptcy Code 523(a) (7) excludes from discharge in bankruptcy a debt for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit that is not compensation for actual pecuniary loss. See, In re Commonwealth Oil Refining Co. (1986, CA5 Tex) 805 F2d 1175, 1182-83, cert den (1987) 483 US 1005, 97 L Ed 2d 734, 107 S Ct 3228, 26 Env't Rep Cas 1856. ("In re Commonwealth") See also *H.R.Rep.No.595, 95th Cong. 1st Sess. 340 (1977) reprinted in the 1978 U.S. Code Cong.&Admin. News 5963, 6296-97.*

(ii) The Enforcement Action is not affected by the Automatic Stay provision of the Bankruptcy filing.

11 U.S.C section 362(b)(4) provides that the filing of a petition in bankruptcy does not operate as a stay of the commencement or continuation of an action or proceeding by a

governmental unit to enforce its police or regulatory power. The purpose of this exception to the automatic stay is explained in the legislative history.

“Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or *attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay [Emphasis added]*. In re Commonwealth Oil at 1182-83, citing S.Rep.No. 989, 95th Cong., 2d Sess. 52 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5838 [hereinafter cited as *Senate Report*]; H.R. Rep. No. 595, 95th Cong. 1st Sess. 343 (1977) reprinted in the 1978 U.S. Code Cong. & Admin. News, p. 6298

The simple fact that money must be spent does not turn a compliance action into action for money judgment. See Penn Terra Ltd. V. Dept. of Env'tl. Resources, 733 F.2d 267, 277-278 (3d Cir. 1984) (“were we to find that any order which requires the expenditure of money is a ‘money judgment’, then the exception to section 362 for government police action... would... be narrowed into virtual nonexistence... We cannot ignore the fundamental fact that, in contemporary times, almost everything costs something..), cited in In re Commonwealth Oil at 1186.

b. Statutes of Limitation and Tolling

(i) Tolling Provisions in the Consent Decree.

The 1999 Order, Section XXIV, Effect of Decree, Paragraphs 122, 123, 124, 125, 126, 127, and 128, set forth Asarco’s agreement that the United States and the State reserve all of their statutory and regulatory powers, authorities, rights, remedies, both legal and equitable, civil and criminal, which EPA or the State has under RCRA, or other federal statutes or State statutes or regulations, and expressly states that Asarco is not released from civil or criminal liability under said statutes and regulations. [Emphasis added] It further states that Asarco shall not assert, and may not maintain any defense or claim based on waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State should have been brought in the instant case.

Paragraph 23.2 of the 2004 Order states that, consistent with the 1999 Order, the 2004 Order in no way precludes the State of Texas or the United States from seeking any remedy allowed by law or the 1999 Order in the event Asarco fails to comply with the requirements of the Consent Decree.

(ii). State law regarding violations cited in the 1999 Complaint and Order.

(a). The statute of limitations is not an absolute bar.

The Court of Criminal Appeals has clarified that it is inappropriate to treat the statute of limitations as an absolute, systemic requirement or prohibition when it has little to do with the

truth-finding function of the criminal justice system, and that a defendant should have the burden of asserting a statute of limitations defense, as is true of other defenses. Proctor and Lemell v. State, 967 S.W.2d 840, 844 (Crim.App.1998, pet.den.). The Court further held that treating limitations as an absolute, systemic requirement may, on occasion, even be unjust, because a defendant may have compelling reasons in his own best interest to forego the defense, for example, to gain time for plea bargaining or to vindicate his good name in the face of a serious and publicly known charge otherwise barred by limitations. Proctor at 844. It would be inappropriate for TCEQ to refuse criminal review in anticipation of a defense which may or may not be successful in a court of law.

Just this month, Asarco has indicated their desire to settle the matter in court, in two recent statements by two separate attorneys for Asarco, as follows:

“Rather than leave the dispute between the parties in a forum where it can be properly adjudicated, the City [of El Paso] has abused its position by allowing its leaders and its staff to present the public with one-sided mischaracterizations of the issues” Pamela M. Giblin, Asarco October 7, 2007 Letter.

And

“GTLO and Sierra Club are essentially requesting that the public and the news media ignore the official, well-documented record, and the rule of law in the state of Texas and in the United States with their meritless allegations...The allegations of criminal charges are false and Asarco will take appropriate steps to protect its reputation and the reputation of its employees. See Asarco October 14, 2007 Letter.

(b). The statute of limitations for criminal actions against Asarco was tolled upon the filing of the original complaint in the Enforcement Action.

There are certain periods of time that are excluded from the computation in determining if the applicable statute of limitations has expired. The complaint filed in the civil action meets the requirements for tolling under Texas Code Of Criminal Procedure art.12.05 (b), which provides that the time during the pendency of an indictment, information or complaint shall not be computed in the period of limitations. The basis for the tolling is that the purpose of the statute of limitations is to protect the accused from having to defend against charges when the basic facts may have become obscured by the passage of time” Hernandez v. State 127 S.W.3d 768, 772 (Tex.Crim.App.2004).

Allowing a prior indictment, information or complaint to toll the statute of limitations does not defeat the purpose of the statute of limitations if the prior indictment, information or complaint gives adequate notice of the substance of the subsequent indictment. See Hernandez at 773. This requirement of notice is satisfied by the complaint filed against Asarco in the Enforcement Action. Under Texas Code Of Criminal Procedure section 15.05, a complaint shall be sufficient, without regard to form, if it have these substantial requisites: 1) It must state the name of the accused, if known, and if not known, must give some reasonably definite description of him;2) It must show that the accused has committed some offense against the laws of the

State, either directly or that the affiant has good reason to believe, and does believe, that the accused has committed such offense; 3) It must state the time and place of the commission of the offense, as definitely as can be done by the affiant; and 4) It must be signed by the affiant by writing his name or affixing his mark.

The complaint in the Enforcement Action meets the requirements stated in Texas Code Of Criminal Procedure 15.05, thereby satisfying the substance of the notice requirements of Texas Code Of Criminal Procedure 1205(b).

c. Change of Ownership or Corporate Reorganization of No Effect

Paragraph 2.1 of the 2004 Order reiterates that the Consent Decree applies and is binding to Asarco, its successors and assigns. Any change in ownership or corporate status of Asarco, including but not limited to, any transfer of assets or real personal property, shall in no way alter Asarco's responsibilities under the Consent Decree.

d. Due Process

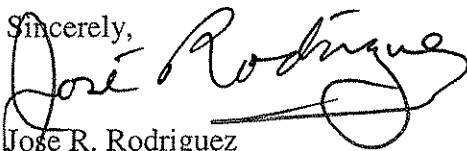
Asarco's due process rights would not be violated by a criminal action based on the acts alleged in the civil action. The decision to prosecute Asarco does not retroactively deprive Asarco of fair warning of what conduct gives rise to which criminal penalties. It does not alter the State and Federal environmental laws that were in effect in 1999, their range of punishment, or the substantive defenses that were available with respect to it. See Proctor at 845, citing Collins v Youngblood, 497 U.S. 37 (1990).

e. TCEQ's Graduated Measures of Enforcement

TCEQ enforcement policies call for graduated measures of enforcement, to offer the alleged violator the opportunity to resolve the matter as smoothly as possible. The first TCEQ efforts are always informal; if that does not work it escalates to administrative measures; if that doesn't work, it escalates to judicial enforcement, with civil enforcement the first option; if that doesn't work, to criminal enforcement. As the informal, administrative and judicial civil measures against Asarco have not worked, enforcement must be escalated to criminal measures, as agreed to by Asarco in the Consent Decree.

Accordingly, attached hereto is the required peace officer's written request for review describing the facts and circumstances of Asarco's alleged violations.

Sincerely,


Jose R. Rodriguez
El Paso County Attorney

Letters ...

Asarco responds

Editor's note: Asarco's attorneys sent this letter to Charlie McNabb, city attorney, on Friday, demanding that an anti-Asarco video be removed from the City of El Paso Web site.

Dear Mr. McNabb:

As counsel for ASARCO L.L.C. ("Asarco"), I write to demand that the City of El Paso immediately remove the inflammatory video posted on its website that opposes renewal of Asarco's air permit and issue a statement

retracting the City's endorsement of this video. A city government has the duty to represent its constituents with honesty, integrity, and professionalism. More fundamentally, the City's representatives have a duty to speak the truth.

The City has wholly failed to discharge these duties with a video that is filled with disparagements that the City leaders know or should know are not true.

For example, the City's leaders know that it has been over twenty years since Asarco smelted lead in El Paso. It is reckless hyperbole to say that a health hazard "will continue to grow as new emissions of

lead and arsenic from Asarco again settles [sic] onto the ground and into dust in homes."

City leaders know that upon restart the plant will not smelt lead and its lead emissions will in all respects comply with the protective federal national ambient air quality standard for lead. In fact, the Texas Commission on Environmental Quality's ("TCEQ's") Toxicology Section staff determined that no adverse health effects are expected to result from the smelter's operation. The former director of the El Paso City-County Health and Environmental District stated in a recent City Council meeting that restarting the smelter will not present public health concerns. But the City chose to use the video for fear-mongering anyway.

Mayor Cook should know that with the smelter operating in its modern configuration, no one will "taste the sulfur in the air" or see "smoke coming out of the smoke-stack ... putting a [sic] smoke over the freeway" as he asserts in the video. Asarco reduced the smelter's sulfur dioxide emissions by 90% when it modernized in 1992.

The smelter's air permit contains opacity limitations to ensure that Asarco will not be "putting a [sic] smoke across the freeway" as Mayor Cook asserts. Asarco has consistently met these opacity limitations. Comprehensive, current air dispersion modeling demonstrated compliance with all applicable air standards. Apparently the objective data and the enforceable protections in Asarco's air permit are not convenient for the City. Instead, the City offers Mayor Cook's inaccurate visions of

smoke and sulfur.

The video also shows a woman on the street who claims to see "the black smoke coming out" of the smelter, despite the fact that the smelter has been idle for over eight years. These images, which the City knows to be inaccurate, are crude scare tactics.

The City's legal team should know that it is a bald mischaracterization to say that "EPA has found that ASARCO illegally burned hazardous waste from 1993 to 1997."

The City's legal team knows that the enforcement action referenced by this statement in the video had nothing to do with "burning" anything at the El Paso smelter. As it related to El Paso, the enforcement action was about a program for smelting concentrates containing recycled copper from the Encycle Texas, Inc. plant in Corpus Christi.

Asarco smelted these concentrates in El Paso to make copper anodes, just like the smelter's other raw material concentrates. TCEQ's predecessor agencies were aware of the program, which accounted for less than 2% of the smelter's production, and for seven years TCEQ's predecessor agencies agreed that the program was consistent with applicable rules. The matter was concluded nine years ago, not with any "EPA finding" but with a decree that expressly acknowledged the dispute over the merits of the action. Moreover, when TCEQ's Regional Director in El Paso reviewed the issue in June of 2006, he wrote that "it appears highly unlikely that smelting the Encycle concentrate would have resulted in any increase in emissions or

abnormal occupational exposure."

The City's legal team knows all of this. But the video offered a theatrical—and inaccurate—statement about the past action anyway.

Those are not the only examples. The nine-minute video contains too many distortions and falsities to list in this letter. Rather than leave the dispute between the parties in a forum where it can be properly adjudicated, the City has abused its position by allowing its leaders and its staff to present the public with one-sided mischaracterizations of the issues.

In the video, Mayor Cook speculates about what the continued operation of the smelter will mean to the public image of El Paso.

The City should give similar consideration to its reputation for truthfulness, integrity, and stewardship of taxpayer resources. The video is a significant part of an anti-Asarco PR campaign budgeted for \$50,000 (so far) in taxpayer dollars and costing untold hours of City employee time and City resources at the same time that the City continues to raise taxes. The real cost of the video, however, will be to the City's reputation.

It is up to the City leaders to decide if they want El Paso to be known for taxpayer-funded hostility to long-standing, productive members of the local economy. But Asarco will not tolerate the City's campaign to damage the company's reputation. Asarco demands that the City remove its Asarco video from the website and retract the City's endorsement of the video.

Pamela M. Giblin
Baker Botts LLP

Team are productions present:

Moon Pie Daince Band

Friday, October 26th, 9:00 p.m.

Admission is \$10.00 @ the door
(Club may seat Las Vegas style)

3135 Trawood (East of George Dieter)
(915) 584-4421 www.lancersclub.com

New Trawood location
Now Open!

Watch for Gary B.
Las Vegas number
one Frank Sinatra
impersonator
coming in November

Lancers Club

VISA MC

October 14-20, 2007

COMMENTARY

Letters ...

Asarco statement

The Get the Lead Out (GTLO) coalition and the Sierra Club are essentially requesting that the public and news media ignore the official, well-documented record, and the rule of law in the state of Texas and in the United States with their meritless allegations.

Anyone who reviews the record in an objective fashion would see that GTLO and Sierra Club are expressing extremist views in an orchestrated effort

together with the City of El Paso to tarnish Asarco's long-standing reputation in the community to pursue a political agenda and to satisfy their keen interest in taking over Asarco's land.

There was an allegation Asarco burned hazardous waste. False. This allegation was thoroughly investigated nine years ago by EPA and TCEQ, and a federal judge signed a federal consent decree.

The matter was also listed in the Federal Register for public comment. It is important to note that no wrong doing was found. The El Paso plant was not fined

but rather agreed to a paving project that would help cut down on dust on El Paso's roads.

There was an allegation that Asarco has not met its obligation under a Supplemental Environmental Project.

Prior to bankruptcy when Asarco was experiencing severe financial difficulties, Asarco offered the City of El Paso monthly payments which would have paid off the majority of the Supplemental Environmental Project obligation, prior to Asarco filing for reorganization.

Asarco believes the City of El Paso, in its partnership with GTLO and Sierra Club, is purposely mischaracterizing the situation. The remaining balance is now subject to the bankruptcy process.

The allegations of criminal

charges are false and Asarco will take appropriate steps to protect its reputation and the reputation of its employees.

Doug McCallister
Asarco general counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

UNITED STATES OF AMERICA,
et al.,

Plaintiffs,

v.

ENCYCLE/TEXAS, INC., et al.,

Defendants.

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AUG 15 2001

MICHAEL N. MILBY, CLERK

CIVIL ACTION NO. H-99-1136

ORDER

Pursuant to paragraph 116 of the Consent Decree (Docket Entry No. 22), defendants, Asarco Incorporated and Encycle/Texas, Inc., have filed a Notice of Judicial Appeal of Dispute Arising Under Consent Decree (Docket Entry No. 30). Defendants argue that audit requirements included by the Texas Natural Resource Conservation Commission ("TNRCC") in an initial draft hazardous waste permit are inconsistent with audit requirements agreed to in the Consent Decree. In addition to the Environmental Management System audits and the Environmental Compliance audits agreed to in the Consent Decree, the draft permit would require defendants to notify affected persons of their intent to conduct an independent annual audit of a facility, to afford affected persons input into the selection of the independent inspector, and to furnish a copy of the results of such an audit to affected persons.

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Defendants argue that "[b]y assenting to the audit provisions of the Consent Decree, Texas essentially waived any right to now impose inconsistent, more stringent provisions of state law." (Notice of Judicial Appeal at page 8) The court is not persuaded by this argument. Nothing in the Consent Decree excuses defendants from having to obtain a renewal of the hazardous waste permit or from complying with other obligations of state law. In fact, paragraphs 125, 126, 127, and 129 of the Consent Decree expressly obligate defendants to comply with all applicable state laws and regulations. The conditions of the draft permit appear to be reasonably based upon § 361.113 of the Texas Health and Safety Code and its implementing regulation, 30 Texas Administrative Code § 305.147.


It is true, as defendants argue, that the audit requirements imposed by the draft permit are different from audit requirements contained in the Consent Decree and that the audits required by the draft permit could be duplicative of the audits conducted pursuant to the Consent Decree. But nothing in the Consent Decree precludes TNRCC from imposing these requirements. The audit requirements in the Consent Decree and those in the proposed draft permit serve different, although related, purposes. The Environmental Management System audits are intended "to assess whether an effective Environmental Management System (EMS) is being implemented" at defendants' facilities. (Consent Decree, at ¶ 65)

The Environmental Compliance audits are intended "to assess ASARCO's compliance" at certain locations. (Consent Decree, at ¶ 72) "An environmental compliance audit is an objective, systematic examination of unit facilities, processes, procedures, and practices to verify whether they comply with legal requirements, internal policies, and accepted practices." (Objectives and Scope of the Environmental Compliance Audit Program, at ¶ 3.1, Exhibit 9 to the Consent Decree) Although the audits required in the draft permit pursuant to § 361.113 and its implementing regulation serve similar purposes, they also allow citizen participation in the permitting process by granting affected persons input into the selection of the independent inspectors and access to the results of the audit.

The Consent Decree was the result of protracted negotiations by competent counsel. The Consent Decree neither expressly nor by implication precludes TNRCC's imposition of the additional audit requirements contained in the draft permit. The Consent Decree imposes requirements agreed to by the parties, while the permit will impose additional requirements mandated by state law. Compliance with the permit's audit requirements would not prevent defendants from complying with the Consent Decree. Nor would compliance with the requirements of 30 Texas Administrative Code § 305.147 compromise the confidentiality provisions of the Environmental Management System and Environmental Compliance audits agreed to in the Consent Decree.

The court concludes that the Consent Decree does not preclude TNRCC from imposing permit provisions required by § 361.113 and its implementing regulation in the draft permit.

SIGNED at Houston, Texas, on this 15th day of August, 2001.


SIM LAKE
UNITED STATES DISTRICT JUDGE

Texas on the Brink
"Distant Dream"
How Texas Ranks Among the 50 States
January 2007 ~ Third Edition

Since 1836, Texas has stood as an icon of the American dream.

Blessed with land, rivers, oil, and other abundant natural resources, early Texas welcomed everyone from cattle ranchers to *braceros*, from cotton farmers to Chinese railroad workers. These pioneers built a great state, and together we fulfilled a destiny.

From humble beginnings, we built a state with the firm belief that *every* Texan might rise as high and as far as their spirit, hard work, and talent might carry them. With education and determination *every* Texan might achieve great success — home ownership, reliable healthcare, safe neighborhoods, and financial prosperity.

In Texas today, the American dream is distant. Texas has the highest percentage of uninsured children in the nation. Texas is dead last in the percentage of residents with their high school diploma and near last in SAT scores. If we do not change course, the Texas generation of tomorrow will be less prosperous than the generation of today.

Without the courage to invest in the minds of our children, and steadfast support for great schools, we face a daunting prospect. Those who value tax cuts over children and budget cuts over college have put Texas at risk in her ability to compete and succeed.

Let us not forget that the business of Texas is Texans. To 'Close the Gap' in Texas, we must graduate more of our best and brightest. If we invest in our greatest resource, Texas will be the state of the future. If we do not, family incomes will fall an average of \$6,000 by 2040.

Texas is on the brink. The choice is ours.

Let us resolve now to invest in young Texans today to guarantee the prosperity of all Texans tomorrow.

State Rankings

State Government Taxes and Spending

(50th=Lowest, 1st=Highest)



- Tax Revenue Raised Per Capita¹ 49th
- Tax Expenditures Per Capita² 50th
- Sales Tax Per Capita³ 7th
- Progressiveness of Tax Revenues⁴ 43rd

Per Capita Spending on:

- Mental Health⁵ 46th
- Medicaid⁶ 38th
- Public Health and Hospitals⁷ 20th
- Public Elementary-Secondary Education⁸ 38th
- Parks and Recreation⁹ 49th
- Police Protection¹⁰ 48th
- Environmental Protection¹¹ 45th
- Highways¹² 42nd
- State Arts Agencies¹³ 48th

Education

(50th=Lowest, 1st=Highest)



- Public School Enrollment¹⁴ 2nd
- Average Teacher Salary¹⁵ 32nd
- Current Expenditures Per Student¹⁶ 40th
- State Aid Per Pupil¹⁷ 46th
- Percentage of School Funding from Local Revenues¹⁸ 12th
- Scholastic Assessment Test (SAT) Scores¹⁹ 47th

- Percentage of Population over 25 with a High School Diploma²⁰ 50th
- High School Graduation Rate²¹ 35th
- Percentage of Adults with At Least a Bachelor's Degree²² 28th

State of the Child

(50th=Lowest, 1st=Highest)

- Birth Rate²³ 2nd
- Percent of Population Under 18²⁴ 4th
- Percentage of Uninsured Children²⁵ 1st
- Percentage of Children Living in Poverty²⁶ 5th
- Percentage of Children Immunized²⁷ 49th

Health Care

(50th=Lowest, 1st=Highest)

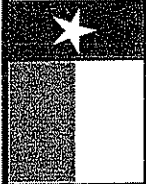
- Percentage of Population *without* Health Insurance²⁸ 1st
- Percentage of Young People (Non-Elderly) *without* Health Insurance²⁹ 1st
- Percentage of Population that Lacked Access to Primary Care³⁰ 17th
- Percentage of Uninsured Low-Income Children³¹ 3rd
- Percentage of Poor *Not* Covered by Medicaid³² 3rd
- Percentage of Population with Employer-Based Health Insurance³³ 42nd
- Rate at which Citizens Receive Treatment for Drug and Alcohol Abuse Problems³⁴ 45th

- Percentage of Population *Not* Physically Active³⁵ 17th
- Health Care Expenditures Per Capita³⁶ 29th
- Hospital Beds Per 100,000 Population³⁷ 30th
- Percentage of Total Employment in Health Care Service Sector³⁸ 33rd

Health Professionals per Capita

- Physicians³⁹ 42nd
- Dentists⁴⁰ 41st
- Pharmacists⁴¹ 44th
- Psychologists⁴² 39th

Health and Well-Being (50th=Lowest, 1st=Highest)



- Percentage Living Below Federal Poverty Level⁴³ 3rd
- Percentage of Population with Food Insecurity⁴⁴ 3rd
- Percentage of Population that is Malnourished⁴⁵ 3rd
- Amount of Welfare and Food Stamp Benefits Paid⁴⁶ 47th
- Amount of Monthly Women, Infant, and Children (WIC) Benefits Paid⁴⁷ 42nd
- Minutes of Daily Care by Registered Nurses for Nursing Home Residents⁴⁸ 46th
- Compliance with the Supreme Court Order Instead of Decision Declaring that Unjustified Institutionalization of a Disabled Person is Discrimination⁴⁹ 37th

Women's Issues

(50th=Lowest, 1st=Highest)



• Overall Birth Rate ⁵⁰	2nd
• Teenage Birth Rate ⁵¹	5th
• Percent of Non-Elderly Women with Health Insurance ⁵²	50th
• Access to Adequate Prenatal Care ⁵³	35th
• Percentage of Women Who Have Had a Dental Visit Within the Past Year ⁵⁵	48th
• Rate of Women Aged 40+ Who Receive Mammograms ⁵⁴	44th
• Rate of Women Aged 18+ Who Receive Pap Smears ⁵⁵	47th
• Cervical Cancer Rate ⁵⁶	5th
• Percentage of Women with High Blood Pressure ⁵⁷	15th
• Family Planning ⁵⁸	45th
• Women's Voter Registration ⁵⁹	43rd
• Women's Voter Turnout ⁶⁰	49th
• Percentage of Women with Four or More Years of College ⁶¹	30th
• Women's Median Annual Earning ⁶²	28th
• Women in Managerial and Professional Occupations ⁶³	28th
• Women Business Ownership ⁶⁴	28th
• Percent of Women Above the Poverty Level ⁶⁵	44th

Diseases

(50th=Lowest, 1st=Highest)



- Prevalence of Obesity⁶⁶

7th

- Rate of Death due to Heart Disease⁶⁷ 18th
- Rate of Infectious Diseases⁶⁸ 8th
- Prevalence of Diagnosed Diabetes⁶⁹ 18th
- Diabetes Death Rate⁷⁰ 5th
- Rate of Death due to Stroke⁷¹ 15th

Access to Capital (50th=Lowest, 1st=Highest)

- Percentage of Home Refinance Loans that are Subprime-Mortgage Loans (generally 3 to 4 percentage points or more higher than a comparable prime market loan)⁷² 1st
- Percent of Households with Savings Accounts⁷³ 42nd
- Percent of Households with Checking Accounts⁷⁴ 43rd
- Average Net Worth of Household Assets⁷⁵ 48th
- Home Mortgage Delinquency Rate⁷⁶ 4th
- Amount of Money that Banks Located in the State Collect through Deposits in Relation to the Amount of Money the Banks Re-channel Back into Communities Through Loans⁷⁷ 48th

Environment (50th=Lowest, 1st=Highest)

- Air Pollution Emissions⁷⁸ 1st
- Pollution Released by Manufacturing Plants⁷⁹ 1st

• Amount of Green House Gases Released ⁸⁰	1st
• Amount of Toxic Chemicals Released into Water ⁸¹	1st
• Amount of Toxic Chemicals Released into Air ⁸²	4th
• Amount of Recognized Cancer-Causing Carcinogens Released into Air ⁸³	1st
• Amount of Recognized Cancer-Causing Carcinogens Released into Water ⁸⁴	7th
• Number of Clean Water Permit Violations ⁸⁵	1st
• Number of Environmental and Civil Rights Complaints ⁸⁶	1st
• Number of Hazardous Waste Spills ⁸⁷	2nd
• Amount of Hazardous Waste Generated ⁸⁸	1st
• Number of Hazardous Waste Sites on National Priority List ⁸⁹	9th
• Amount of Carbon Dioxide Emissions ⁹⁰	1st
• Consumption of Energy Per Capita ⁹¹	5th
• Consumption of Electricity Per Customer ⁹²	10th
• Open Space Protection ⁹³	50th
• Drinking Water Quality ⁹⁴	38th

Workforce
(50th=Lowest, 1st=Highest)



• Unemployment Rate ⁹⁵	10th
• Average Hourly Earnings ⁹⁶	42nd
• Income Inequality Between the Rich and the Poor ⁹⁷	2nd
• Government Employee Wages and Salaries ⁹⁸	30th
• Workforce Education ⁹⁹	43rd
• Percentage of Workforce Represented	

- by a Union¹⁰⁰ 48th
- Number of Job Discrimination Lawsuits¹⁰¹ 1st

Cost of Living

(50th=Lowest, 1st=Highest)

- Home Ownership Rate¹⁰² 44th
- Homeowner's Insurance Affordability¹⁰³ 50th
- Auto Insurance Affordability¹⁰⁴ 39th
- Residential Electric Bill Affordability¹⁰⁵ 50th
- Percentage of Households with Internet Access¹⁰⁶ 34th

Public Safety

(50th=Lowest, 1st=Highest)

- Number of Executions¹⁰⁷ 1st
- Number of Gun Shows¹⁰⁸ 1st
- Rate of Incarceration¹⁰⁹ 3rd
- Total Crime Rate¹¹⁰ 6th
- Violent Crime Rate¹¹¹ 12th
- Murder and Rape Rate¹¹² 14th
- Rate of Firearm Deaths Per 100,000 Population¹¹³ 22nd
- Number of Registered Machine Guns¹¹⁴ 1st
- Number of Deaths Attributed to Floods (Pre-Hurricane Katrina)¹¹⁵ 1st
- Fatalities Caused by Tornadoes¹¹⁶ 1st
- Rate of Motor Vehicle Fatalities¹¹⁷ 20th
- Number of Road-Rage Traffic Fatalities¹¹⁸ 2nd

- Number of Alcohol-Related Traffic Deaths as a Percentage of Highway Fatalities¹¹⁹ 11th



- Percentage of Eligible Voters that are Registered¹²⁰ 41st
- Percentage of Eligible Voters that Vote¹²¹ 44th

Key Facts and Figures

Child Abuse and Neglect

- In 2005, over 61,000 Texas children were victims of abuse and neglect.¹²²
- On average in 2003, each Child Protective Services investigative caseworker had 31 cases per month,¹²³ more than twice the recommended amount of 12 cases per month according to the Child Welfare League of America.¹²⁴
- On child protection, Texas spends \$135.19 per child. The national average is \$303.95 per child.¹²⁵

Children and Families

- In 2002, 151,464 Texas children were considered "At Risk" (having a significant impairment due to a mental disorder) and eligible for services through the Texas Department of Mental Health and Mental Retardation. However, only 26 percent of those at risk, eligible children were served in 2002.¹²⁶

- In El Paso County, the rate of immunization in the 4:3:1 series (most basic vaccination series) for children was 71.8 percent, significantly below the national average of 83.5 percent.¹²⁷
- 49 percent of children in Texas live in low-income families, as opposed to 39 percent nationwide.¹²⁸
- 86 percent of children whose parents did not have a high school degree live in low-income families, compared to 28 percent of children whose parents had some college education.¹²⁹
- 43 percent of children in low-income families live with a single parent.¹³⁰
- In Texas, 69 percent of Latino children and 58 percent of African American children live in low-income families, compared to 25 percent of Anglo children.¹³¹
- 1 in 10 children in Texas lives in extreme poverty, a 10 percent increase since 2000. The threshold for a family of two adults and two children living in extreme poverty is \$8,731 a year.¹³²
- The average Temporary Assistance for Needy Families (TANF) cash assistance for a family is \$208 per month in Texas;¹³³ the monthly national average is \$355.¹³⁴
- In 2005, the average monthly benefit for Women, Infant, and Children (WIC) recipients in Texas was \$31.62, whereas the national average was \$37.42.¹³⁵
- 32 percent of poor children in Texas are uninsured as compared to 22 percent nationwide.¹³⁶

Status of Women in Texas

- In 2004, only two women in Texas were elected to statewide executive offices, and only four were elected to the U.S. Congress.¹³⁷

- Hispanic women in Texas earned 46.3 percent of what Anglo men earned in 1999.¹³⁸
- In 2000, only 42.4 percent of Anglo women, 31.2 percent of African American women, and 23.6 percent of Hispanic women were in managerial positions in Texas.¹³⁹
- The percentage of Hispanic women in Texas with an Associate's or Bachelor's degree was 12.5 percent, compared to 32.8 percent of Anglo women and 22.2 percent of African American women.¹⁴⁰
- Between 1999-2001, the ratio of female heart disease mortality per 100,000 for African American women was 306.1, compared to 182.3 for Hispanic women and 214.9 for Anglo women in Texas.¹⁴¹
- The ratio of breast cancer mortality per 100,000 between 1999-2001 for African American women was 37.0, compared to 18.5 for Hispanic women and 25.5 for Anglo women in Texas.¹⁴²
- The average annual incidence rate of AIDS among women in Texas was highest amongst African Americans at 33.9, compared to 5.1 for Hispanic women and 3.1 for Anglo women.¹⁴³
- Of the 10 largest cities in the U.S., Dallas, San Antonio, and Houston ranked among the lowest in safety, with the worst being one crime committed per 11.8 residents in Dallas.¹⁴⁴

Education

- Texas spends \$7,142 per pupil annually.¹⁴⁵ Annual expenditures per prisoner in Texas prisons is \$20,232.¹⁴⁶
- While the number of students in Texas who scored above the proficient level on national math assessment exams has increased since 1992, African American and Hispanic

students continue to score far below that of Anglo students by 18–25 points on exams.¹⁴⁷

- 47 percent of 4th graders in Texas who come from low-income families scored below proficient in national science assessment exams, while only 17 percent of students from middle to high income families scored below proficient on the exam.¹⁴⁸
- In science, only 23 percent of Texas 8th graders scored at or above proficient on the national assessment exam, as compared to 41 percent nationally.¹⁴⁹
- In reading, only 26 percent of Texas 8th graders scored at or above the national assessment exam as compared to 38 percent nationally.¹⁵⁰
- The national high school graduation rate in 2002 was 71 percent,¹⁵¹ compared to 64.2 percent in Texas in 2005, unchanged from the year before.¹⁵²
- In Texas, Hispanic students dropped out of high school at a rate three times greater than that of African American and Anglo students in Texas.¹⁵³
- In Texas, 57 percent of Hispanic students, 66 percent of African American students, and 77 percent of Anglo students graduated in 2002.¹⁵⁴
- Only 58 percent of 7th to 12th graders in Texas were taught by teachers with a major in their subject, as compared to 81 percent in top-performing states.¹⁵⁵
- 25 percent of Texas science teachers and 13 percent of math teachers in 2005 had taught classes for which they were not certified.¹⁵⁶
- In 2006, the national combined SAT score was 1021, whereas for Texas it was 997.¹⁵⁷

Higher Education

- In El Paso County, only 17 percent of the population has a bachelor's degree or higher, as opposed to 42 percent in Travis County.¹⁵⁸
- In Texas, only 26 percent of the population aged 25-65 has a bachelor's degree or higher.¹⁵⁹
- Texas funds only 34 percent of need-based financial aid, as opposed to 89 percent by the top-investing states.¹⁶⁰
- The share of Texan family income needed to pay for college expenses at four-year institutions increased from 22 percent to 30 percent between 1992 and 2006.¹⁶¹
- The University of Texas at Austin and Texas A&M University at College Station are the only Texas public institutions of higher education that made the top 60 in U.S. News and World Report's Best Colleges in the U.S., with UT-Austin at 47 and Texas A&M at 60.¹⁶²
- In Texas, only 13 percent of the Hispanic population has an Associate's Degree or higher, as compared to 40 percent of the Anglo population.¹⁶³

The Elderly

- On average in 2004, Adult Protective Services of Texas takes on 48.8 cases per investigator a month, while accreditation agencies recommend only 25 cases per worker.¹⁶⁴
- In 2002, 86 percent of nursing homes in Texas did not meet federal standards governing quality of care.¹⁶⁵
- 94 percent of nursing homes did not meet minimum staffing levels,¹⁶⁶ and 39 percent of facilities had a violation that caused actual harm to nursing home residents or placed them at risk for death or serious injury.¹⁶⁷

- The average nursing home in Texas provided just 21 minutes of daily care by registered nurses for each resident--less than half of the minimum required by the regulatory agency.¹⁶⁸
- In 2004, 84 percent of Texas nursing homes were cited for fire safety deficiencies.¹⁶⁹
- The population in Texas that is over 65 years of age will be expected to grow from 2.1 to 7.4 million, or 258 percent, by 2040.¹⁷⁰
- While Texas had more nursing home beds per 1,000 population over 65 than the national average, Texas still lagged behind in workers per nursing home and personal care facilities with 0.8 workers per bed compared to 1.02 workers per bed nationally.¹⁷¹

The Uninsured

- 46.6 million people in the U.S. are uninsured, up by 7 million since 2000.¹⁷²
- 24.6 percent of people in Texas are uninsured or 5.4 million people,¹⁷³ the largest share of uninsured in the nation.¹⁷⁴
- More than 825,000 people were added to the uninsured population in Texas between 2000 and 2004.¹⁷⁵
- 21 percent of children in Texas were uninsured in 2005, compared to 11 percent nationally.¹⁷⁶
- In Texas, 58 percent of adults between the ages of 19 and 64 living in poverty did not have health insurance.¹⁷⁷
- Of those uninsured, 59 percent, or almost 3 million, are Hispanic.¹⁷⁸
- Children and youth under the age of 17 comprise 26.6 percent of the total uninsured population, the largest portion.¹⁷⁹

- Of the 16 major metropolitan areas in Texas, El Paso had the second highest rate of uninsured residents at 33.2 percent following Laredo.¹⁸⁰
- Texas does not provide Medicaid to parents making even poverty-line incomes; therefore, a working parent of two does not qualify for coverage if he or she makes more than \$3,696 in a year.¹⁸¹

Health Professionals

- El Paso County has 486 registered nurses per 100,000 population, compared to 639 per 100,000 for the state of Texas and 798 per 100,000 nationwide.¹⁸²
- El Paso County has 21 dentists per 100,000 population, compared to the state's average of 42 per 100,000 and the national average of 48 per 100,000 population.¹⁸³
- El Paso County has 105 direct primary care physicians per 100,000 population,¹⁸⁴ while statewide there are 222 physicians per 100,000 population, and nationwide there are 279 per 100,000 population.¹⁸⁵
- Of the 65 counties that did not have acute care hospitals, 21 were located in the Border region.¹⁸⁶
- 39 of the 43 Border counties had been designated as Primary Care and Dental Health Professional Shortage Areas in 2005 by the Texas Department of State Health Services.¹⁸⁷
- The metropolitan border areas have a ratio of 145 direct primary care physicians per 100,000 people, as compared to 170 in non-Border metropolitan areas in Texas.¹⁸⁸
- Along the Border Areas, the ratio of nurses to population is 900 to 100,000 population, as opposed to 1147 to 100,000 population in non-Border areas.¹⁸⁹

- The ratio of dentists in the border region is 44.8 per 100,000 people, compared to 65.3 per 100,000 people in the non-Border regions of Texas.¹⁹⁰

Income Disparity and Employment

- Texas has the tenth largest economy in the world,¹⁹¹ and is the second largest in the nation with a GDP (Gross Domestic Product) of \$982.4 billion for 2005.¹⁹²
 - The per capita income for Texas in 2005 was \$30,222.¹⁹³
 - 17.6 percent of people in Texas, or nearly 3.8 million, live in poverty.¹⁹⁴
 - Currently, five percent of workers in Texas earn \$6.15 an hour or less, an income of \$11,808 a year.¹⁹⁵
 - Only seven percent of workers are covered by a union.¹⁹⁶
 - 45 percent of families in Texas earn poverty-level wages.¹⁹⁷
 - The Lower Rio Grande Valley metropolitan area ranks last in the nation in per capita income, averaging only 44 percent of the U.S. per capita income.¹⁹⁸
 - Starr County in South Texas has the highest poverty rate with 50.9 percent of the population at or below poverty level.¹⁹⁹
 - In the early 2000s, the income gap between the richest 20 percent of families and the poorest 20 percent was 2nd largest in the nation. The income gap between the richest 20 percent of families and the middle 20 percent was 1st in the nation.²⁰⁰
 - In the early 2000s, the richest five percent of families had average incomes 13.8 times greater than the poorest 20 percent. This is up from a ratio of 9.2 in the early 1980s.²⁰¹
 - Middle- and low-income Texas families did not share equally in the economic boom of the eighties and nineties.²⁰²
- Families that made \$36,000 and under only gained four

- percent, while families who made \$84,500 or more gained 33 percent.²⁰³
- An increase in the minimum wage of just \$1 would directly effect 750,000 Texas children living in low-wage households.²⁰⁴
- Three Border regions in Texas, the McAllen-Edinburg-Mission region, the Brownsville-Harlingen-San Benito region, and the El Paso region, had the highest rates of unemployment in Texas at 13.6 percent, 11.0 percent, and 9.7 percent respectively, well above the state's average of 6.7 percent.²⁰⁵

Taxation

- Texas' tax system is listed as one of the "Terrible Ten" most regressive states in the nation.²⁰⁶
- Texas requires low-income families, those in the bottom 20 percent of the income scale, to pay more than three times as great a share of their earnings in taxes as the wealthy.²⁰⁷
- Middle-income families pay more than twice as high a share of their income in taxes as the wealthiest families.²⁰⁸
- Changes in state and local taxes over the past decade have made state tax systems even more regressive. Overall, low- and middle-income taxpayers saw their burden grow, while the top-fifth highest income-earning Texans primarily received tax reductions.²⁰⁹
- Sales tax, amongst the most regressive of all taxes, forces middle- to low-income families to pay on average as much as eight times more tax than the wealthiest families in the U.S. as a percentage of their income.²¹⁰

Transportation

- Traffic delays in Dallas, Fort Worth, and Houston cost each driver in those cities \$711 a year. In Austin, traffic delays cost each driver \$590 a year.²¹¹
- Houston and Dallas were ranked 5th and 6th respectively amongst 85 large metropolitan cities in the yearly number of hours delayed in traffic per traveler.²¹²
- Traffic volume in Texas is growing 16 times faster than lane miles are added.²¹³
- Every two minutes, someone is injured in a traffic accident. The resulting economic loss to Texas is \$9.3 billion annually.²¹⁴
- 725 people died on Texas highways in 2002.²¹⁵

Obesity

- In Texas, 22.4 percent of 4th graders, 19.2 percent of 8th graders and 15.5 percent of 11th graders in Texas are overweight.²¹⁶
- Overweight prevalence is highest in Texas among Hispanic boys.²¹⁷
- 70 percent of Texas youths do not attend physical education class daily.²¹⁸
- Two of the top 10 "Fattest Cities in America" are in Texas, with Houston ranked number five and El Paso ranked number eight.²¹⁹
- 27.0 percent of Texans are severely overweight, up from 24.6 percent in 2004, and higher than the national average of 24.4 percent.²²⁰
- Texas ranks 5th in the percentage of children who are obese with 19 percent.²²¹

Sex Education

- Texas does not require schools, nor does it provide state funds, to give students information on HIV, sexually transmitted diseases, or pregnancy prevention education.²²²
- In 2001, the birth rate for teens between 15 and 17 years old was 24.7 to 1,000 population in the United States and 38.9 to 1,000 in Texas.²²³
- In a statewide survey of Texas high school students, almost half have had sexual intercourse at least once in their lifetime.
- Of those interviewed, 67.6 percent of 12th graders, 57.2 percent of 11th graders, 47.2 percent of 10th graders, and 37.4 percent of 9th graders have had sexual intercourse.²²⁴
- 19.3 percent of 12th graders who had once been sexually active are now practicing abstinence.²²⁵
- Among currently sexually active students, only about half (55.4 percent) reported that they or their partner had used a condom during their last sexual intercourse. Only 10 percent reported that they or their partner had used birth control pills before their last sexual intercourse.²²⁶
- 22.6 percent of sexually active students had used drugs or alcohol at the time of their last sexual intercourse.²²⁷
- Texas has no state law or administrative rule that addresses attendance for pregnant or parenting students, nor does the state require districts to offer alternative programs for such students.²²⁸

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