

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN INTERIM ORDER

concerning Application of ASARCO, Incorporated to
renew Air Quality Permit No. 20345, TCEQ Docket
No. 2004-0049-AIR, SOAH Docket No. 582-05-0593

On February 8, 2006, the Texas Commission on Environmental Quality (Commission or TCEQ) considered during its public meeting the application of ASARCO, Incorporated, to renew Air Quality Permit No. 20345. The application was presented to the Commission with a Proposal for Decision by the Honorable William G. Newchurch and Veronica S. Najera, Administrative Law Judges (ALJs) with the State Office of Administrative Hearings (SOAH). The Commission then heard from various local and state officials on this matter, including officials from New Mexico and Mexico.

During its public meeting, the Commission listened to the oral argument of the parties and asked questions of the parties during and after their oral presentations. On completion of the Commission's deliberation on the evidence in the record and the applicable law, including Section 382.055 of the Texas Clean Air Act (TCAA), Chapter 382 of the Texas Health & Safety Code, the Commission determined that ASARCO, Incorporated (Applicant or ASARCO) had not met the statutory requirements for renewal of its permit. Specifically, the Commission determined that, based on the evidentiary record from SOAH and particularly, the findings of the ALJs' with regard to predicted exceedances of the significance level for PM_{10} , $PM_{2.5}$, and NO_2 , and of the SO_2 area control plan compliance standard, ASARCO has failed to demonstrate the effectiveness of its existing emission control equipment and practices as provided in Section 382.055(d)(2), which is a minimum condition for renewal of its permit.

The Commission stated that Section 382.055(d)(2) of the TCAA requires the Commission to consider both the condition and effectiveness of existing emission control equipment and practices. Given the length and scope of the shutdown, the Commission explained current modeling in accordance with applicable federal and state law and an investigation of the site by the Executive Director is needed so that the Commission may make the determination required by Section 382.055(d)(2). The Commission also explained that current modeling and an investigation by the Executive Director are needed so that the Commission may make the determination under Section 382.055(e) on what additional requirements should be imposed in light of the effect of the emissions on the surrounding area. The Commission further stated an examination by the Executive Director of the equipment and facilities on-site is necessary to determine if a renewal application is appropriate, or if instead, a permit amendment application is required. Thus, the Commission determined a remand of ASARCO's permit application to the Executive Director by interim order is required under subsections (d)(2) and (e) of Section 382.055 as well as subsections (f) and (g) of that section, which require issuance of a report on and schedule for additional requirements prior to a Commission decision denying the permit application.

The Commission also determined to include the ALJs' findings of fact in its interim order, which concern jurisdictional matters, designation and withdrawal of parties, and general background with regard to the El Paso Plant. In addition, the Commission allocated all of the transcript costs to ASARCO, and the Commission ordered ASARCO to pay all of the transcription costs. Accordingly, the ALJs' findings and conclusions with regard to transcript costs are included herein as consistent with the Commission's determination that ASARCO has failed to demonstrate the effectiveness of its existing emission control equipment and practices as provided in Section 382.055(d)(2).

THEREFORE, the Commission makes the following Findings of Fact (FOF) and Conclusions of Law (COL):

I. FINDINGS OF FACT

Introduction

1. On March 28, 2002, ASARCO, Incorporated, (Applicant or ASARCO) applied to the Commission to renew its Air Quality Permit No. 20345 (Permit, Current Permit, or Permit 20345).
2. The requested renewal would allow Applicant to resume its copper smelting operations, which it ceased in 1999.
3. On April 28, 2004, during its open meeting and public comment period, the Commission received a request for hearing on the renewal issue.
4. On May 14, 2004, the Commission, exercised its plenary authority to hold a hearing in the public interest and issued an interim order referring two issues to SOAH:
 - a. Whether the operation of the El Paso Copper Smelter under the terms of the proposed permit will cause or contribute to a condition of air pollution; and
 - b. Whether the Applicant's compliance history for the last five years of operation of the El Paso Primary Copper Smelter warrant the renewal of Air Quality Permit No. 20345.
5. The Commission also assigned the burden of proof on these issues to ASARCO.

Procedural History and Parties

6. On January 27, 2005, the ALJs held a preliminary hearing in this matter at the University of Texas at El Paso.

7. Notice of the preliminary hearing was published in the *El Paso Times*, a newspaper generally circulated in El Paso County, on December 26, 2005, and mailed by the Commission's Chief Clerk to persons who had previously requested such notice.
8. At the preliminary hearing, parties were admitted and aligned as follows:

ADMITTED PARTIES	REPRESENTATIVE
ASARCO	Mr. Eric Groten and Mr. Patrick Lee
City of El Paso (El Paso)	Mr. Erich M. Birch
Executive Director (ED)	Mr. Daniel Long and Mr. Brian MacLeod
Office of Public Interest Counsel (PIC)	Ms. Anne Rowland
Sierra Club, <i>et al.</i> (Sierra Club) <ul style="list-style-type: none"> • Quality of Life El Paso • El Paso County Medical Society • Get the Lead Out Coalition • Senator Eliot Shapleigh, individually • UTEP Students Against ASARCO • UTEP Students Government Association • El Paso High Neighborhood Association • Matthew F. Carroll, individually • Debra Kelly, individually • Juan Garza, individually 	Mr. Richard W. Lowerre and Ms. L. Layla Aflatooni
Sandoval, <i>et al.</i> (Sandoval or Anapra Group) <ul style="list-style-type: none"> • Southside Low Income Housing Development • Linda Sandoval, individually • Michelle Velasco, individually • Olga Arguelles, individually 	Mr. Taylor Moore

<p>Sunset Heights ACORN, <i>et al.</i> (ACORN)</p> <ul style="list-style-type: none"> • Henry L. Pfafflin, individually • Edward C. Patrykus, individually • Rodolfo Urias, individually • Blanca Vega de Urias, individually • Dr. Fidel Urrutia, individually • Arturo Moreno, individually 	<p>Mr. Michael R. Wyatt, Mr. Enrique Valdivia, and Ms. Veronica Carbajal</p>
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9. The PIC is currently represented by Emily A. Collins. Ms. Rowland has left the PIC.
10. On March 7, 2005, Juan Garza filed a motion to withdraw as a party. His motion was granted via Order No. 10.
11. On May 31, 2005, the El Paso Medical Society filed a motion to withdraw as a party. Its motion was granted via Order No. 24.
12. On March 31, 2005, the El Paso High Neighborhood Association filed a motion to withdraw as a party. Its motion was granted via Order No. 9.
13. On March 31, 2005, Matthew F. Carroll filed a motion to withdraw as a party. His motion was granted via Order No. 9.
14. Subsequent to the preliminary hearing, the ALJs established a docket control order designed to complete the proceeding within the maximum expected duration set by the Commission. In its Interim Order, the Commission set October 27, 2005, as the date by which the PFD would be due.
15. The following are the principal procedural events in the case:

DATE	PROCEDURAL SCHEDULE
Jan. 27, 2005	Preliminary hearing at which parties were designated and aligned.
March 14, 2005	Deadline for each party to serve TRCP 194 disclosures. Discovery began.
March 21, 2005	ASARCO pre-filed its direct-case evidence in writing, including all testimony and exhibits.
May 6, 2005	First prehearing conference.
May 6, 2005	All parties, other than ASARCO, El Paso, and the ED, pre-filed their direct case evidence in writing, including all testimony and exhibits.
May 13, 2005	Second prehearing conference.
May 18, 2005	El Paso pre-filed its direct-case evidence in writing, including all testimony and exhibits.
May 23, 2005	Deadline to submit written discovery requests.
June 13, 2005	ED pre-filed his direct-case evidence in writing, including all testimony and exhibits.
June 27, 2005	Close of discovery/Final day to take depositions/Deadline to file objections to and motions to strike pre-filed evidence/Deadline for ASARCO to file list of rebuttal witnesses and brief summary of each's rebuttal testimony/Deadline to file dispositive motions.
July 5, 2005	Deadline to file responses to objections to pre-filed evidence and to dispositive motions.
July 8, 2005	Third Prehearing conference.
July 11- 22, 2005	Hearing on the merits.
August 19, 2005	Deadline to file closing briefs.
August 29, 2005	Deadline to file replies to closing briefs.
October 27, 2005	Deadline to issue Proposal for Decision.

General Background

16. ASARCO has operated a smelting and refining operations at its El Paso facility for over one-hundred years. The original plant was built in 1887, along the Rio Grande, to process lead ores from the mines in Mexico and the Southwest.
17. In 1899, the smelter incorporated into the American Smelting and Refining Company, and it so operated until 1975, when the company officially became ASARCO, Incorporated.
18. The ASARCO EL Paso Plant is situated at the juncture of two countries (the United States and Mexico) and three states (Texas, New Mexico, and the Mexican state of Chihuahua). The ASARCO plant is located immediately north and east of the Rio Grande. It lies in the Rio Grande Canyon between the Franklin Mountains and the Cerros del Muleros in Mexico.
19. The ASARCO EL Paso Plant is bounded by Interstate 10 on the east, Executive Center Boulevard to the north, the American Canal to the southwest, and Paisano Boulevard to the west.
20. Before closing operation, ASARCO smelted copper in El Paso using a Continuous Top-Feed Oxygen Process (ConTop).
21. Permit 20345, which this case concerns, was issued by the Texas Air Control Board (TACB) in 1992 to permit the new ConTop reactors at the ASARCO El Paso Plant.
22. The ConTop reactors replaced ASARCO's previously grandfathered copper-smelting facilities.

23. ASARCO also holds Permit No. 4151, which authorizes unloading operations, certain conveyance systems, and other operations up to and including the bedding building at the El Paso plant.
24. ConTop was implemented in March 1993, and has been the exclusive operating unit used for the production of copper anodes since then.
25. Since Permit 20345's 1992 issuance, several permit amendments and alterations have been approved by the ED without contested case hearings.
26. Applicant ceased its copper smelting operations in 1999 and remains in an extended condition of inoperation.

Transcript Costs

27. The ALJs ordered ASARCO to pay for transcripts of the hearing for the ALJs' and the Commission's use and for the Commission's record. No party requested the transcript.
28. This is not a rate case, and none of the parties who is potentially liable for transcript costs is a state or federal agency.
29. ACORN's members, who are represented by Texas Rio Grande Legal Aid, Inc., a non-profit agency that specializes in providing free civil legal services to indigents, do not have money to cover the transcript costs.
30. All of the parties actively participated in the hearing, though some far more than others. A rough count of the number of transcript pages devoted to each party's examination of witnesses shows that the parties participated to approximately the following extent:

PARTY	PERCENT
ASARCO	20
Sandoval	28
El Paso	32
Sierra Club	5
ACORN	6
PIC	5
ED	3

31. ASARCO and El Paso extensively used and cited to the transcript in their post-hearing arguments. Sandoval did not file an argument. The other parties used it approximately in proportion to their participation.
32. ASARCO put on a difficult to understand case primarily based on the 1992 modeling, which did not represent what would be emitted if Permit 20345 were renewed, and that contained many questionable adjustments and gaps.
33. The nature of ASARCO's case caused the hearing to take longer than it should have.
34. El Paso took the lead for the Protestants on nearly every issue.
35. The amount of time that El Paso took during the hearing was in very large part due to the odd nature of ASARCO's substantive case.
36. ASARCO's attorneys and witnesses were orderly, prepared, efficient, and professional at the hearing.

37. The Anapra Group took an enormous amount of time during the hearing pursuing wildly irrelevant lines of inquiry suggesting misconduct by ASARCO and nearly every other party and witness.
38. The Anapra Group offered virtually no relevant evidence, or even irrelevant evidence that supported the thrust of its irrelevant questioning.
39. The Anapra Group's representative was repeatedly instructed by the ALJs to move on the relevant evidence, but he continually failed to do so.

CONCLUSIONS OF LAW

Transcript

1. The Commission's rules provide that the Commission will not assess transcript costs against the ED or the PIC. 30 TAC § 80.23 (d)(2).
2. Under 30 TAC § 80.23 (d)(1), the Commission considers the following relevant factors in allocating reporting and transcription costs among the other parties:
 - the party who requested the transcript;
 - the financial ability of the party to pay the costs;
 - the extent to which the party participated in the hearing;
 - the relative benefits to the various parties of having a transcript;
 - the budgetary constraints of a state or federal administrative agency participating in the proceeding;
 - in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
 - any other factor which is relevant to a just and reasonable assessment of costs.

3. Because ASARCO failed to prove that its operation under Permit 20345, if renewed, would meet the requirements for renewal of its permit in Section 382.055(d)(2) of the TCAA, it would be just and reasonable to allocate the entire transcript cost to ASARCO.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

1. The permit application filed by ASARCO on March 28, 2002, is remanded to the Executive Director.
2. ASARCO is directed to submit additional information regarding all emissions from and related to the El Paso Plant and their impacts on surrounding areas, including current modeling results, within six months of issuance of this Interim Order. Prevention of significant deterioration (PSD) area-wide modeling shall be conducted on a fifty-kilometer basis. However, with regard to the impacts of ASARCO's emissions from its El Paso Plant in New Mexico and Mexico only the impact of the emissions from Texas shall be considered.
3. The Executive Director is directed to conduct concurrently within the same six-month period a vigorous investigation of all air quality control equipment at the El Paso Plant, including related practices, and based on that investigation and the results of the information submitted in accordance with Ordering Provision 2 prepare his recommended Report and any related Schedule as required under Section 382.055 of the TCAA, which includes his written assessment of the sufficiency of existing plant control equipment and practices, within eight months of issuance of this Interim Order. In addition, the Executive Director is to assess the appropriateness of a permit amendment application rather than a renewal application for equipment that has not been previously authorized or that requires repair or replacement.

4. The Applicant's modeling analyses and the summary of the modeling results and the Executive Director's recommended Report and any related Schedule, which includes his written assessment of existing plant control equipment and practices, shall be made available to all parties by filing a copy in the El Paso regional office and in the Austin Office of the Chief Clerk. In addition, a copy of the summary of the modeling results and the Executive Director's recommended Report and any related Schedule shall be mailed to all parties on the official mailing list for the Proposal for Decision. Filings and mailing of documents in accordance with this ordering provision shall occur within two weeks of the end of the eighth-month period described in Ordering Provision No. 3.
5. All parties in this matter have seven weeks after the end of the eighth-month period to file in the Austin Office of Chief Clerk and mail to all other parties, their comments on the Applicant's modeling and related summary of results and the Executive Director's recommended Report and any related Schedule.
6. The Executive Director shall issue a response to all comments within six weeks of the end of the period for submitting comments. A copy of the Response to all Comments shall be filed in the Office of Chief Clerk and mailed to all parties.
7. The Executive Director's recommended Report and any related Schedule and the comments shall be scheduled for Commission consideration during a public meeting.
8. In accordance with the agreement of ASARCO's representative during the public meeting, ASARCO shall not restart operations at its El Paso Plant before the Commission's issuance of its final Report and any related Schedule as required by Section 382.055 of the TCAA.
9. ASARCO is allocated all of the transcript costs of the SOAH hearing, and accordingly, ASARCO shall pay all of the transcription costs.

10. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not granted in this Interim Order are denied.
11. If any provision, sentence, clause, or phrase of this Interim Order is held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Interim Order.
12. The Chief Clerk of the Texas Commission on Environmental Quality shall forward copy of this Interim Order to all parties on the official mailing list for the Proposal for Decision.

Issue date: **MAR 10 2006**

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY


Kathleen Hartnett White, Chairman