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January 25, 2008

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## BY HAND DELIVERY

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2008 JAN 25 PM 4:12  
CHIEF CLERKS OFFICE

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Re: TCEQ Docket No. 2004-0049-AIR; SOAH Docket No. 582-05-0593; *Application of ASARCO, Incorporated for Renewal of Air Quality Permit No. 20345*

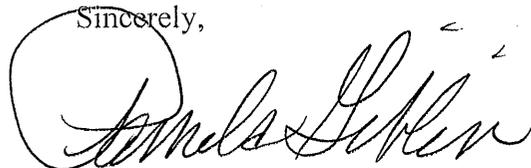
Dear Ms. Castañuela:

Enclosed for filing in the above-referenced and numbered proceeding please find an original and twelve (12) copies of ASARCO's Brief to the Commission in Support of Renewal of ASARCO Incorporated's Air Quality Permit No. 20345.

Please file the original and 11 copies of this document and return one file-stamped copy to the messenger. A copy of the above referenced document is being served on the persons in the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions concerning this filing, please do not hesitate to contact me at the number above.

Sincerely,



Pamela M. Giblin

Enclosures

cc: Attached Service List

SOAH DOCKET NO. 582-05-0593  
TCEQ DOCKET NO. 2004-0049-AIR

2008 JAN 25 PM 4: 12

APPLICATION OF ASARCO  
INCORPORATED FOR RENEWAL  
OF AIR QUALITY  
PERMIT NO. 20345

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BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY  
CHIEF CLERKS OFFICE

**ASARCO'S BRIEF TO THE COMMISSION  
IN SUPPORT OF RENEWAL OF ASARCO INCORPORATED'S  
AIR QUALITY PERMIT NO. 20345**

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

ASARCO, L.L.C. ("Asarco") hereby files this, its brief to the Texas Commission on Environmental Quality ("TCEQ") in support of renewal of Air Quality Permit No. 20345, and would respectfully show the following:

**I. Introduction**

Asarco's no-increase air quality permit renewal application comes before the Commission for the third time, and the appropriate Commission action under § 382.055 of the Texas Clean Air Act ("TCAA")<sup>1</sup> at this point is clear: renew Asarco's permit conditioned upon Asarco's completion of the recommendations provided by the Executive Director in his May 1, 2007 *Report to the Commission on Renewal of Asarco, Incorporated's Air Quality Permit No. 20345*.<sup>2</sup> Asarco's renewal application, first filed nearly six years ago, has seen extraordinary technical and administrative review by Commission staff, an unprecedented contested case hearing for the public interest in El Paso, and resulting detailed audits by the TCEQ staff and an independent industry expert. Asarco has prepared comprehensive air dispersion modeling, from which the Executive Director concluded that emissions from Asarco's El Paso Plant are not expected to cause or contribute to a condition of air pollution.<sup>3</sup> The Texas Clean Air Act's renewal process, as supplemented by the public interest hearing under the Commission's plenary

<sup>1</sup> TEX. HEALTH & SAFETY CODE § 382.055.

<sup>2</sup> Hereinafter "Executive Director's Report."

<sup>3</sup> See Executive Director's Report at 24.

power under the Texas Water Code, has ensured vigorous technical review of Asarco's renewal application. The process has provided for extensive public participation throughout, and the Executive Director's Report leaves no unanswered questions about renewal.

## **II. The Executive Director's Report Shows that Renewal is Justified.**

### **A. Background**

With its March 10, 2006 Interim Order, the Commission acted on proposed findings of the administrative law judges following the 2005 contested case hearing in El Paso and remanded Asarco's application to the Executive Director.<sup>4</sup> The Commission ordered the Executive Director to complete a rigorous investigation of all air quality control equipment and related practices at the El Paso Plant.<sup>5</sup> The Executive Director was also ordered to assess the appropriateness of a permit amendment rather than a renewal application.<sup>6</sup> The Commission ordered Asarco to conduct Prevention of Significant Deterioration area-wide modeling on a fifty-kilometer area, with consideration given to impacts in Texas, New Mexico, and Mexico.<sup>7</sup> From the investigation and the modeling, the Executive Director was directed to prepare a report and schedule, with the report to include the Executive Director's written assessment of the sufficiency of existing plant control equipment and practices.<sup>8</sup> As the Commission noted in its Interim Order, the report and schedule are elements of the statutory renewal procedure in TCAA § 382.055.<sup>9</sup>

Consistent with § 382.055, and as directed by the Commission, the Executive Director's Report is the product of comprehensive air modeling, two different site investigations, a toxicology review, independent audits, and a review of the history of Permit No. 20345 to assess the appropriateness of renewal. The Executive Director's investigation and resulting report confirm that renewal is warranted.<sup>10</sup>

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<sup>4</sup> See generally, Tex. Comm'n on Env'tl. Quality, *An Interim Order Concerning the Application of ASARCO Incorporated to Renew Air Quality Permit No. 20345* (Mar. 10, 2006) (hereinafter "March 2006 Interim Order.")

<sup>5</sup> *Id.* at 11, Ordering Provision 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 11, Ordering Provision 2.

<sup>8</sup> *Id.* at 12, Ordering Provision 4.

<sup>9</sup> See March 2006 Interim Order at 1-2.

<sup>10</sup> Asarco has commented more fully on the Executive Director's Report and its recommendations in comments filed during the public comment period following issuance of the Report.

## B. Summary of Executive Director's Conclusions and Recommendations

After detailed investigations by TCEQ staff and an independent industry expert, the Executive Director concluded that all major process and abatement equipment and components are present, intact, and in generally satisfactory condition.<sup>11</sup> Given the Plant's recent idle state, the Executive Director has, consistent with TCAA § 382.055 and the Commission's Interim Order, recommended maintenance and rehabilitation work that Asarco should complete prior to restarting the smelter.<sup>12</sup> The Executive Director's recommendations generally call for inspection, repair, then final verification to the Executive Director 90 days before restart. As discussed below, Asarco has been working to meet these recommendations since the report's May 2007 issuance. The Executive Director also concluded that past actions do not necessitate an amendment application.<sup>13</sup>

As ordered by the Commission, Asarco conducted air dispersion modeling according to a well-established TCEQ protocol. The modeling was audited by TCEQ's Air Dispersion Modeling Team ("ADMT") and also by an independent expert.<sup>14</sup> Consistent with the Commission's March 10, 2006 Interim Order, the modeling includes unprecedented consideration of impacts in Texas, New Mexico, and Mexico. The air dispersion modeling demonstrated that emissions from the Plant will comply with applicable federal and state air quality standards.<sup>15</sup> TCEQ's toxicology section confirmed that adverse health effects are not expected to occur as a result of exposure to the proposed emissions from the facility.<sup>16</sup> Using the comprehensive air dispersion modeling, and with the expertise of TCEQ's ADMT, toxicology section, and an independent auditor, Executive Director concluded that emissions from the Asarco El Paso Plant are not expected to cause or contribute to a condition of air pollution, and

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<sup>11</sup> Executive Director's Report at 24.

<sup>12</sup> See *id.* at 24-26.

<sup>13</sup> *Id.* at 26.

<sup>14</sup> See *id.* at 21 (citing Arnold R. Srackangast, ASIMET Svcs., *Independent Third Party Audit of Air Quality Analysis for ASARCO Incorporated El Paso Smelter Plant Renewal of TCEQ Permit No. 20345* (Apr. 23, 2007) (Executive Director's Report, Attachment L)).

<sup>15</sup> *Id.* at 24.

<sup>16</sup> Executive Director's Report at 24 (citing Memorandum from Jong-Song Lee, TCEQ Toxicology Section, to Dois Webb, TCEQ Air Permits Division, *Health Effects Review of Emissions from Asarco, Inc., El Paso, El Paso County, Texas* (Apr. 12, 2007) (Executive Director's Report Attachment J)).

the Executive Director therefore did not recommend any new controls or changes to current practices.<sup>17</sup>

**C. Renewal Opponents Would Have the Commission Evaluate the Renewal Application Against Illusory Technical Standards.**

Because the modeling confirms that emissions from the Plant will meet all applicable standards, some opponents of the renewal are trying to attack these well-established standards and suggesting that the rules should be changed because they do not agree with the outcome. These technical arguments are wide-ranging, but they have one thing in common: they are the product of efforts to mislead the Commission away from applying the technical and legal standards that govern TCEQ permitting decisions and toward a moving target designed by renewal opponents for no other purpose than defeating the renewal. For example, opponents of the renewal will continue to advance arguments that are based on multi-pathway theories that the Commission and SOAH have already recognized to be irrelevant to this proceeding.<sup>18</sup> Or, the opponents will try to argue that, because the established standards are not suited to their purposes, the Commission should simply ignore them.<sup>19</sup> Asarco's position is that the Commission should judge its renewal application against the renewal standards that are actually in effect today, just as the Commission does in every other permitting action.

**III. Permit Renewal is the Next Step in the Section 382.055 Process.**

Following the Report's May 1, 2007 issuance, the Executive Director received public comments, and the Executive Director responded to public comments on July 27, 2007.<sup>20</sup> The Executive Director recommended no changes to the Report.<sup>21</sup>

The next step in the statutory process is Commission adoption of the Executive Director's report along with renewal of Air Quality Permit No. 20435, conditioned upon Asarco's

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<sup>17</sup> Executive Director's Report at 24.

<sup>18</sup> See, e.g., Protestant's, the City of El Paso's, Comments on the Applicant's Modeling Analyses and Summary of Modeling Results and the Executive Director's Report to the Commission on Renewal of Asarco Incorporated's Air Quality Permit No. 20345 at 57 (June 18, 2007).

<sup>19</sup> See, e.g., Sunset Heights ACORN et al. Supplemental Comments on Executive Director's Report at 1 (Jul. 24, 2007) ("The Commission should consider medical and scientific consensus that the current lead NAAQS . . . is antiquated and not protective of human health.")

<sup>20</sup> 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 (Jul. 27, 2007).

<sup>21</sup> *Id.* at 40.

completion of the Executive Director's Recommendations. Proceeding in that manner is consistent with TCAA § 382.055, which states that "if the applicant meets the commission's requirements in accordance with the schedule, then the commission *shall* renew the permit."<sup>22</sup> A conditional renewal is best matched to the recommendations, which call for Asarco to complete the necessary repairs to each major component of the plant's air quality control equipment and verify completion no later than 90 days prior to startup with a report to the Executive Director. The Executive Director's staff is well qualified to evaluate Asarco's completion of the recommendations and report to the Commission following their completion. Moreover, the Commission will continue to exercise full authority over the permit following renewal, just as it does with every permit.

Opponents will attempt to mischaracterize the procedural posture of this renewal and misapply the result of the contested case hearing. With its Interim Order of March 10, 2006, the Commission has expressly, and correctly, recognized that TCAA § 382.055 governs this renewal proceeding.<sup>23</sup> Although TCAA § 382.056(g) states that there is to be no contested case hearing in a no-increase renewal such as this one, the Commission referred the 2005 contested case hearing under its plenary power under the Water Code to hold hearings in the public interest.<sup>24</sup> Evidence adduced at the contested case hearing informed and shaped the Commission's actions within the TCAA's no-increase renewal process, but the hearing did not affect the fundamental applicability of § 382.055. Following the hearing, the Commission ordered comprehensive modeling, which Asarco provided. The Commission ordered a rigorous inspection of the Plant's air quality control equipment and an assessment of whether renewal or amendment is most appropriate. The Executive Director provided the inspection and assessment after enlisting the assistance of an independent industry expert. The hearing is over, and the application has been remanded to the Executive Director.<sup>25</sup> The process has moved past the hearing and issuance of the Executive Director's Report to the point of renewal.

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<sup>22</sup> TEX. HEALTH & SAFETY CODE § 382.055(g) (emphasis added).

<sup>23</sup> See March 2006 Interim Order at 1-2.

<sup>24</sup> See Texas Comm'n on Env'tl Quality, *An Interim Order Concerning the Application of ASARCO Incorporated to Renew Air Quality Permit No. 20345* at 1 (May 14, 2004) (referencing Commission's plenary power to hold a hearing in the public interest under Chapter 5 of the Texas Water Code).

<sup>25</sup> March 2006 Interim Order at 11, Ordering Provision 1.

#### IV. Opponents of Renewal Will Rely on Irrelevant Arguments About Issues That are Not Before the Commission.

With comprehensive air dispersion modeling confirming that the restart will not cause or contribute to a condition of air pollution in El Paso, and with the Executive Director's detailed 14-month investigation demonstrating that the Plant will restart in a manner that is protective of air quality, the relevant issues have become increasingly inconvenient for opponents of the renewal. Since the issuance of the Executive Director's report, opponents have devoted their time and energy toward trying to create new irrelevant issues that will distract from the relevant issues.

For example, opponents try to dredge up the decade-old enforcement action against Encycle/Texas, Inc., without pointing out that the matter was resolved with a public settlement over eight years ago.<sup>26</sup> A recent federal Government Accountability Office investigation of the matter stated that, according to TCEQ and Environmental Protection Agency officials, the recycling program that was the subject of the enforcement "did not have a harmful impact on the environment."<sup>27</sup> Should the opponents make reference to El Paso County Attorney Jose Rodriguez's letter to TCEQ requesting a criminal enforcement review related to this same decade-old enforcement, the Commission should know that TCEQ staff reviewed the request, deemed it inconsistent with the governing statute, and returned it to County Attorney Rodriguez without action.<sup>28</sup> The request served as the basis for several anti-Asarco press conferences by permit renewal opponents, but it did not serve as the basis for any legitimate enforcement. Should opponents attempt to claim extensive opposition to the renewal in El Paso, the Commission should know that over two thirds of the comment cards mailed to TCEQ opposing the renewal were mailed from cities other than El Paso.<sup>29</sup> An *El Paso Times* poll showed that half of the respondents in El Paso favor reopening the Plant.<sup>30</sup> Most importantly, Asarco trusts

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<sup>26</sup> See Notice of Consent Decree Under the Resource Conservation and Recovery Act and Clean Water Act, 64 Fed. Reg. 23,858 (May 4, 1999).

<sup>27</sup> See U.S. Gov't Accountability Office, *Hazardous Waste: Information on How DOD and Federal and State Regulators Oversee the Off-Site Disposal of Waste from DOD Installations*, GAO-08-74 at 35 (Nov. 2007).

<sup>28</sup> See Letter from Glenn Shankle, TCEQ Executive Director, to Jose R. Rodriguez and Bruce Manvell, Office of the El Paso County Attorney, Texas Peace Officer Request for Criminal Enforcement Review Pursuant to Texas Water Code, Section 7.203 *et seq.* (Dec 13, 2007).

<sup>29</sup> Based on a count of all comments filed with the Commission during the public comment period that ended on June 18, 2007.

<sup>30</sup> See Darrin Meritz, *Half of El Paso Wants Smelter Re-Opened*, EL PASO TIMES, Oct. 29, 2007.

that the Commission will recognize that none of these arguments is relevant to the matters that are before the Commission on February 13.

**V. Asarco is Ready to Resume the Plant's Substantial Economic Impact to El Paso and Texas.**

**A. Asarco's Preparations for Restart in El Paso**

The Executive Director's recommendations for maintenance and refurbishment of the plant's air quality control equipment are consistent with Asarco's own plans for restart, and the company is preparing to meet the recommendations and restart the Plant. Immediately after issuance of the Executive Director's Report in May, Asarco retained a nationally-recognized expert consultant to coordinate the restart effort. Since his retention, Asarco's consultant has worked on site with resident El Paso Plant staff. The consultant has inspected the entire plant three times, developed a restart plan, and prepared comprehensive cost estimates. Subcontractors with equipment-specific expertise have completed a thorough investigation of the Plant's oxygen plant and developed a specific restart plan for that unit. The important inspection and planning steps completed to date have positioned Asarco to complete the recommended maintenance and rehabilitation work following Commission action on the Executive Director's Report.

**B. Asarco Plans to Emerge from Bankruptcy as a Strong Company.**

In 2005, two independent directors were appointed to the company's three-member board, and the company thereafter assembled a new management team. In January 2007, Asarco's new management and the United Steel Workers negotiated a new mutually-favorable contract covering approximately 1,600 workers at five Asarco plants. The new contract will apply to the 286 union workers who will be employed at the El Paso Plant following restart and the 44 union workers who will be added to the company's Amarillo Copper Refinery following restart. In total, restarting the El Paso Plant is forecasted by the University of Texas at El Paso's Institute for Policy and Economic Development to provide 2,264 jobs equivalent to \$92.7 million in new labor income and generate \$1.35 billion in regional economic output for the state of Texas.<sup>31</sup>

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<sup>31</sup> Matthew S. McElroy et. al., Economic Impact of Asarco on the Texas Economy (Apr. 2007) (Special Report of the University of Texas at El Paso Institute for Policy and Economic Development).

Under new management and with the help of historically high copper prices, Asarco is operating profitably and has amassed a substantial amount of cash, which will ease its emergence from bankruptcy. Asarco expects to make a substantial distribution to creditors when it emerges from bankruptcy, including those creditors who have asserted claims for legacy environmental liabilities associated with Asarco's more than 100 years in the metals and mining industries. Asarco has been able to settle a number of environmental bankruptcy claims with the United States and several individual states, including \$13.7 million to address EPA's past costs at the El Paso Metals Survey Site and \$10.0 million for remediation at the former Encycle/Texas, Inc. site in Corpus Christi.<sup>32</sup> Further, Asarco and the City of El Paso reached a \$1.2 million bankruptcy settlement to resolve Asarco's past obligation to fund road-paving projects in El Paso. The facts of Asarco's bankruptcy proceeding stand in contrast to the assertions of those who (without basis in the Texas Clean Air Act) would portray the bankruptcy as reason to doubt the company's ability to meet its environmental obligations or manage the El Paso Plant in a responsible manner.

**C. Asarco is Meeting Its Legacy Environmental Remediation Commitments.**

The bankruptcy proceeding has not interfered with Asarco's commitment to remediation in El Paso. Asarco assumed control from EPA of remediation to residential properties in the El Paso Metals Survey Site in El Paso and continues on-site remediation pursuant to a 1996 state agreed order. Asarco's action at the El Paso Metals Survey Site kept El Paso off the EPA's National Priorities List and has resulted in the cleanup of 976 yards in El Paso since 2002: 476 by Asarco and 500 by EPA's contractor. Since assuming control of the project, Asarco has invested \$8 million, and the cleanup of approximately 100 remaining yards within the Site is expected to be completed this summer. Since 1996, Asarco has invested over \$30 million for on-site remediation projects including soil and groundwater remediation, the installation of a storm water collection system, and the demolition of inactive processes affecting the exterior appearance of the Plant. These accomplishments were achieved working hand-in-hand with neighbors and community leaders, and they hardly reflect a permit holder without

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<sup>32</sup> It is likely that permit renewal opponents will attempt to exaggerate Asarco's legacy environmental liabilities by reciting the highest amounts sought by bankruptcy claimants in their initial proofs of claim. The settlements described here reflect legitimate estimations of the company's legacy environmental liabilities the resulted from good-faith negotiation between Asarco and the government claimants.

regard for its community. Nor do they reflect, as renewal opponents in effect argue for, the need for new Commission policies that would close permitted stationary *air* sources as a means to address *soil* contamination.

## **VI. Asarco Has Reduced Emissions from the El Paso Plant in the Past, and Asarco Will Continue to Reduce Emissions in the Future.**

The Plant's recent history gives reason to be confident that Asarco will continue to employ new technology to reduce emissions, improve environmental performance, and maintain compliance with evolving regulatory standards. The continuing reductions in lead emissions from the El Paso Plant are an example of this. The Plant's lead-smelting operations ceased in 1985. The air permit that will be considered for renewal by the Commission on February 13 was first issued after the previously-grandfathered copper plant went through a \$100 million modernization to add new reactors that cut total air emissions from the plant by 90% and cut lead emissions by 6.50 tons per year.<sup>33</sup> The Oglebay-Norton slag processing facility — a non-Asarco facility that has been recognized as one of many sources of past lead deposition in the area — has closed. More recently, Asarco eliminated its highest lead-containing feedstocks and wrote them out of its permit, thereby reducing lead emissions from the Plant by another 9.49 tons per year, or 66%.<sup>34</sup>

After these reductions, lead emissions from the Plant are conservatively modeled to result in maximum concentrations that are less than 20% of the National Ambient Air Quality Standard ("NAAQS") that is in effect today.<sup>35</sup> Asarco's record of utilizing technology and reducing emissions shows that opponent's efforts to mischaracterize the Plant as an obsolete relic of El Paso's history are misguided.

## **VII. Conclusion and Prayer**

This six-year renewal proceeding—which has included a nine-month special contested case hearing, a 14-month investigation by the Executive Director and an independent industry expert, and air dispersion modeling of unprecedented scope—has progressed to its final point: renewal. Asarco appreciates the privilege of holding a Texas air quality permit, and the

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<sup>33</sup> See Executive Director's Report at 1, n. 1.

<sup>34</sup> See *id.* at 14.

<sup>35</sup> See David Cabe, Zephyr Environmental Corp., *Air Quality Analysis, ASARCO El Paso Plant*, Executive Summary at 2 (Nov. 22, 2006) (Executive Director's Report, Attachment H).

company is ready to meet the Executive Director's recommendations. Asarco is proud of its contributions to El Paso, Amarillo, and Texas. The company is confident that its investment in the Plant's refurbishment, along with the Plant's \$100 million modernization, will position the Plant to add to these contributions in the future in a manner that is fully protective of human health and the environment. The Executive Director's Report and Asarco's air dispersion modeling show that Asarco is not asking the state to trade environmental protection for economic benefits. For the foregoing reasons, Asarco respectfully requests that the Commission renew Air Quality Permit No. 20345, with the condition that Asarco complete the Executive Director's recommendations.

Respectfully submitted,

BAKER BOTTS L.L.P.

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## CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on the following parties on this 25th day of January, 2008.

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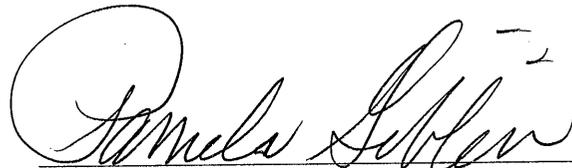
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TEXAS  
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