

# BIRCH, BECKER & MOORMAN, LLP

7000 NORTH MOPAC EXPRESSWAY, SECOND FLOOR, AUSTIN, TEXAS 78731 ■ (512) 514-6747 ■ FAX (512) 514-6267

b|b|m

Mr. Birch's Direct Line: (512) 258-9199  
E-mail: [ebirch@birchbecker.com](mailto:ebirch@birchbecker.com)

March 17, 2008

## VIA HAND DELIVERY

Ms. LaDonna Castañuela  
Office of Chief Clerk (MC-105)  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

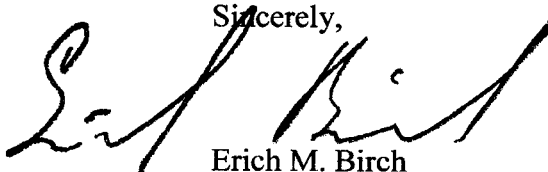
Re: *Petition by the City of El Paso and the State of New Mexico Environment Department for Revocation of Air Quality Permit No. 20345, Issued to Asarco, Incorporated.*

Dear Ms. Castañuela:

Enclosed for filing are an original and eleven copies of *Petition by the City of El Paso and the State of New Mexico Environment Department for Revocation of Air Quality Permit No. 20345, Issued to Asarco, Incorporated.* This Petition for Revocation is being filed pursuant to Texas Health and Safety Code Sections 7.302 *et al.* Please file this on behalf of the City of El Paso and the New Mexico Environment Department in the above-referenced matter.

If you have any questions, please telephone me at the above number.

Sincerely,



Erich M. Birch

## ENCLOSURES

cc: Service List  
Mr. Charlie McNabb, City Attorney  
Ms. Laura Prendergast Gordon, Deputy City Attorney  
Mr. Ron Curry, Secretary, New Mexico Environment Department  
Mr. Bill Grantham, Assistant General Counsel, New Mexico Environment Department

TCEQ DOCKET NO. \_\_\_\_\_

**PETITION BY THE CITY OF EL PASO AND THE STATE OF  
NEW MEXICO ENVIRONMENT DEPARTMENT FOR REVOCATION OF  
AIR QUALITY PERMIT NO. 20345, ISSUED TO ASARCO, INCORPORATED**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

COMES NOW, the City of El Paso ("El Paso" or the "City") and the State of New Mexico Environment Department ("NMED"), together, the "Petitioners," and present this their *Petition for Revocation of Air Quality Permit No. 20345, Issued to Asarco, Incorporated*, and would respectfully present the following:

**I. INTRODUCTION**

Asarco began smelting operations in El Paso in 1887, and various types of metal smelting facilities have been operated at the Asarco El Paso Plant site over the years. In the 1970s health concerns surfaced because children living near the smelter were found to have very high blood-lead levels. In response to a lawsuit by the City and the State of Texas, Asarco curtailed some of its emissions in the 1970s, and over the next twenty years eventually decommissioned all of the smelting operations at the site of Asarco El Paso Plant, except for the copper smelter. Because it had been operational prior to the applicability of the federal Clean Air Act ("CAA") and the Texas Clean Air Act ("TCAA"), an air quality permit was not required for the copper smelter operations, and the copper smelter operated as a grandfathered facility.

Asarco proposed to replace the existing copper smelting furnace at the Asarco El Paso Plant with ConTop reactors, and in 1992, the Texas Air Control Board ("TACB") issued Air Quality Permit No. 20345 for the new copper smelting facilities. The copper smelter operated for six years, and during that time Asarco amended or sought a revision to Air Quality Permit No. 20345 on fourteen separate occasions. Many of those amendments resulted in increases to the levels of emissions of certain pollutants authorized by the permit—increases that had to be sought to correct representations made by Asarco about the levels of emissions from the copper

smelter during the process to approve the 1992 permit. In 1999, Asarco shut down the Asarco El Paso Plant apparently due to low copper prices.

The unique nature of the Asarco El Paso Plant is important to the consideration of this Petition. The Asarco El Paso Plant is the only copper smelter in Texas and is one of the few in the United States. The Asarco El Paso Plant is located immediately adjacent to both a state border (*i.e.*, the Texas/New Mexico border) and an international border (*i.e.*, the United States/Mexico border), and it is located in, and immediately adjacent to, two thriving and growing metropolitan areas, one on either side of the international border. Therefore, the emissions that would be generated at the Asarco El Paso Plant have broad impacts, not only in terms of the number of people potentially affected, but also in terms of the relations with a sister state and a neighboring country. Additionally, it is important to note that the Asarco El Paso Plant is located in a complex geographic terrain and in an area with elevated background levels of metals, *e.g.*, lead and arsenic, in the soils, which as noted by the U.S. Environmental Protection Agency (“EPA”), leads to additional concerns regarding the effects of the Asarco El Paso Plant on air quality.

The Asarco El Paso Plant has polluted the air, soils, and waters in and around the El Paso area and should never be allowed to do so again. Studies conducted by independent researchers and government agencies have repeatedly found that lead and arsenic contamination in the area is tied to the Asarco El Paso Plant. Asarco has also admitted that its smelter is responsible for lead and arsenic contamination in the area and has been held responsible by EPA for cleaning up contaminated soils in El Paso and New Mexico.

The Asarco El Paso Plant has been shutdown for over nine years. During that time, the City of El Paso and surrounding areas in Texas and New Mexico have moved forward both in terms of improved air quality and in terms of economic progress and development. Since 2001, El Paso has had no exceedances of the National Ambient Air Quality Standard (“NAAQS”) for

carbon monoxide (CO), and the area continues to make progress toward achieving the NAAQS for particulate matter less than ten microns in diameter (PM<sub>10</sub>). El Paso is in attainment of the lead NAAQS; however, EPA is currently reviewing the lead NAAQS and may significantly lower the lead NAAQS within the next several months.

Regardless of EPA's actions on the lead standard, El Paso and the surrounding areas in Texas and New Mexico are more sensitive to additional lead air emissions because there is a legacy of lead contamination in the area. It is disturbing for the Petitioners that Asarco maintains that it plans to reactivate the copper smelter. The restart of the Asarco El Paso Plant will result in air emissions that immediately create health threats to persons living in the El Paso area, and over the years, those air emissions will again deposit onto the ground and into the water and will contaminate El Paso and surrounding areas in Texas and New Mexico with lead, arsenic, and other toxic metals. Lead is of particular concern since the medical community has found that exposure to any levels of lead in children potentially results in irreversible health effects.<sup>1</sup>

Equally disturbing for the Petitioners is Asarco's pattern of noncompliance with environmental regulations. The extent of Asarco's noncompliance with Air Quality Permit No. 20345 did not come to light until the Hearing on the Merits regarding Asarco's application to renew Air Quality Permit No. 20345 ("2005 Asarco Permitting Proceeding") during the summer of 2005. This poor compliance record, coupled with the very real health threats posed by the air emissions from the Asarco El Paso Plant demand that the Asarco El Paso Plant be forever removed as a source of contamination in the El Paso area.

Most disturbing for the Petitioners is that the Texas Commission on Environmental Quality ("TCEQ" or the "Commission") recently took the position that it was legally required to renew Air Quality Permit No. 20345. The Commission's utilization of Texas Health and Safety

---

<sup>1</sup> See, e.g., Letter from Dr. Rogene Henderson, Chair, Clean Air Scientific Advisory Committee, to the Honorable Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency (Mar. 27, 2007).

Code Section 382.055 as the basis for approving the renewal of Air Quality Permit No. 20345 discounts the overall purpose and policy of the TCAA. Section 382.002 of the Texas Health and Safety Code, which identifies the policy and purpose of the TCAA, states:

The policy of this state and the purpose of this chapter are to safeguard the state's air quality resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility.<sup>2</sup>

The Commission's decision to renew Air Quality Permit No. 20345 failed to protect the public health, general welfare, and physical property near the Asarco El Paso Plant, even though the weight of the evidence indicated the probable negative impacts of future operation of the Asarco El Paso Plant. The Petitioners believe that this *Petition for Revocation* provides the Commission a legal process whereby it can fully evaluate the potential negative impacts of the Asarco El Paso Plants, outside of the possible legal constraints associated with Section 382.055.

The Texas legislature has adopted provisions for the Commission to revoke the permit of a facility that should no longer be allowed to operate as an emissions source in Texas. To protect the safety, health, and welfare of the public and the citizens of El Paso and the citizens of New Mexico who are affected by emissions from the Asarco El Paso Plant and to protect the environment, the Petitioners therefore submit this *Petition for Revocation of Air Quality Permit No. 20345* urging TCEQ to revoke the Asarco El Paso Plant air quality permit, and enumerate the following statutory reasons in support of its *Petition*.

## **II. ARGUMENT AND AUTHORITIES**

Texas statute authorizes the Commission to revoke air quality permits issued pursuant to Texas Health and Safety Code Chapter 382.<sup>3</sup> Texas Water Code Section 7.302, Grounds for Revocation or Suspension of Permit, provides, in relevant part:

---

<sup>2</sup> TEX. HEALTH & SAFETY CODE § 382.002(a).

<sup>3</sup> TEX. WATER CODE § 7.302(a).

After notice and hearing, the commission may revoke, suspend, or revoke and reissue a permit or exemption on any of the following grounds:

- (1) violating any term or condition of the permit, and revocation, suspension, or revocation and reissuance is necessary in order to maintain the quality of water or the quality of air in the state, or to otherwise protect human health and the environment consistent with the objectives of the statutes or rules within the commission's jurisdiction;
- (2) having a record of environmental violations in the preceding five years at the permitted or exempted site;
- (3) causing a discharge, release, or emission contravening a pollution control standard set by the commission or contravening the intent of a statute or rule described in Subsection (a);
- (4) including a material mistake in a federal operating permit issued under Chapter 382, Health and Safety Code, or making an inaccurate statement in establishing an emissions standard or other term or condition of a federal operating permit;
- (5) misrepresenting or failing to disclose fully all relevant facts in obtaining the permit or misrepresenting to the commission any relevant fact at any time;
- (6) a permit holder being indebted to the state for fees, payment of penalties, or taxes imposed by the statutes or rules within the commission's jurisdiction;
- (7) a permit holder failing to ensure that the management of the permitted facility conforms or will conform to the statutes and rules within the commission's jurisdiction;
- (8) the permit is subject to cancellation or suspension under Section 26.084;
- (9) abandoning the permit or operations under the permit; or
- (10) the commission finds that a change in conditions requires elimination of the discharge authorized by the permit.<sup>4</sup>

For the reasons detailed below, the Petitioners petition the Commission to revoke Air Quality Permit No. 20345, as issued to Asarco, based on many of the conditions set out in Texas Water Code Section 7.302(b).

---

<sup>4</sup> *Id.* § 7.302(b).

**A. The Commission Should Revoke Air Quality Permit No. 20345 Because Asarco Has Consistently Violated the Terms and Conditions of the Permit, and Revocation Is Necessary to Maintain the Quality of Air in the State and to Protect Human Health and the Environment.**

Asarco repeatedly and consistently violated the requirements of Air Quality Permit No. 20345 during the entire time the Asarco El Paso Plant was operational between 1993 and 1999. The overwhelming evidence presented at the Hearing on the Merits in the 2005 Asarco Permitting Proceeding demonstrated that Asarco was in violation of the emissions limitations set out in Air Quality Permit No. 20345 for most of the time period that the Asarco El Paso Plant was operational from 1993 through 1999. Asarco conducted limited stack testing twice after the permit was issued in 1992. On both occasions—one in 1993 and the other in 1998—Asarco determined that certain air emissions from the Asarco El Paso Plant were far in exceedance of the permitted emissions limitations set out in Air Quality Permit No. 20345. Thus, Asarco persistently violated the emissions limits in Air Quality Permit No. 20345 throughout the 1990s, demonstrating that it apparently could not operate the facility in compliance with permitted emissions limits. For these reasons, the Commission should revoke Air Quality Permit No. 20345 in order to maintain the quality of the air in the state of Texas and New Mexico and to protect human health and the environment from future emissions violations.

In 1993, Asarco determined through performance testing that the Asarco El Paso Plant was emitting significantly more sulfur dioxide (SO<sub>2</sub>) than was authorized in the 1992 permit. In fact, in order to address the findings of the stack testing, Asarco had to seek an amendment to the permit to increase the level of authorized emissions of SO<sub>2</sub> from 50 parts per million (ppm) to 250 ppm—a five fold increase.<sup>5</sup>

---

<sup>5</sup> See Transcript, Hearing on the Merits, *In the Matter of the Application of Asarco LLC for Renewal of Air Quality Permit No. 20345, Copper Smelter, El Paso, El Paso County*, SOAH Docket No. 582-05-593, TCEQ Docket No. 2004-0049-AIR, at 71-74 (July 11, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. Lawrence Castor). Throughout this Petition, the Transcript to the Hearing on the Merits in the 2005 Asarco Permitting Proceeding will be cited to as “Tr.”

In 1994, Asarco sought another permit amendment to increase the heavy metals emissions rates based on the results of performance testing. Asarco found that while its particulate matter (PM) emissions overall were lower than expected, the composition of the PM emissions was “different” than it originally represented. “Different” meant “higher” for many of the heavy metals.<sup>6</sup> For example, the emission rate for arsenic was fourteen times higher than represented in its permit application.<sup>7</sup>

In 1998, following only the second and last round of stack testing, Asarco determined that emissions of nitrogen oxides (NO<sub>x</sub>) and CO were far greater than permitted levels. Again, Asarco amended its permit in order to address the identified permit violations. The levels of authorized emissions of NO<sub>x</sub> were increased from 89.2 tons per year (TPY) to 230 TPY—a two and one-half fold increase, and the levels of authorized emissions of CO were increased from 24.8 TYP to 288 TPY—approximately an *eleven fold increase* over previously permitted levels.<sup>8</sup> Based on these isolated stack testing and performance testing results, it is clear that Asarco spent all of the operational life of the Asarco El Paso Plant in the 1990s in violation of multiple emissions limitations as established in Air Quality Permit No. 20345.

This operational history of violations vividly demonstrates that there is no reason to believe that Asarco can or will operate the Asarco El Paso Plant in compliance with Air Quality Permit No. 20345. Thus, the Commission should revoke Air Quality Permit No. 20345 in order to maintain the quality of the air in the state of Texas and New Mexico and to protect human health and the environment from future emissions violations.

---

<sup>6</sup> See Letter from Mr. William R. Campbell, Acting Executive Director, Texas Comm’n on Env’tl. Quality, to Mr. Tom Martin, Environmental Manager, ASARCO, Inc., at 6 (Nov. 4, 1994) [hereinafter Nov. 1994 Amendment].

<sup>7</sup> See *id.*; see also Tr. at 587 (July 13, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. David Cabe, P.E.).

<sup>8</sup> See Tr. at 76-79 (July 11, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. Lawrence Castor).



**B. The Commission Should Revoke Air Quality Permit No. 20345 Because Asarco Has a Record of Environmental Violations.**

**1. *The Asarco El Paso Plant's Operational Record Was Replete With Air Quality Violations During the Last Five Years of Operation in the 1990s.***

The Asarco El Paso Plant has not been operational in the last five years. As described in detail below, Asarco shutdown the Asarco El Paso Plant in 1999, and the plant has not been operational at any point in over nine years. Because of Asarco's shutdown of the plant in 1999, there is not a history of air quality violations in the past five years, but the history of the last five years of operation—1994 through 1999—is replete with air quality violations.

A brief review of Asarco's operation of the Asarco El Paso Plant in the 1990s reveals the following:

- From 1993 through 1999, Asarco operated two unpermitted reactors, the ConTop reactors, at the Asarco El Paso Plant.<sup>9</sup>
- From 1993 through at least 1994, emissions of SO<sub>2</sub> from the Asarco El Paso Plant were approximately twice the permitted levels.<sup>10</sup>
- From 1993 through at least 1994, emissions of arsenic from one emission point at the Asarco El Paso Plant were approximately fourteen times the permitted levels. Emissions of other metals from this and other emissions points were also significantly higher than permitted levels during this timeframe.<sup>11</sup>

---

<sup>9</sup> See the discussion regarding the replacement of the ConTop reactors in Section II.E.2, *infra*.

<sup>10</sup> See Maximum Allowable Emission Rates (original vs. current versions of Permit No. 20345) (Asarco Exhibit No. 27 in the 2005 Asarco Permitting Proceeding) [hereinafter MAER Comparison]; *see also* Prefiled Testimony of Mr. Larry Castor, *In the Matter of the Application of Asarco LLC for Renewal of Air Quality Permit No. 20345, Copper Smelter, El Paso, El Paso County*, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, at 2; Tr. at 71-76 (July 11, 2006) (Cross-Exam (by Mr. Erich Birch) of Mr. Lawrence Castor). With regard to SO<sub>2</sub> emissions, Mr. Castor testified:

Q. But the fact is your emissions were in excess of your permitted emissions during that entire time [March 1993 through December 1995], is that correct?

A. That is correct.

*Id.* at 205 (July 11, 2005) (Cross Exam (by Mr. Michael Wyatt) of Mr. Lawrence Castor).

<sup>11</sup> Arsenic emissions from the Water Treatment Plant Spray Dryer were increased by 1545%. *See* Tr. at 587 (July 13, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. David Cabe, P.E.); *see also* Nov. 1994 Amendment, *supra* note 6, at 4 & 6. In addition, emissions of lead from that source were increased by 3900%, and emissions of zinc from that source were increased by 7700%. *See id.*

- From 1993 through 1999, emissions of NO<sub>x</sub> from the Asarco El Paso Plant were approximately two and one-half times the permitted levels.<sup>12</sup>
- From 1993 through 1999, emissions of CO from the Asarco El Paso Plant were approximately eleven times the permitted levels.<sup>13</sup>
- From 1993 through 1999, emissions of volatile organic compounds (VOCs) from the Asarco El Paso Plant were approximately twice the permitted levels.<sup>14</sup>
- From 1993 through 1999, the Asarco El Paso Plant received copper concentrate that contained concentrations of metals in excess of representations made in the application in support of the 1992 issuance of Air Quality Permit No. 20345.<sup>15</sup>
- From 1996 through 1999, Asarco circumvented the rules of the Commission through use of a Senate Bill 1126 (“SB 1126”) modification to increase production rates and emissions rates.<sup>16</sup>

All of the above violations involved *air-related* infractions that resulted in emissions from the Asarco El Paso Plant in excess of permitted levels. Since Asarco has only measured a few of its emissions sources, the compliance status of most of the other emissions from the Asarco El Paso Plant is largely unknown. Clearly, the Asarco El Paso Plant was in violation of many permitted emission limits for all years of its operation pursuant to Air Quality Permit No. 20345.

---

<sup>12</sup> See MAER Comparison, *supra* note 10; see also Tr. at 76-80 (July 11, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. Lawrence Castor); *id.* at 634-635 (July 13, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. David Cabe, P.E.). With regard to NO<sub>x</sub> emissions, Mr. Castor testified:

- Q. . . . So during the entire time period from 1993 through 1999, was the Asarco facility actually emitting NO<sub>x</sub> at a higher rate than its permitted levels?
- A. Well, I don’t know that for sure for the entire time, but I would assume that they were higher.

*Id.* at 76-80 (July 11, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. Lawrence Castor).

<sup>13</sup> See MAER Comparison, *supra* note 10; see also Tr. at 78-81 (July 11, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. Lawrence Castor); *id.* at 635 (July 13, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. David Cabe, P.E.).

<sup>14</sup> See MAER Comparison, *supra* note 10; see also Tr. at 129 (July 11, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. Lawrence Castor).

<sup>15</sup> See Tr. at 61-63 (July 11, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. Lawrence Castor); see also *id.* at 652-53 (July 13, 2005) & 1072-74 (July 15, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. David Cabe, P.E.); “Table 1, El Paso Design Basis: KHD Cyclone Retrofit, Mass Balance – Solid and Molten Streams” (City of El Paso Exhibit No. 17 in the 2005 Asarco Permitting Proceeding).

<sup>16</sup> See the discussion regarding the SB 1126 modification in Section II.E.1, *infra*.

Asarco's "official" compliance history shows that during only five years of operation the Asarco El Paso Plant received eleven notices of violations ("NOVs"), an enforcement order for air violations, an enforcement order for waste violations, an EPA Consent Decree, and a referral by EPA for violations that soon became the basis of another federal consent decree.

Of the eight violations enumerated in the bullet points above, only one was recognized and enforced against Asarco by the Commission. Except for the one incident of SO<sub>2</sub> emissions in violation of permitted standards, none of the violations identified in the bullet points above—all confirmed as violations of Air Quality Permit No. 20345 or applicable statutes or regulations through testimony at the Hearing on the Merits in the 2005 Asarco Permit Proceeding—have been included in the formal compliance history for the Asarco El Paso Plant. Most of these violations do not appear on Asarco's compliance history record because TCEQ did not know about them or simply failed to enforce against Asarco. In fact, apparently TCEQ was first made aware of many of these violations during the Hearing on the Merits in the 2005 Asarco Permitting Proceeding.<sup>17</sup>

In addition, Texas Water Code Section 7.302(b) authorizes revocation of Air Quality Permit 20345 if Asarco has a history of "environmental violations" at the site, which is not limited to air emissions violations. As set forth, *infra*, numerous claims have been made in the last five years against Asarco relating to environmental contamination and violations originating from the Asarco El Paso Plant.

**2. *The Asarco El Paso Plant Processed Hazardous Waste in Violation of Air Quality Permit No. 20345.***

From 1993 through 1997, the Asarco El Paso Plant processed hazardous waste, the "Encycle Concentrate," in violation of Air Quality Permit No. 20345. As identified during the Hearing on the Merits, the Asarco El Paso Plant processed "copper sulfide-bearing materials"

---

<sup>17</sup> See, e.g., Tr. at 1726 (July 20, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. LeRoy "Skip" Clark, P.E.).

from the Encycle facility in Corpus Christi,<sup>18</sup> which EPA determined were actually a hazardous waste.<sup>19</sup> EPA identified that the Asarco El Paso Plant had processed the Encycle concentrate at its smelter for the purposes of recovering copper and that the Encycle concentrate was a hazardous waste. EPA determined that the Asarco El Paso Plant did not have the appropriate authorizations to process the hazardous waste.<sup>20</sup>

The seriousness of the potential impact on the citizens of El Paso and surrounding areas was only recognized in the last several months when the Commission's response to a Public Information Act request produced additional background documents regarding the range of sources of materials for the Encycle feedstock.<sup>21</sup> The Encycle waste, containing little to no copper, was incinerated at the Asarco El Paso Plant in a process determined to be "sham" recycling by EPA. The Environmental Protection Agency identified that Asarco illegally burned 5,000 tons of waste including more than 300 tons of chemical warfare agents from the U.S. Army Rocky Mountain Arsenal facility.<sup>22</sup> Asarco was fined \$20 million in penalties by EPA for these sham recycling activities.<sup>23</sup> Asarco was clearly acting in violation of Air Quality Permit No. 20345.

---

<sup>18</sup> See *id.* at 100 (July 11, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. Lawrence Castor).

<sup>19</sup> See *id.* at 101-02.

<sup>20</sup> See Memorandum from Terry Sykes, Senior Enforcement Counsel, EPA Region 6, to Samuel Coleman, Director, Compliance Assurance and Enforcement Division, EPA Region 6, at 1 & 6 (no date) (City of El Paso Exhibit No. 19 in the 2005 Asarco Permitting Proceeding).

<sup>21</sup> See Letter from Mr. Booker Harrison, Environmental Law Div., Texas Comm'n on Env'tl. Quality, to Ms. Heather McMurray (July 21, 2006) (including "EPA Response to Encycle/Asarco Settlement Statement" at tbl. 1 (July 31, 1998).

<sup>22</sup> See Ralph Blumenthal, *Copper Plant Illegally Burned Hazardous Waste, E.P.A. Says*, N.Y. TIMES (Oct. 11, 2006).

<sup>23</sup> See *id.*

**C. The Commission Should Revoke Air Quality Permit No. 20345 Because the Asarco El Paso Plant Has Consistently Caused Emissions Contravening a Pollution Control Standard Set by the Commission and Federal and State Clean Air Statutes.**

As identified above, in Sections II.A. and II.B.1., Asarco consistently and repeatedly violated the emissions limitations for multiple constituents—SO<sub>2</sub>, NO<sub>x</sub>, PM (including arsenic and lead), and CO—throughout the six years the Asarco El Paso Plant was operational during the 1990s.<sup>24</sup> Based on the operational history of violations, there is no reason to believe that Asarco can or will operate the Asarco El Paso Plant in compliance with Air Quality Permit No. 20345. Thus, the Commission should revoke Air Quality Permit No. 20345 because the Asarco El Paso Plant has consistently caused emissions contravening pollution control standards set by the Commission.

Further, the Asarco El Paso Plant will continue to cause emissions exceeding federal and state emission standards. Asarco's newest modeling (*i.e.*, the modeling completed in 2006) demonstrates that emissions of particulate matter less than 2.5 microns in diameter (PM<sub>2.5</sub>) from the Asarco El Paso Plant would cause a condition of nonattainment in Sunland Park, New Mexico.

Asarco excluded the Sunland Park monitoring data from the PM<sub>2.5</sub> background concentration analysis, even though it is one of the closest monitors to the Asarco El Paso Plant. In excluding the background concentration data from the Sunland Park monitor, Asarco argued that the Sunland Park monitor was not representative of the El Paso region and even identified that the Air Quality Bureau of the NMED had indicated that the Sunland Park monitor was "influenced by very localized, unique geographical features that tend to 'funnel' pollutants to the monitor," and thus apparently not appropriate for the modeling analysis.<sup>25</sup> After becoming aware of Asarco's claims regarding the Sunland Park monitor, the NMED clarified that it "never

---

<sup>24</sup> See the discussions regarding permit violations in Sections II.A. and II.B., *supra*.

<sup>25</sup> Zephyr Envtl. Corp., Air Quality Analysis for ASARCO El Paso Plant at app. B at 2 (Nov. 22, 2006).

represented to ASARCO that the Agency favored excluding the monitor, and we object to its exclusion now.”<sup>26</sup> The NMED went on to explain why the Sunland Park monitor should be included in Asarco’s modeling analysis because the monitor is representative of the areas influenced by the Asarco El Paso Plant. The NMED reasserted this position again at the February 13, 2008 Agenda meeting where the Commissioners considered Asarco’s renewal application.

Thus, Asarco’s own modeling demonstrates that a condition of air pollution will be caused at the Sunland Park monitor due to its emissions of PM<sub>2.5</sub>. The federal NAAQS for PM<sub>2.5</sub> is 35.0 micrograms per cubic meter (µg/m<sup>3</sup>). The background concentration of PM<sub>2.5</sub> at the Sunland Park monitor is 31.3 µg/m<sup>3</sup>, and Asarco’s modeling demonstrated that the PM<sub>2.5</sub> emissions from the Asarco El Paso Plant would be 14.0 µg/m<sup>3</sup>. When Asarco’s modeled emissions are added to the background concentration at the Sunland Park monitor, the total levels of PM<sub>2.5</sub> are 45.3 µg/m<sup>3</sup>, far in excess of the NAAQS of 35.0 µg/m<sup>3</sup>.

Texas Health and Safety Code Section 382.003(3) states:

“Air pollution” means the presence in the atmosphere of one or more air contaminants or combination of air contaminants in such concentrations and of such duration that:

- (1) are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property; or
- (2) interference with the normal use or enjoyment of animal life, vegetation, or property.<sup>27</sup>

Similarly, Section 382.002, which identifies the policy and purpose of the TCAA states:

The policy of this state and the purpose of this chapter are to safeguard the state’s air quality resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health,

---

<sup>26</sup> See Letter from Mr. Ron Curry, Secretary, New Mex. Env’tl. Dept., to Chairman Buddy Garcia and Commissioner Larry Soward, Texas Comm’n on Env’tl. Quality (Oct. 2, 2007).

<sup>27</sup> TEX. HEALTH & SAFETY CODE § 382.003(3).

general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility.<sup>28</sup>

The NAAQS are ambient air quality standards that EPA has determined are requisite to protect the public health and welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.<sup>29</sup> The criteria for the adoption of a NAAQS closely parallel the definition of air pollution in the TCAA. In adopting the NAAQSs, EPA was setting standards that would prevent “air pollution” as that term is used in the TCAA. Additionally, the Commission has adopted the NAAQS by reference and has specified that the NAAQS are to be enforced throughout Texas.<sup>30</sup> Thus, an exceedance of a NAAQS, including the NAAQS for PM<sub>2.5</sub>, would be air pollution under the TCAA, and to cause or contribute to an exceedance of the PM<sub>2.5</sub> NAAQS would be to cause or to contribute to a condition of air pollution. Therefore, the exceedance of the NAAQS for PM<sub>2.5</sub> that will be caused by operation of the Asarco El Paso Plant will be in contravention of federal and state air control statutes and pollution control standards set by the Commission.

**D. The Commission Should Revoke Air Quality Permit No. 20345 Because Asarco Included a Material Mistake in Its Federal Operating Permit Issued under Chapter 382, Health and Safety Code, and Made Inaccurate Statements in Establishing Emissions Standards and Other Terms and Conditions of Its Federal Operating Permit.**

Operation of the Asarco El Paso Plant pursuant to Air Quality Permit No. 20345 will result in emissions that cause exceedances of state and federal air quality standards. As described above, Asarco’s own modeling predicts that PM<sub>2.5</sub> emissions from the Asarco El Paso Plant will cause violations of the PM<sub>2.5</sub> NAAQS. Further, Asarco’s permit does not include adequate monitoring provisions to determine whether its emissions will be in compliance with its permit limitations. The most disturbing example of this concerns lead emissions from the

---

<sup>28</sup> *Id.* § 382.002(a).

<sup>29</sup> *See* 42 U.S.C. § 7409(a)&(b)(1)&(2).

<sup>30</sup> *See* 30 TEX. ADMIN. CODE § 101.21.

Asarco El Paso Plant. Even with the addition of several monitors, which were added as requirements in Air Quality Permit No. 20345 for the first time by the Commission during its February 13, 2008 Agenda meeting, it is impossible to determine what the actual lead emissions will be from the Asarco El Paso Plant.

The Title V permit issued to Asarco for the Asarco El Paso Plant is required to include applicable hazardous air pollutant provisions under Section 112 of the federal Clean Air Act (“CAA”), new source performance standards (“NSPS”), Prevention of Significant Deterioration (“PSD”) and nonattainment new source review (“NSR”) permits, and other CAA regulations. The Asarco El Paso Plant has never undergone PSD or nonattainment review, even though it is a major source of multiple pollutants and emits pollutants for which the El Paso area is in nonattainment. The Asarco El Paso Plant has been shutdown for over nine years, yet there has been no comprehensive review to determine whether the renewed operations can meet the permit and monitoring requirements under current CAA regulatory programs. The current monitoring requirements in the NSR permit are also insufficient to demonstrate that the Asarco El Paso Plant is a minor source of hazardous air pollutants (“HAPs”). If the Asarco El Paso Plant is re-started, it may be a major source of HAPs, which triggers additional CAA requirements, such as the Maximum Achievable Control Technology (“MACT”) standards for primary copper smelters. The MACT standards should be, but currently are not, included in the Title V permit.

Asarco’s Title V permit application is based on its state NSR permit, which, because it lacks comprehensive monitoring requirements, cannot lead to a determination of compliance with emissions limitations for certain pollutants. The federal Title V permit requires monitoring sufficient to provide reliable data demonstrating compliance with the permit, and any representation that Asarco can provide such reliable data misrepresents its compliance obligations under Air Quality Permit No. 20345.



**E. The Commission Should Revoke Air Quality Permit No. 20345 Because Asarco Misrepresented or Failed to Disclose All Relevant Facts When It Obtained the Permit in 1992 and in Subsequent Permit Revisions.**

Air Quality Permit No. 20345 was issued to Asarco in 1992, and the Asarco El Paso Plant operated for six years (*i.e.*, 1993 through 1999) pursuant to that permit. As demonstrated above, Asarco repeatedly found that its emissions were higher than authorized under its 1992 permit. Evidence presented at the Hearing on the Merits in the 2005 Asarco Permitting Proceeding revealed that Asarco either misrepresented facts or failed to disclose all relevant facts in the permit application that provided the technical basis for issuing the 1992 permit. The permit was subsequently modified in some manner on fourteen separate occasions. On at least one of those occasions, Asarco again failed to provide all relevant information to the Commission regarding the requested modification to the permit. The result of not providing all of the relevant information was that Asarco obtained the modifications to Air Quality Permit No. 20345, but it circumvented TCEQ rules to do so. Even more importantly, Asarco modified the Asarco El Paso Plant itself without obtaining any type of approval from TCEQ. Asarco apparently never notified TCEQ of the modifications to the Asarco El Paso Plant, again in violation of State statute and TCEQ rules. Both of these situations will be described below, and both situations provide a basis for the Commission to revoke Air Quality Permit No. 20345 because Asarco failed to disclose all relevant facts since Air Quality Permit No. 20345 was issued in 1992.

**1. *Asarco's Utilization of a SB 1126 Permit Modification Circumvented TCEQ Air Quality Permitting Rules in Violation of 30 TEX. ADMIN. CODE § 101.3.***

In 1996 Asarco circumvented State air quality regulations by increasing its production rates under a Senate Bill 1126 ("SB 1126") modification, coupled with a permit alteration to authorize an increase in its permitted emissions rates as a result of the production rate increase. In utilizing a SB 1126 modification to circumvent State permitting requirements, Asarco failed to provide all relevant facts to TCEQ.

On August 14, 1996, Asarco obtained approval for an increase in production of copper anodes and sulfuric acid as a change to a qualified facility, *i.e.*, a SB 1126 modification.<sup>31</sup> The Commission's Technical Review Letter regarding the SB 1126 change states: "Through process experience and organizations, ASARCO has determined that production can be increased without any significant physical changes. Production can be increased to 152,000 tons per year of copper anodes and 378,500 tons per year of sulfuric acid."<sup>32</sup> The *Executive Director's Report to the Commission on Renewal of Asarco Incorporated's Air Quality Permit No. 20345* ("ED Report") states that "Asarco claimed standard exemptions to increase the allowable emissions for selected equipment"; however, the permitting history shows that only two months later Asarco obtained approval for an increase in its permitted emissions levels at the Asarco El Paso Plant pursuant to a permit alteration issued by the Commission on October 31, 1996.<sup>33</sup> The increased emissions represented on the amended Maximum Allowable Emission Rate Table ("MAERT") were due to an increase in production of copper anodes and sulfuric acid that previously had been approved as a change to a qualified facility, namely, the authorized increases in emissions resulted from the previously-approved SB 1126 production increases.<sup>34</sup>

Senate Bill 1126 permit modifications are authorized by Texas Health and Safety Code Section 382.003(9)(E), which authorizes changes in the method of operation of a facility provided it does not "result in a *net increase* in allowable emissions of any air contaminant."<sup>35</sup> It

---

<sup>31</sup> The ED Report states: "The permit conditions and MAERT needed to be updated because of the previous SB 1126 action discussed in paragraph 7." Executive Director's Report to the Commission on Renewal of Asarco Incorporated's Air Quality Permit No. 20345, *Application of Asarco Incorporated to Renew Air Quality Permit No. 20345*, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, at 11 (May 1, 2007) [hereinafter ED Report]; *see also* "Asarco Inc. Permitting History" (City of El Paso Exhibit No. 6 in the 2005 Asarco Permitting Proceeding) [hereinafter Permitting History]; "SB 1126 Letter, Technical Review" (City of El Paso Exhibit No. 12 in the 2005 Asarco Permitting Proceeding) [hereinafter Technical Review Letter].

<sup>32</sup> Technical Review Letter, *supra* note 31, at 1; *see also* ED Report, *supra* note 31, at 11.

<sup>33</sup> *See* ED Report, *supra* note 31, at 11; *see also* Permitting History, *supra* note 31, at 1.

<sup>34</sup> *See* Permitting History, *supra* note 31, at 1; Technical Review Letter, *supra* note 31, at 1.

<sup>35</sup> TEX. HEALTH & SAFETY CODE § 382.003(9)(E) (emphasis added).

is clear, based on the information in TCEQ memoranda prepared contemporaneously with the changes to Air Quality Permit No. 20345, that the increase in emissions authorized by the October 1996 permit alteration was required as a result of the August 1996 SB 1126 increase in production rates of copper anodes and sulfuric acid.<sup>36</sup> It is equally clear that the August 12, 1996 action and the October 28, 1996 action were inextricably linked, but Asarco failed to disclose all relevant facts to the Commission in order to unjustly utilize the SB 1126 permit modification process. The two actions in 1996, when considered together, resulted in a net increase in allowable emissions of certain air contaminants in violation of Section 382.003(9)(E). To present the two actions separately in an attempt to utilize the less onerous SB 1126 process was a violation of TCEQ rules.

Texas Administrative Code Title 30, Section 101.3 provides: “No person shall use any plan, activity, device or contrivance which the executive director determines will, without resulting in an actual reduction of air contaminants, conceal or appear to minimize the effects of an emission which would otherwise constitute a violation of the act or regulations.”<sup>37</sup> Asarco’s increase in copper anodes and sulfuric acid production rates by use of a SB 1126 modification on August 12, 1996, followed by a purportedly unrelated permit alteration on October 29, 1996, to increase permitted emissions from the Asarco El Paso Plant due to the production increase, is a prohibited circumvention of air quality requirements in Air Quality Permit No. 20345 and the requirements for a SB 1126 permit modification, as set out in Section 382.003(9)(E) of the Texas

---

<sup>36</sup> See Technical Review Letter, *supra* note 31, at 1.

<sup>37</sup> 30 TEX. ADMIN. CODE § 101.3.

Health and Safety Code, and thus, is a direct violation of Texas Administrative Code Title 30, Section 101.3.<sup>38</sup>

Asarco increased its production rates to produce more copper and sulfuric acid at the Asarco El Paso Plant, and in doing so, increased permitted emissions, but it did not provide all of the relevant facts to TCEQ for the appropriate permit review to occur. Because of this, Asarco bypassed the public notice process and avoided the possibility that its plans could be protested, thus obtaining the ability to quickly increase production, profits, and emissions, without the knowledge of any potentially affected persons in the El Paso area.

**2. *Asarco Modified the ConTop Reactors Without Notifying TCEQ and Without Obtaining TCEQ Approval.***

While Asarco sought and obtained fourteen separate modifications of Air Quality Permit No. 20345 during the 1990s, it failed to notify TCEQ or obtain TCEQ authorization for the replacement of the “ConTop” reactors at the Asarco El Paso Plant. The ConTop reactors were replaced shortly after start-up of the ConTop facilities. Asarco failed to seek an amendment or other revision to Air Quality Permit No. 20345 to authorize replacement of these major sources of air pollution in violation of TCEQ rules, and as such, failed to disclose all relevant facts regarding the construction and operation of the Asarco El Paso Plant to TCEQ.

The purpose of issuance of Air Quality Permit No. 20345 in 1992 was to permit the copper smelting operations at the Asarco El Paso Plant, including the new ConTop reactors. The ConTop reactors replaced the previously grandfathered furnace copper smelting facilities.

---

<sup>38</sup> The ED Report claims that in 1996 the two actions were appropriately considered separately, but such a claim cannot excuse Asarco’s contravention of the applicable laws and rules in 1996, and thus Asarco’s failure to provide all relevant facts to TCEQ. See ED Report, *supra* note 31, at 14. The ED Report does not provide documentation to support its claim regarding what the policy was in 1996. Instead, it provides a blanket statement to excuse Asarco’s clear violation of the SB 1126 standards (which are the same now as they were in 1996) and 30 TEX. ADMIN. CODE § 101.3 (which has been applicable to all air permitting actions since 1979). Asarco’s contravention of TCEQ permitting requirements in 1996, while possibly deemed acceptable or simply not identified by the Executive Director when it occurred because Asarco failed to provide all relevant facts for review, cannot be excused today.

Asarco then replaced the new ConTop reactors with newly-designed reactors within just a few months after the start-up of the ConTop facilities. Mr. Lawrence Castor, the Plant Manager of the Asarco El Paso Plant, testified at the Hearing on the Merits in the 2005 Asarco Permitting Proceeding that the first of the two ConTop reactors was replaced two to three months after start-up and that Asarco replaced the second of the two ConTop reactors about a month later.<sup>39</sup> The ConTop reactors were the main facilities permitted pursuant to the 1992 permit, and Asarco failed to even notify the Commission, much less seek an amendment or other revision to the permit, when Asarco replaced the permitted ConTop reactors with other reactors that had been designed and built in-house by Asarco.<sup>40</sup> Only Asarco and its design personnel knew about the unauthorized changes made to the ConTop reactors. In fact, TCEQ's permit engineer who had reviewed Asarco's 1992 permit application as well as all subsequent permitting actions through 2005, Mr. LeRoy "Skip" Clark, P.E., testified that the ConTop reactors were permitted facilities, that he was not aware that the replacement of the two reactors had occurred in 1993, and that he had only learned of the replacement of the reactors during the Hearing on the Merits of the 2005 Asarco Permitting Proceeding.<sup>41</sup>

Commission rules specifically provide that a modification of an existing permitted facility must be handled through an amendment or other type of revision to the permit.<sup>42</sup> During the Hearing on the Merits in the 2005 Asarco Permitting Proceeding, throughout all of the post-

---

<sup>39</sup> Tr. at 369-70 (July 12, 2005) (Cross Exam (by Ms. Anne Rowland) of Mr. Lawrence Castor). Mr. Castor testified:

Q. Did you change the whole reactor? You put two whole new reactors in, did you not?

A. Yes, we did.

*Id.* at 425.

<sup>40</sup> *See id.* at 206 (July 11, 2005) (Cross Exam (by Mr. Michael Wyatt) of Mr. Lawrence Castor).

<sup>41</sup> *See id.* at 1726 (July 20, 2005) (Cross Exam (by Mr. Erich Birch) of Mr. LeRoy "Skip" Clark, P.E.).

<sup>42</sup> *See* TEX. ADMIN. CODE §§ 116.110 & 116.116.

hearing briefings, and even at the time of the filing of the ED Report, neither Asarco nor the Executive Director had ever identified how or when Asarco had sought authorization to replace the ConTop reactors. Only with the filing of 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* did the Executive Director finally claim that Asarco replaced the ConTop reactors pursuant to Standard Exemption 111, which was reported to the Commission during a 1994 investigation.<sup>43</sup> The ED Response to Comments also stated that Standard Exemption 111 did not require pre-authorization or prior approval.<sup>44</sup>

While the Executive Director has made these claims, he never provided any documentation demonstrating that Asarco relied on Standard Exemption 111. No TCEQ records have been identified or produced by the Executive Director documenting that Asarco relied upon Standard Exemption 111 for the replacement of the ConTop reactors, that Asarco notified the Commission of the replacement of the ConTop reactors, or that the Commission had even noted that the ConTop reactors had been replaced during any investigation of the Asarco El Paso Plant. Additionally, Standard Exemption 111, as it existed in 1993 and 1994, could not have been utilized legally to authorize replacement of the ConTop reactors. Standard Exemption 111, as of August 16, 1993, included the following requirements:

A facility which replaces an existing facility provided that the following conditions are satisfied:

- (a) The replacement facility functions in the same or similar manner as the facility to be replaced;
- (b) The emissions from the replacement facility are not more than nor have different characteristics than those from the facility to be replaced.

---

<sup>43</sup> See 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, *Application of Asarco Incorporated to Renew Air Quality Permit No. 20345*, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, at 19 (July 27, 2007) [hereinafter ED Response to Comments].

<sup>44</sup> *Id.*

(c) *The emissions from the replacement facility will not exceed 25 tons per year of any air contaminant.*

(d) The physical location of the replacement facility is the same or immediately adjacent to the facility being replaced.

(e) There will be no increase in capacity, production rate, or throughput as a result of the replacement.

(f) Notwithstanding the provisions of (c) above, the emissions from the replacement facility *will not contain any compounds (other than carbon monoxide, nitrogen oxide, or sulfur dioxide) listed or proposed to be listed as hazardous constituents in 40 Code of Federal Regulations 261, Appendix VIII.*

(g) *Notification of the replacement is provided to the Executive Director within 10 days following installation of the replacement facility.*<sup>45</sup>

The replacement of the ConTop reactors could not be covered by Standard Exemption 111 because air emissions from the replacement ConTop reactors exceeded 25 TPY of at least one air contaminant. Further, the ConTop reactors emit compounds listed in Code of Federal Regulations Title 40, Part 261, Appendix VIII, *e.g.*, arsenic, cadmium, and lead. In addition, there is nothing to show that Asarco provided notification to the Executive Director of TCEQ within ten days following installation of the replacement ConTop reactors.

Because Asarco never notified TCEQ of the replacement of the ConTop reactors, it is not possible for TCEQ to have evaluated what type of revision of Air Quality Permit No. 20345 was required, but based on TCEQ rules, it is clear that a minimum of notification was required.<sup>46</sup> Thus, it is clear that a key piece of permitted equipment at the Asarco El Paso Plant was removed and replaced by Asarco with a new and different Asarco-built piece of equipment without the knowledge of TCEQ and without a complete evaluation of what impact the changes might have

---

<sup>45</sup> Standard Exemption 111 (as of Aug. 16, 1993) (emphasis added), available at [http://www.tceq.state.tx.us/permitting/air/permitbyrule/historical\\_rules/oldselist/se\\_aug93/108-115.html#111](http://www.tceq.state.tx.us/permitting/air/permitbyrule/historical_rules/oldselist/se_aug93/108-115.html#111). Standard Exemption 111, as of May 4, 1994, contained identical language. See Standard Exemption 111 (as of May 4, 1994), available at [http://www.tceq.state.tx.us/permitting/air/permitbyrule/historical\\_rules/oldselist/se\\_may1994/108-115.html#111](http://www.tceq.state.tx.us/permitting/air/permitbyrule/historical_rules/oldselist/se_may1994/108-115.html#111).

<sup>46</sup> Commission rules at 30 TEX. ADMIN. CODE § 116.110(a) specify the requirements for modification of an existing facility. See 30 TEX. ADMIN. CODE § 116.110(a). Since Asarco failed to notify the Commission of the modifications made to the ConTop reactors, TCEQ was not given the opportunity to evaluate the air quality impacts of the modifications as required by State law and TCEQ rules.

on emissions from the Asarco El Paso Plant. Instead, the Asarco El Paso Plant operated from 1993 through 1999, and when it re-opens will continue to operate, with this unauthorized equipment.

For these reasons, the Commission should revoke Air Quality Permit No. 20345 because Asarco failed to disclose all relevant facts to the Commission since the permit was issued in 1992.

**F. The Commission Should Revoke Air Quality Permit No. 20345 Because Asarco Has Failed to Ensure that the Management of the Asarco El Paso Plant Conforms or Will Conform to the Statutes and Rules Within the Commission's Jurisdiction.**

As illustrated in the discussions above, throughout the operational life of the Asarco El Paso Plant in the 1990s—the only time period of operation covered by Air Quality Permit No. 20345—Asarco continuously and repeatedly failed to operate the Asarco El Paso Plant in compliance with the permit, TCEQ rules, and State statute. Such a record of noncompliance is clear evidence that Asarco failed to ensure that the Asarco El Paso Plant would conform to the statutes and rules within the Commission's jurisdiction. Years of emissions violations of virtually every permitted parameter under Air Quality Permit No. 20345 demonstrate that Asarco was incapable of operating the Asarco El Paso Plant in compliance with its permit, and thus with State law and TCEQ rules. With such an abysmal operational history, the Asarco El Paso Plant should not be allowed to reopen. For these reasons, the Commission should revoke Air Quality Permit No. 20345.

Just as importantly to Asarco's ability to ensure that the management of the Asarco El Paso Plant will conform to applicable statutes and rules is Asarco's ongoing status in bankruptcy. Asarco is one of the biggest polluters in United States history, filing for bankruptcy protection largely because of its massive environmental liabilities. By its own admission, Asarco has environmental responsibility for almost one hundred sites across the United States and has



billions of dollars in environmental liabilities.<sup>47</sup> The United States (through EPA and other federal agencies) filed environmental claims against Asarco of more than \$4 billion.<sup>48</sup> Sixteen different states (including Texas on behalf of TCEQ) also filed environmental claims against Asarco in excess of \$4 billion.<sup>49</sup> In addition, private parties and tribes throughout the United States filed environmental claims against Asarco in excess of \$2 billion.<sup>50</sup> Also, approximately \$2 billion in asbestos-related claims have been asserted against Asarco.<sup>51</sup>

Claims filed in the on-going Asarco bankruptcy proceedings have exposed the consequences of emissions from the Asarco El Paso Plant on the El Paso area. Multiple federal and state regulators and private parties have asserted environmental claims against Asarco due to emissions from the Asarco El Paso Plant that settled onto the ground and into the water:

1. U.S. Environmental Protection Agency Cleanup of El Paso residences (Metals Survey Site). The U.S. Environmental Protection Agency has determined that El Paso residential soil has been contaminated from air emissions of lead and arsenic from the Asarco El Paso Plant and has ordered Asarco to clean up the contamination.<sup>52</sup> Moreover, an expert for Asarco in the bankruptcy proceeding has admitted that Asarco is one of the sources of lead and arsenic in El Paso

---

<sup>47</sup> See ASARCO LLC's Motion to Estimate Environmental Liabilities and for Implementation of Procedures for the Handling of Omnibus Objections to Environmental Claims, *In re ASARCO LLC*, et al., Case No. 05-21207, at 4 (S.D. Tex. Bankr. Ct. Jan. 30, 2007).

<sup>48</sup> See *id.* at 5.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See Statement of Aggregate Amount of ASARCO LLC's Asbestos Liability, *In re ASARCO LLC*, et al., Case No. 05-21207, at 1-2 (S.D. Tex. Bankr. Ct. Mar. 5, 2007).

<sup>52</sup> See Unilateral Administrative Order for Removal and Response Activities, *In the Matter of El Paso County Metal Survey Site, El Paso, El Paso County, Texas, Asarco, Inc., Respondent*, U.S. EPA Region 6 CERCLA Docket No. 6-8-05, at 4 (Mar. 25 [sic], 2005) (Public Interest Counsel Exhibit No. 4 in the 2005 Asarco Permitting Proceeding). The EPA Unilateral Administrative Order concluded that the conditions present at those residential properties constitute an imminent and substantial endangerment to public health, welfare, or the environment. See *id.* at 7.

residences.<sup>53</sup> Approximately 1,100 El Paso residences were identified by EPA as being contaminated by Asarco, and Asarco itself began cleaning up El Paso residences in 2005, thereby admitting its responsibility.<sup>54</sup> Approximately 300 El Paso residences remain to be cleaned up as of May 2007.<sup>55</sup>

2. El Paso Schools. The El Paso Independent School District (“EPISD”) has claims against Asarco for over \$5 million for contamination of four schools located near the Asarco El Paso Plant.<sup>56</sup>
3. El Paso citizens. Dozens of El Paso citizens have suffered toxic tort injuries arising from Asarco’s operation of the Asarco El Paso Plant.<sup>57</sup>
4. The United States Section of the International Boundary and Water Commission (“USIBWC”). The USIBWC, a federal agency, has a field office and operates the American Canal and Dam adjacent to the Asarco El Paso Plant. The USIBWC has asserted environmental claims against Asarco for over \$27 million. According to the U.S. Department of Justice, the Asarco El Paso Plant has emitted pollution into the air that has resulted in lead and arsenic contamination of soils and groundwater, and the migration of contamination continually threatens adjacent

---

<sup>53</sup> See Supplemental Expert Report of Jeffrey Zelikson and Richard Lane White on behalf of ASARCO, LLC, *In re: ASARCO LLC*, Case No. 05-21207, at 2 (S.D. Tex. Bankr. Ct. May 25, 2007). Asarco contends that there are also other sources of lead and arsenic. See *id.*

<sup>54</sup> See U.S. Environmental Protection Agency, “El Paso County Metals Site Update, El Paso, Texas/Sunland Park/Anapra Area, New Mexico” (May 2007) [hereinafter EPA Update]; see also Initial Proof of Claim (Secured) of the United States on Behalf of the United States Environmental Protection Agency, Department of Agriculture, and Department of Interior, *In re: ASARCO LLC*, Case No. 05-21207, at 20 (S.D. Tex. Bankr. Ct.).

<sup>55</sup> See EPA Update, *supra* note 54.

<sup>56</sup> See El Paso Independent School District’s Update of Claim Amount, Designation of Experts and Witnesses and Designation of Documents Supporting Expert Reports and Exhibits for Hearing Relating to Docket No. 3675 Estimation of ASARCO LLC’s Environmental Liabilities, *In re: ASARCO LLC*, Case No. 05-21207, at 1 (S.D. Tex. Bankr. Ct.).

<sup>57</sup> See ASARCO LLC’s Motion to Approve (A) Compromise and Settlement of Certain Non-Asbestos Toxic Tort Claims and (B) Settlement of Certain Minors Claims, *In re: ASARCO LLC*, et al., Case No. 05-21207, at 4 & 7 (S.D. Tex. Bankr. Ct., Jan. 23, 2008).

properties and the Rio Grande River, which is located next to the Asarco El Paso Plant.<sup>58</sup>

5. The State of Texas on Behalf of TCEQ. The Commission has filed multiple claims against Asarco for environmental contamination and violations throughout the State of Texas, including claims relating to clean up of the Asarco El Paso Plant, Supplemental Environmental Projects (“SEPs”), civil fines and penalties for non-compliance with Consent Decrees and Orders, and \$600,000 for costs already incurred in cleanup of the El Paso Metals Survey Site.<sup>59</sup>

Although these claims underscore the extent of contamination from past air emissions from the Asarco El Paso Plant, the concern today is with future emissions from the plant. Based on Asarco’s past operational history at the Asarco El Paso Plant, it is impossible for Asarco to ensure that it can conform to applicable statutes and regulations.

It should also be noted that there is considerable uncertainty regarding whether Asarco will even be the future operator of the Asarco El Paso Plant. Through the bankruptcy process, Asarco is actively seeking plan sponsors to purchase all or substantially all of Asarco’s assets, which could include the Asarco El Paso Plant.<sup>60</sup> If Asarco is not the future operator of the

---

<sup>58</sup> See United State’s Opening Pre-Trial Brief Regarding Estimation of Environmental Claims at the United States Section, International Boundary and Water Commission, United States and Mexico Site, *In re: ASARCO LLC*, et al., Case No. 05-21207, at 1-5 (S.D. Tex. Bankr. Ct.) (Nov. 29, 2007) [hereinafter USIBWC Brief]; see also Supplemental Proof of Claim of the United States on Behalf of the United States Environmental Protection Agency, the Department of Agriculture, the Department of Interior, and the United States Section of the International Boundary and Water Commission, Against ASARCO, LLC, *In re: ASARCO LLC*, et al., Case No. 05-21207, at 48 (S.D. Tex. Bankr. Ct.).

<sup>59</sup> See Proofs of Claim Filed by the Texas Commission on Environmental Quality Against ASARCO, LLC, *In re: ASARCO LLC*, et al., Case No. 05-21207 (S.D. Tex. Bankr. Ct.).

<sup>60</sup> See Motion of Asarco LLC for Entry of Order Approving Bid Procedures in Connection with Selecting a Chapter 11 Plan Sponsor and Exit Transaction under a Chapter 11 Plan, *In re: ASARCO LLC*, et al., Case No. 05-21207 (S.D. Tex. Bankr. Ct. Feb. 4, 2008); see also Transcript of Motions Hearing, *In re: ASARCO LLC*, et al., Case No. 05-21207, at 45 & 58 (Testimony of Mr. Joseph Lapinsky, President and CEO of ASARCO, LLC) (S.D. Tex. Bankr. Ct. Apr. 11, 2007); ASARCO LLC, Plan of Reorganization Exit Process Timeline, *In re: ASARCO LLC*, et al., Case No. 05-21207 (S.D. Tex. Bankr. Ct.).

Asarco El Paso Plant it cannot ensure that the management of the plant will conform to applicable statutes and rules.

For the reasons identified above, TCEQ should revoke Air Quality Permit No. 20345 because Asarco has failed to ensure that management of the Asarco El Paso Plant conforms or will conform to statutes and rules within the Commission's jurisdiction.

**G. The Commission Should Revoke Air Quality Permit No. 20345 Because Asarco Abandoned Operations under the Permit.**

As addressed in detail in Section I, *supra*, and Section H.3., *infra*, Asarco shutdown the Asarco El Paso Plant in 1999; thus, the plant has not been operational in over nine years. As late as 2005, Asarco could not demonstrate that it intended to re-start the Asarco El Paso Plant. Asarco's recent claims that it intends to start the plant does not mean that Asarco had not abandoned the operations since 1999. In fact, EPA adopts a presumption under its reactivation policy, discussed below, that a facility that has sat idle for two years or more has been effectively abandoned, and its restart should be reviewed under current regulatory provisions and considering the surrounding, possibly changed, environment. Among the factors for determining the operator's intent as to whether or not a shutdown is permanent is the status of the source's operating permit and whether permit fees have been paid. According to statements by TCEQ staff, Asarco had not paid its Title V fees, and after shutdown in 1999, Asarco allowed its Title V permit to lapse. Thus, the Commission should revoke Air Quality Permit No. 20345 because Asarco has abandoned operations under the permit.

**H. The Commission Should Revoke, or in the Alternative Suspend, Air Quality Permit No. 20345 Because Changes in Conditions in the Area of the Asarco El Paso Plant Require Elimination of the Discharge Authorized by the Permit.**

**1. *The El Paso Area Has Changed Dramatically Since Air Quality Permit No. 20345 Was Issued in 1992.***

Much has changed in the El Paso area since Air Quality Permit No. 20345 was issued in 1992. For example, the combined population of El Paso County, Texas and Ciudad Juarez, Chihuahua, Mexico in 1991 was 1,390,109. In 2005, the combined population was 2,047,797.<sup>61</sup> It is estimated that the combined population in 2016 will be 2,768,277.<sup>62</sup> Thus approximately three-quarters of a million more people would be affected by the emissions from the Asarco El Paso Plant in 2008 than were affected in 1992.

In addition, the character of the El Paso area continues to change. The first new medical school in the country in more than thirty years is under construction in El Paso. A company located a large data processing center in El Paso and already employs approximately three hundred people and expects to eventually employ over 1,000 people. Due to the U.S. Army's decision to realign military bases, a significant influx of new people will soon be moving to the El Paso area. With the people, there will be many professional services and support businesses, leisure and recreational facilities, and similar businesses required to support the needs of the new residents.

But in addition to the changes that have occurred in the El Paso area, a key unique factor of the current Asarco permit is that Air Quality Permit No. 20345 has never been completely reviewed under state or federal law to determine the total impact of emissions from the Asarco El Paso Plant. This is due to the fact that the permit application proposed by Asarco and approved by the TACB in 1992 contained significant errors regarding emissions from the Asarco

---

<sup>61</sup> Prefiled Testimony of Verónica Rosales, *Application of Asarco Incorporated for Renewal of Air Quality Permit No. 20345*, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR at tbl. A (May 18, 2005).

<sup>62</sup> *Id.*

El Paso Plant. Over the years it was demonstrated that SO<sub>2</sub> emissions were double the levels evaluated in 1992, and CO, NO<sub>x</sub>, VOCs, and certain PM constituents were multiple times higher than approved under the permit. Therefore, the actual impact of emissions from the Asarco El Paso Plant has never been properly evaluated; in particular the federal PSD permitting requirements, which are intended to fully evaluate major sources of air contaminants, have never been applied to the Asarco El Paso Plant.

## ***2. More Is Known Today Regarding Impacts of Emissions from the Asarco El Paso Plant.***

The primary indicator of lead exposure is a measurement of the concentration of lead in blood, *i.e.*, the “blood-lead standard.”<sup>63</sup> Over the past thirty years the “blood-lead standard” has been lowered twice, recognizing new information regarding the potential negative health impacts from lead exposure.<sup>64</sup> Current research shows that lead-induced health effects may occur at even lower concentrations in blood, and the medical community is considering lowering the standard even further.

On the other hand, the current federal air quality standard, or NAAQS for lead, as established by EPA in 1978, has not been updated in nearly thirty years. The NAAQS for lead of 1.5 micrograms per cubic meter (µg/m<sup>3</sup>) was established in 1978 to ensure “safe” blood-lead concentrations based on a now out-of-date, and unprotective, blood-lead standard.<sup>65</sup> In other words, the health standard for lead in blood, *i.e.*, the blood-lead standard, has been reduced twice in response to ongoing research, but EPA has not lowered the NAAQS for lead in air to

---

<sup>63</sup> See, *e.g.*, Tr. at 1313 (July 19, 2005) (Cross Exam (by Ms. Layla Aflatooni) of Ms. Lucy Fraiser, Ph.D.).

<sup>64</sup> See *id.*

<sup>65</sup> 40 C.F.R. § 50.12; see also Tr. at 1313 (July 19, 2005) (Cross Exam (by Ms. Layla Aflatooni) of Ms. Lucy Fraiser, Ph.D.).

correspond to the lowered blood-lead standard. The current lead NAAQS is based on a blood-lead standard three times higher than the currently accepted blood-lead standard.<sup>66</sup>

The Environmental Protection Agency is now taking preliminary steps to tighten the lead NAAQS. In a review of the lead NAAQS released in November 2007, EPA staff concluded that a significant reduction is necessary to protect the public's health and recommended that the standard be reduced from 1.5  $\mu\text{g}/\text{m}^3$  to a level between 0.02  $\mu\text{g}/\text{m}^3$  and 0.2  $\mu\text{g}/\text{m}^3$ .<sup>67</sup> Staff of EPA's Office of Air Quality Planning and Standards ("OAQPS") also recommended that a monthly averaging time (rather than the current quarterly averaging time) be implemented.<sup>68</sup> In December 2007, EPA released an Advance Notice of Proposed Rulemaking ("ANPR") to invite comment from all interested parties on the adequacy of the current lead NAAQS and potential revisions to the standard.<sup>69</sup> It is expected that a proposed rulemaking will be published in March 2008.<sup>70</sup>

The combined permitted lead emissions from the Asarco El Paso Plant, which includes Air Quality Permit No. 20345 and Permit No. 4151, authorizes the Asarco El Paso Plant to emit 4.7 tons of lead into the El Paso air annually, making it one of the highest lead emitters in the entire State of Texas. This high volume of emissions coupled with the historic lead contamination in El Paso, the high levels of lead found in the blood of children in the El Paso and Ciudad Juarez areas in the 1970s, and the on-going cleanup of lead contaminated yards throughout the area, all of which resulted from Asarco's past operations, would only aggravate existing health threats from historical lead exposure in the El Paso area.

---

<sup>66</sup> See Tr. at 1313 (July 19, 2005) (Cross Exam (by Ms. Layla Aflatooni) of Ms. Lucy Fraiser, Ph.D.).

<sup>67</sup> See U.S. Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Lead: Final Staff Paper and Human Exposure and Risk Assessment Report* at 1 (Nov. 2007), available at [http://www.epa.gov/ttnnaqs/standards/pb/data/20071101\\_pb\\_fs.pdf](http://www.epa.gov/ttnnaqs/standards/pb/data/20071101_pb_fs.pdf).

<sup>68</sup> See *id.* at 2.

<sup>69</sup> See 72 Fed. Reg. 71,488 (Dec. 17, 2007).

<sup>70</sup> See *id.* at 71,493.

No health analysis of the combined impact of persons exposed to Asarco's lead emissions into the air, coupled with exposure to soil contamination has ever been conducted. Further, as briefly addressed above, the USIBWC recently disclosed that the groundwater in the vicinity of the Asarco El Paso Plant is contaminated, potentially threatening a portion of the drinking water supply of the area.<sup>71</sup> No TCEQ division or regulatory program has reviewed the combined impact of soil and air exposure, let alone the potential water exposure. The Commission limited its evaluation to only the air emissions from the operations of the Asarco El Paso Plant during its health impact review, presumably under the assumption that soil exposure is reviewed under other programs. However, soil contamination and water contamination programs are also interpreted to be so narrowly focused as to only consider exposures resulting from those media, as appropriate. Incredibly, the combined impact of emissions from the Asarco El Paso Plant has never been reviewed.

Based on the new information currently being considered by EPA, and the potential that EPA will adopt a significantly more stringent lead NAAQS, it is clear that the lead emissions from the Asarco El Paso Plant have been evaluated based on out-dated and unprotective standards. The Commission should revoke Air Quality Permit No. 20345 until such time as the health effects of the emissions of lead from the Asarco El Paso Plant can be evaluated based on a standard that is protective of the citizens of El Paso and the surrounding area.

**3. *Because EPA's Reactivation Policy Has Been Triggered, the Commission Should, at a Minimum, Suspend Air Quality Permit No. 20345 Until Such Time as a Complete PSD Review Has Been Completed.***

Just as importantly, policies espoused by EPA and TCEQ recognize that an air quality permit must be re-evaluated when a facility, such as the Asarco El Paso Plant, has experienced a long-term shutdown. Pursuant to EPA's reactivation policy, stationary sources that shut down,

---

<sup>71</sup> See USIBWC Brief, *supra* note 58.



even temporarily, may be considered new sources upon reactivation, and thus must undergo nonattainment or PSD review, as appropriate. Because of the required PSD review, Air Quality Permit No. 20345 must be re-evaluated and cannot simply be allowed to continue in its current form. Instead, Asarco must file an application to amend Air Quality Permit No. 20345 and to request issuance of a federal PSD permit, and such application must be subject to all PSD permitting review requirements. For these reasons, the Commission, at the very least, should suspend Air Quality Permit No. 20345, until such time as the reactivation policy has been implemented and the complete PSD review has occurred.

The Environmental Protection Agency's reactivation policy requires facilities that are being reactivated after being shutdown for extended periods of time to undergo nonattainment or PSD review, as appropriate. The reactivation policy identifies that the startup of a facility that has been shutdown for an extended period of time is a change in operation and thus requires PSD review. In other words, the change in operations for the facility is the increase in its hours of operation from zero to whatever is requested in the permit.

Pursuant to EPA's reactivation policy, the review is fact specific, but there is a presumption that a shutdown is permanent if it lasts longer than two years. As EPA stated in 1978:

A source which had been shut down would be a new source for PSD purposes upon reopening if the shutdown was permanent. . . . Whether a shutdown was permanent depends upon the intention of the owner or operator at the time of the shutdown as determined from all the facts and circumstances, including the cause of the shutdown and the handling of the shutdown by the State. *A shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State, should be presumed permanent.* The owner or operator proposing to reopen the source would have the burden of showing that the shutdown was not permanent.<sup>72</sup>

---

<sup>72</sup> Memorandum from Director, Division of Stationary Source Enforcement, U.S. Environmental Protection Agency, to Mr. Stephen A. Dvorkin, Chief, General Enforcement Branch, Region II, U.S. Environmental Protection Agency (Sept. 6, 1978) (emphasis added).

The Environmental Protection Agency's application of the reactivation policy has routinely required facilities that have been shutdown for a number of years, such as the Asarco El Paso Plant, to undergo nonattainment or PSD review in order to re-start operations.<sup>73</sup>

For example, EPA reviewed the startup of the Monroe Electric Generating Plant in Monroe, Louisiana, in 1999, and determined that, because the facility had been shutdown for an extended period of time, a PSD review was required.<sup>74</sup> In the 1999 Monroe Electric Generating Plant decision (the "Monroe Order"), EPA wrote:

[R]eactivation of facilities that have been in an extended condition of inoperation may trigger PSD requirements as "construction" of either a new major stationary source or a major modification of an existing stationary source. Where facilities are reactivated after having been permanently shutdown, operation of the facility will be treated as operation of a new source. Alternatively, shutdown and subsequent reactivation of a long-dormant facility may trigger PSD review by qualifying as a major modification.<sup>75</sup>

EPA's standard, as set out in the Monroe Order, has two separate prongs: (1) where the facility is treated as a new source; and (2) where the re-start of the facility is treated as a major modification. Both prongs trigger PSD review for the Asarco El Paso Plant.

With regard to a new source, EPA wrote:

While the policy suggests that the key determination is whether, at the time of shutdown, the owner or operator intended shutdown to be permanent, in practice, after two years, statements of original intent are not considered determinative. Instead, EPA assesses whether the owner or operator has demonstrated a continuous intent to reopen.

. . . EPA believes owners and operators of shutdown facilities must continuously demonstrate concrete plans to restart the facility sometime in the

---

<sup>73</sup> For example, an incinerator that had been shut down for five years and removed from the State of New York's emissions inventory was presumed new upon reactivation and was subject to PSD permitting requirements. See Memorandum from Mr. Edward E. Reich, Director, Stationary Source Enforcement Division, U.S. Environmental Protection Agency, to Mr. William K. Sawyer, General Enforcement Branch, Region II, U.S. Environmental Protection Agency (Aug. 8, 1980).

<sup>74</sup> See Order Partially Granting and Partially Denying Petition for Objection to Permit, *In the Matter of Monroe Electric Generating Plant, Entergy Louisiana, Inc. Proposed Operating Permit*, Petition No. 6-99-2 (June 11, 1999) [hereinafter *Monroe Order*], available at [http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/entergy\\_decision1999.pdf](http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/entergy_decision1999.pdf).

<sup>75</sup> *Id.* at 8.

reasonably foreseeable future. If they cannot make such a determination, it suggests that for at least some period of the shutdown, the shutdown was intended to be permanent. Once it is found that an owner or operator has no real plan to restart a particular facility, such owner or operator cannot overcome this suggestion that the shutdown was intended to be permanent by later pointing to the more recent efforts to reopen the facility.<sup>76</sup>

Asarco fails this test because it cannot demonstrate that it had concrete plans to restart the Asarco El Paso Plant sometime in the reasonably foreseeable future when this issue was addressed during the Hearing on the Merits in the 2005 Asarco Permitting Proceeding, six years after the Asarco El Paso Plant was shutdown. When questioned regarding the potential start-up plans for the Asarco El Paso Plant, Asarco's expert witness, Mr. Castor, could not identify if there were any plans for startup.<sup>77</sup> While Asarco now claims that it has all types of plans in place regarding the future startup of the Asarco El Paso Plant, it does not appear that anything more than the general statement that Asarco intended to reopen sometime in the future was in place until Asarco was threatened with the possibility of losing its case regarding renewal of Air Quality Permit No. 20345. In other words, Asarco has not demonstrated a continuous intent to re-open at a foreseeable time in the future, and thus would be considered a new source under this prong of EPA's reactivation policy.

---

<sup>76</sup> *Id.* at 9-10.

<sup>77</sup> Mr. Castor testified:

Q. And have you seen a document prepared by Asarco that identifies when this facility is going to restart?

A. No, there's no such document that I know of.

Q. And so there is no current intent to restart it any certain date?

A. Well, I certainly hope it starts at some certain date, but I'm not privy to the strategic planning Asarco may have on that. I don't know of anything like that.

Q. So it could be five years, 10 years, 15 years, 20 years down the road before it restarts?

A. Theoretically, it could.

Tr. at 165-66 (July 11, 2005) (Cross Exam (by Mr. Richard Lowerre) of Mr. Lawrence Castor).

In addition, Asarco triggers the “major modification – change in the method of operation” prong of EPA’s reactivation policy, as set out in the Monroe Order. With regard to this prong of the reactivation policy, EPA wrote in the Monroe Order:

Restart of a long-dormant facility may also be treated as a major modification subject to PSD review if it represents a “change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.”<sup>78</sup>

This prong looks at a change in operation as the change from nonoperational status to operational status, and also considers the net increase of emissions from zero emissions at the nonoperational state to what the permitted emissions will be when the facility restarts. Under this standard, Asarco’s startup of the Asarco El Paso Plant would be considered a major modification and would trigger nonattainment or PSD review.

Even before issuance of the Monroe Order by EPA, the Commission had acknowledged the applicability of EPA’s reactivation policy to air quality permits in Texas; and thus, the reactivation policy must be addressed by the Commission.<sup>79</sup> Application and implementation of EPA’s reactivation policy must be addressed by the Commission. While Asarco may have represented in 1999 that its shutdown was only temporary and while Asarco may now be claiming that it has plans to restart the Asarco El Paso Plant pending issuance of the renewed permit, the time in between tells another story. It tells the story of a facility that has now been dormant for over nine years, allowing corrosion of equipment and failing to maintain up-to-date emissions control equipment.<sup>80</sup> It tells the story of an owner or operator that as late as July 2005, at the Hearing on the Merits in the 2005 Asarco Permitting Proceeding, could not identify if or

---

<sup>78</sup> Monroe Order, *supra* note 74, at 11.

<sup>79</sup> See Interoffice Memorandum from Mr. Ruben Herrera, P.E., Technical Specialist, Texas Natural Resource Conservation Comm’n, to New Source Review Permits (NSRP) Engineers, Texas Natural Resource Conservation Comm’n (Aug. 4, 1998).

<sup>80</sup> See generally Eric Partelpoeg, EHP Consulting, Inc., Asarco El Paso Smelter Review and Comments at 6-7 (Apr. 9, 2007) (Attachment K to the ED Report).

when the Asarco El Paso Plant would re-start operations. It tells the story of a facility that is clearly covered by both prongs of EPA's reactivation policy, as identified in the Monroe Order.

Because EPA's reactivation policy is triggered by any attempt by Asarco to re-start operation of the Asarco El Paso Plant, PSD review is required. Because of the required PSD review, Air Quality Permit No. 20345 must be re-evaluated and cannot simply be allowed to continue in its current form. Asarco must be required to file an application to amend Air Quality Permit No. 20345 and to request issuance of a federal PSD permit, and such application must be subject to all PSD permitting review requirements. For these reasons, the Commission, at the very least, should suspend Air Quality Permit No. 20345, until such time as the reactivation policy has been implemented and the complete PSD review has occurred.

### **III. THE PETITIONERS REQUEST THAT THE COMMISSION HOLD A HEARING REGARDING THIS PETITION FOR REVOCATION.**

Texas Health and Safety Code Section 7.302 and the related sections governing revocation of permits contemplate that the Commission will hold a public hearing to consider evidence regarding a petition for revocation.<sup>81</sup> As such, the Petitioners request that the Commission provide the proper public notice and hold an evidentiary hearing regarding this *Petition for Revocation of Air Quality Permit No. 20345, Issued to Asarco, Incorporated.*

### **IV. PRAYER**

To protect the safety, health, and welfare of the public and the citizens of El Paso and the surrounding areas in Texas and New Mexico and to protect and maintain the environment, for all of the reasons addressed above, the City of El Paso and the State of New Mexico Environment Department request that the Texas Commission on Environmental Quality provide the proper notice and hold an evidentiary hearing as contemplated by Texas Water Code Sections 7.302 and

---

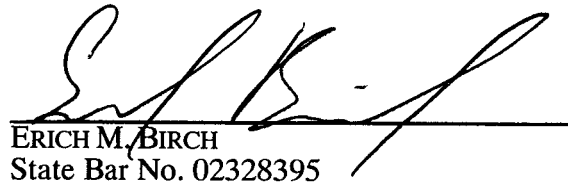
<sup>81</sup> TEX. HEALTH & SAFETY CODE §§ 7.302 & 7.306.

7.306, and after such hearing, either (1) revoke Air Quality Permit No. 20345 as issued to Asarco, based on many of the conditions set out in Texas Water Code Section 7.302(b), or in the alternative (2) suspend Air Quality Permit No. 20345 until such time as the Prevention of Significant Deterioration Review, as required by the Environmental Protection Agency's reactivation policy, can be completed.

Respectfully submitted,

**Birch, Becker & Moorman, LLP**  
7000 North MoPac Expressway  
Plaza 7000, Second Floor  
Austin, Texas 78731  
(512) 514-6747  
(512) 514-6267 – fax

By:

  
ERICH M. BIRCH  
State Bar No. 02328395


ANGELA K. MOORMAN  
State Bar No. 24007700

**CHARLIE McNABB, CITY ATTORNEY**  
City of El Paso

By: Laura Prendergast Gordon  
Deputy City Attorney  
State Bar No. 00791192  
#2 Civic Center Plaza  
El Paso, Texas 79901-1196  
(915) 541-4550  
(915) 541-4190 – fax

**ATTORNEYS FOR THE CITY OF EL PASO**

**NEW MEXICO ENVIRONMENT DEPARTMENT**

  
By: (William G. GRANTHAM, for!)  
Ron Curry, Secretary  
New Mexico Environment Department  
1190 St. Francis Drive  
Santa Fe, New Mexico 87502-6110  
(505) 827-2855  
(505) 827-2836 – fax

**REPRESENTATIVE OF THE NEW MEXICO  
ENVIRONMENT DEPARTMENT**

**PETITION BY THE CITY OF EL PASO AND THE NEW MEXICO ENVIRONMENT DEPARTMENT FOR REVOCATION OF  
AIR QUALITY PERMIT NO. 20345, ISSUED TO ASARCO, INCORPORATED**

### **CERTIFICATE OF SERVICE**

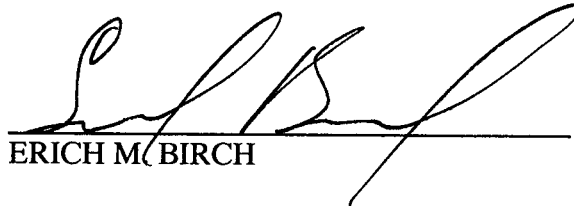
I certify that an original and eleven true and correct copies of the foregoing document have been filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality. I also certify that a true and correct copy of the foregoing document has been served upon the individuals identified below via facsimile, certified mail return receipt requested, hand delivery, overnight delivery, or electronic mail addressed to:

Mr. Les Trobman General Counsel (MC-101) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building F Austin, Texas 78753 (delivery) Fax: (512) 239-5533	
Ms. Emily A. Collins Assistant P.I.C. (MC-103) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building F Austin, Texas 78753 (delivery) Fax: (512) 239-6377	Representing the Office of Public Interest Counsel of TCEQ
Mr. Booker Harrison Senior Attorney/Air (MC-173) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building F Austin, Texas 78753 (delivery) Fax: (512) 239-0606	Representing the Executive Director of TCEQ



Ms. Pamela M. Giblin Mr. Derek R. McDonald Baker Botts LLP 1500 San Jacinto Center 98 San Jacinto Blvd. Austin, Texas 78701-4078 Fax: (512) 322-8342	Representing ASARCO LLC
Docket Clerk Office of Chief Clerk (MC-105) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building F Austin, Texas 78753 (delivery) Fax: (512) 239-3311	

On this the 17th day of March, 2008

  
ERICH M. BIRCH