

Kathleen Hartnett White, *Chairman*  
Larry R. Soward, *Commissioner*  
Glenn Shankle, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 10, 2006

Mr. Lairy Johnson  
ASARCO, Incorporated  
P.O. Box 1111  
El Paso, Texas 79999-1111

Re: Application by ASARCO, Incorporated, to Renew Air Quality Permit No. 20345,  
Texas Commission on Environmental Quality Docket No. 2004-0049-AIR

Dear Mr. Johnson:

I am in receipt of your July 18, 2006 letter apprising me of the status of compliance with the Commission's March 10, 2006 Interim Order (Interim Order) by ASARCO, Incorporated (ASARCO). Your letter addresses two primary issues: ASARCO's interim modeling protocol and third party consultant expenses.

With regard to the modeling protocol, agency staff has reviewed the information provided to the agency on July 24, 2006. Agency staff will continue its analysis upon formal submission of ASARCO's modeling results, preferably accompanied by an independent audit, in September. Only when a third party contractor audits the results will I consider the review to be complete. This ensures a thorough and impartial review of the emissions from and related to the El Paso Plant and their impacts on surrounding areas as required by the Interim Order.

To date, my staff has completed those investigation-related items under the order for which we have the resources and expertise. More specifically, the agency has conducted a site investigation of all the air quality control equipment and related practices and assessed the appropriateness of a permit amendment application rather than a renewal application. The results of the site visit will be evaluated as part of the report required under the Interim Order. However, due to the extended suspension of operations and lack of agency expertise to assess equipment that has not been operating, staff has been unable to assess the sufficiency of existing plant control equipment and practices and whether the plant can operate in accordance with permit conditions and with industry standards and practices.

With regard to third party consultant expenses, ASARCO specifically requested a legal analysis explaining the regulatory and/or statutory basis for requiring the expenditure of funds for third party consultants. To begin, the investigation required under the Interim Order exceeds the scope of the agency's normal permit renewal permit process and requires resources beyond those appropriated to the agency for that process. In order to comply with the Interim Order, and consistent with the burden of proof an applicant carries in meeting all regulatory requirements, I provided ASARCO with two options using third party contractors to supply the additional

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information found to be lacking by the Commission. I believe the use of third party contractors ensures the impartiality and thoroughness of the additional information to be considered.

The Executive Director (ED) has several sources of legal authority to require ASARCO to perform the actions necessitated by the Commission's March 10, 2006 Interim Order. The Commission, in its Interim Order, determined, "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." As noted above, my staff has performed the investigatory tasks for which we have the resources and expertise. Additionally, it is imperative that the information considered by the Commission be viewed as impartial by all parties in this matter. Therefore, in administering the Commission's Interim Order, I find it necessary and advisable to acquire the services of a process engineer to determine the effectiveness of existing, out-of-operation control equipment and a modeler to audit the modeling results. Pursuant to Texas Health & Safety Code (THSC) §382.022, I have authority to require such an investigation.

In seeking authorization to operate, applicants must submit an application, copies of plans and specifications, and "any other information the commission considers necessary." THSC §382.0515. For air quality permit renewals 30 Texas Administrative Code (TAC) §116.311(b)(1) provides that "the applicant may be required to submit additional information regarding the emissions from the facility and their impacts on the surrounding area." Additionally, to renew ASARCO's air quality permit, the Commission must, at a minimum, consider the condition and effectiveness of existing emission control equipment and practices. THSC §382.055(d)(2). Without this information to consider, I will be unable to recommend that the Commission move forward with renewal of the permit. The Executive Director's staff has performed the tasks that are within the scope their expertise and resources. As the party with the burden of proof, ASARCO is responsible for ensuring that it provides the information necessary for commission evaluation.

For these reasons, I hope that this explanation is informative to ASARCO for the approval of expenditures for expenses related to the renewal of ASARCO's air quality permit. I continue to have concerns with respect to my ability to prepare the report required by the Interim Order within the prescribed timeframes in the absence of this additional necessary information. Lastly, as you are aware, we are scheduled to meet this Friday, August 11<sup>th</sup> at 2:00 to discuss further the issues raised in your letter. If you have further questions, please do not hesitate to contact me at (512)239-3900 or Stephanie Bergeron Perdue of the Office of Legal Services at (512)239-0615.

Sincerely,



Glenn Shankle, Executive Director  
Texas Commission on Environmental Quality

cc: See Distribution List on following page

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