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FRIDAY, JANUARY 25, 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

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
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CHIEF CLERKS OFFICE

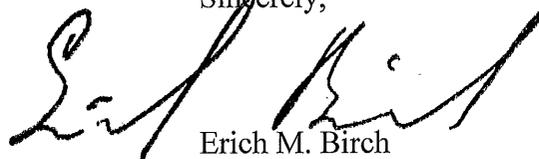
Re: Protestant's, the City of El Paso's, Brief Opposing Renewal of Air Quality Permit No. 20345, *Application of ASARCO Incorporated for Renewal of Air Quality Permit No. 20345*, TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-0593.

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced proceeding are an original and eleven copies of *Protestant's, the City of El Paso's, Brief Opposing Renewal of Air Quality Permit No. 20345*. The City's Brief is being filed as authorized by the December 28, 2007 correspondence from Ms. Celeste A. Baker, Assistant General Counsel.

Please file this on behalf of the City of El Paso in the above-referenced matter. If you have any questions, please telephone me at the above number.

Sincerely,



Erich M. Birch

ENCLOSURE

cc: Service List  
Mr. Charlie McNabb, City Attorney  
Ms. Laura Prendergast Gordon, Deputy City Attorney

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

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

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§  
§

BEFORE THE TEXAS COMMISSION  
ON  
ENVIRONMENTAL QUALITY

TEXAS  
COMMISSION  
ON  
ENVIRONMENTAL  
QUALITY  
JAN 25 PM 2:51  
HEARINGS OFFICE

**PROTESTANT'S, THE CITY OF EL PASO'S, BRIEF  
OPPOSING RENEWAL OF AIR QUALITY PERMIT NO. 20345**

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

COMES NOW, Protestant, the City of El Paso ("El Paso" or the "City") and presents this its *Brief Opposing Renewal of Air Quality Permit No. 20345* in the above-referenced proceeding. For the reasons identified below and as identified in the City'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*, the City requests that the Commissioners of the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") (1) deny Asarco's application for renewal (the "Application") of Air Quality Permit No. 20345 (the "Permit"); (2) require Asarco to file an application to amend the Permit for review under the U.S. Environmental Protection Agency's ("EPA") reactivation policy; or (3) refer the proceeding to the State Office of Administrative Hearings ("SOAH"), instructing the Administrative Law Judges ("ALJs") to reopen the record pursuant to Texas Administrative Code Title 30, Section 80.265 for further proceedings on the issues in dispute.

**I. INTRODUCTION AND BACKGROUND**

The complex permitting history, six-year operational history, and the extended history of noncompliance of the Asarco El Paso Plant (the "Plant") was addressed in detail at the two-week Hearing on the Merits ("HOM") in July 2005. Based on the thousands of pages of evidentiary record, the ALJs and the Commissioners agreed that Asarco had failed to prove that operation of the Plant pursuant to the Permit would not cause or contribute to a condition of air pollution.<sup>1</sup>

<sup>1</sup> See Proposal for Decision, *Application of Asarco Inc. to Renew Air Quality Permit No. 20345*, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, at 2 & 130 (Oct. 27, 2005); Texas Comin'n on Env'tl. Quality, *An Interim Order Concerning Application of ASARCO, Inc. to Renew Air Quality Permit No. 20345*, TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-593, at 1 (Mar. 10, 2006) [hereinafter Interim Order].

Among the worst of the issues identified were the following. Asarco replaced the ConTop reactors without notifying TCEQ, and thus had operated unpermitted facilities since 1993.<sup>2</sup> In 1995, Asarco doubled its emissions of sulfur dioxide (SO<sub>2</sub>) without an opportunity for hearing being afforded to those affected by the increase.<sup>3</sup> In 1994, Asarco obtained authorization to increase emissions of lead and arsenic from one point by 3900% and 1545%, respectively.<sup>4</sup> From 1993 through 1999, emissions of nitrogen oxides (NO<sub>x</sub>) were approximately two and one-half times permitted levels,<sup>5</sup> and emissions of carbon monoxide (CO) were approximately eleven times permitted levels.<sup>6</sup> In 1996, 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>7</sup> These, along with the litany of other violations and operational irregularities documented

<sup>2</sup> See Tr. at 369-70 & 425 (Cross Exam ("CE") of Lawrence Castor); see *id.* at 1726 (CE of LeRoy "Skip" Clark, P.E.). While the Executive Director ("ED") now claims that the ConTop reactors were replaced pursuant to Standard Exemption 111 ("SE 111"), SE 111 was not applicable. Air emissions from the replacement ConTop reactors exceeded 25 tons per year (TPY) of at least one air contaminant, and it does not appear that Asarco provided notification to the ED within ten days following installation of the replacement ConTop reactors, both requirements of SE 111 in 1993 and 1994. See Executive Director's Response to Comments on Executive Director's Report to the Commission on Renewal of Asarco Inc.'s Air Quality Permit No. 20345, *Application of Asarco Inc. to Renew Air Quality Permit No. 20345*, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, at 19 (July 27, 2007); Standard Exemption 111 (as of Aug. 16, 1993); Standard Exemption 111 (as of May 4, 1994).

<sup>3</sup> See Asarco Exh. 27, Maximum Allowable Emission Rates (original vs. current versions of Permit No. 20345) [hereinafter MAER Comparison]. While the Asarco El Paso Plant began operations in 1993, the actual SO<sub>2</sub> emission levels were not discovered until stack testing was conducted in 1994. The permit amendment increased the level of authorized emissions of SO<sub>2</sub> from the copper stack annulus from 50 parts per million (ppm) to 250 ppm, a five fold increase. See Tr. at 73-74 (CE of Castor).

<sup>4</sup> Emissions from the Water Treatment Plant Spray Dryer were increased as follows: arsenic, from 0.0020 TPY to 0.0309 TPY; lead, from <0.0001 TPY to 0.0039 TPY. See El Paso Exh. 10, Letter from William R. Campbell, Acting ED, Texas Comm'n on Env'tl. Quality, to Tom Martin, Env'tl. Manager, Asarco, at 6 (Nov. 4, 1994); see Tr. at 587 (CE of David Cabe, P.E.).

<sup>5</sup> See MAER Comparison, *supra* note 3; see Tr. at 76-80 (CE of Castor); *id.* at 634-635 (CE of Cabe).

<sup>6</sup> See MAER Comparison, *supra* note 3; see Tr. at 78-81 (CE of Castor); *id.* at 635 (CE of Cabe).

<sup>7</sup> 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. See El Paso Exh. 6, "Asarco Inc. Permitting History" [hereinafter Permitting History]; El Paso Exh. 12, "SB 1126 Letter, Technical Review." Only two months later Asarco obtained approval for an increase in its permitted emissions levels at the Plant pursuant to a permit alteration issued by TCEQ on October 31, 1996. See Permitting History, *supra* note 7, at 1. The increase in emissions authorized in October was required as a result of the August SB 1126 increases in production rates of copper anodes and sulfuric acid, violating the requirements of a SB 1126 modification.

during the HOM, demonstrate that Asarco failed to prove that operation of the Plant pursuant to the Permit would not cause or contribute to a condition of air pollution. No new evidence to challenge that determination has been added to the evidentiary record. As such, the Commission should deny the Application, and thus, not renew the Permit. To do otherwise, would violate the provisions of the Texas Administrative Procedures Act (“APA”) and the City’s due process rights.

**II. ASARCO’S APPLICATION FOR RENEWAL OF THE PERMIT SHOULD BE DENIED.**

**A. The Commission’s Consideration of the Application Is Not Governed by Texas Health and Safety Code Section 382.055.**

Texas Health and Safety Code Section 382.055 does not provide a means by which the Commission must, or even may, approve the Application. Asarco and TCEQ have previously litigated the applicability of Section 382.055 in Travis County District Court, where Asarco challenged the Commission’s authority to refer the Application to SOAH for an evidentiary hearing. In its *Initial Brief* to the District Court, Asarco specifically argued that TCEQ must either renew the Permit or follow the procedures of Section 382.055.<sup>8</sup> On March 9, 2005, all of Asarco’s requests for relief, including the application of Section 382.055 to the Application, were denied.<sup>9</sup> The applicability of Section 382.055 has been adjudicated, and the District Court determined that it was not applicable in this case. As such, the Commission is barred from relying on Section 382.055 as a means to approve the Application. Instead, the Commission must treat the Application and the evidentiary record as it would any other application under the applicable procedures of the APA.

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<sup>8</sup> See Plaintiff’s Initial Brief, *ASARCO Inc. v. Texas Comm’n on Env’tl. Quality*, GN4-01709 (261st Jud. Dist., Travis County, Nov. 29, 2004); see Plaintiff’s Reply Brief, *ASARCO Inc. v. Texas Comm’n on Env’tl. Quality*, GN4-01709 (261st Jud. Dist., Travis County Jan. 24, 2005). In its briefs, Asarco identified the procedures outlined in Section 382.055 in detail. See Initial Brief, *supra* note 8, at 21-23; Reply Brief, *supra* note 8, at 12-13.

<sup>9</sup> Order on Appeal from Texas Comm’n on Env’tl. Quality’s Order Dated May 14, 2004, *ASARCO Inc. v. Texas Comm’n on Env’tl. Quality*, GN4-01709 (261st Jud. Dist., Travis County, Mar. 9, 2005).

Additionally, Section 382.055 is not the proper statutory provision for review of the Application because it is not a simple renewal application. Section 382.055 is intended to be used for the review of a renewal of a previously authorized permit, which may include increases in emissions that have been *properly* authorized subsequent to the initial permit issuance.

As addressed in previous filings, the Permit has been modified fourteen times since it was issued in 1992. Many of those modifications resulted in substantial increases in emissions from the Plant, and as addressed in previous City pleadings, Asarco obtained some of these emissions increases in contravention of agency rules and policies.<sup>10</sup> In addition, Asarco only provided modeling to support one of the fourteen revisions to the Permit.<sup>11</sup> That one SO<sub>2</sub> modeling event showed that increased levels would result in SO<sub>2</sub> emissions of 99.8% of the property line standard,<sup>12</sup> yet future increases in SO<sub>2</sub> emissions were not supported by modeling. Because the 1995 amendment identified emissions of over 99% of the standard, it is clear that additional modeling would be necessary to demonstrate the 1996 and 1997 increases in SO<sub>2</sub> emissions did not result in a violation of the standards, but those SO<sub>2</sub> increases were approved by TCEQ without the benefit of modeling.<sup>13</sup>

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<sup>10</sup> As described above the SO<sub>2</sub> emissions were doubled in 1995 without an opportunity for hearing being provided to affected persons, and in 1996, Asarco, in effect, relied on a SB 1126 modification to increase emissions from the Plant, in violation of the SB 1126 modification requirements.

<sup>11</sup> Modeling was provided in support of the 1995 increase in SO<sub>2</sub> emissions. The amendment authorized an increase in site-wide SO<sub>2</sub> emissions to approximately twice the levels originally permitted in 1992, and the emissions from the copper stack annulus from the converter ventilation baghouse were increased roughly five times over the 1992 permitted levels. *See* MAER Comparison, *supra* note 3; Tr. at 73-74 (CE of Castor).

<sup>12</sup> *See* El Paso Exh. 1, Prefiled Testimony of Jennifer Geran, P.E., at 37. With regard to the 1995 modeling for SO<sub>2</sub>, Jennifer Geran, P.E., testifying for the City, noted: "This model prediction is extremely close to exceeding the standard. . . . Even if there were no model input error, the model has a margin of error significantly greater than 0.2%, indicating that there is clearly a potential for the currently authorized emission rates to exceed the standard." *Id.*

<sup>13</sup> As noted by Ms. Geran, monitoring of SO<sub>2</sub> was conducted by the TACB at the fence line of the Plant in January and February 1995, indicating exceedances of the state property line standard. Additional exceedances were measured by Asarco between October 1993 and February 1999. *See id.*

Further, Asarco replaced the two ConTop reactors at the Plant shortly after start-up in 1993. Asarco failed to notify TCEQ and failed to seek an amendment or other revision to the Permit to authorize replacement of these major sources of air pollution in violation of TCEQ rules.<sup>14</sup> These two pieces of equipment are therefore unpermitted emission units and cannot be authorized under a permit “renewal” application. Asarco is again circumventing TCEQ rules in its effort to convince the Commission to approve its Application pursuant to Section 382.055. Approval of this “renewal” application would sanction the previously unsupported emissions increases, again without the benefit of modeling in the evidentiary record. Approving the Application would be in violation of the Texas Clean Air Act’s intent to protect air quality and would deny due process to the citizens of El Paso.

**B. Operation of the Plant Must Be Reviewed Under the EPA Reactivation Policy Before Issuance of the Permit.**

Because the Plant has been shutdown for almost nine years, EPA’s reactivation policy has been triggered. Pursuant to the reactivation policy, stationary sources that shut down, even temporarily, may be considered new sources upon reactivation, and thus must undergo nonattainment or Prevention of Significant Deterioration (“PSD”) review, as appropriate. 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.<sup>15</sup> Because of the required PSD review, Asarco must file an application to amend the Permit and to request issuance of a federal PSD permit. Such application must be subject to all PSD permitting review requirements.

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<sup>14</sup> See discussion, *supra*, at fn. 2.

<sup>15</sup> 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. See Memo from Director, Div. of Stationary Source Enforcement, U.S. EPA, to Stephen A. Dvorkin, Chief, General Enforcement Branch, Region II, U.S. EPA (Sept. 6, 1978); 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).

**C. The Commission's Decision Must Be Made on the Evidentiary Record; thus, the Application Must Be Denied or Referred to SOAH for Further Evidentiary Proceedings.**

Based on the evidentiary record in this APA proceeding, the Commission concluded that Asarco "had not met the statutory requirements for renewal of its permit."<sup>16</sup> The evidentiary record was closed by the ALJs at the conclusion of the HOM. While there have been multiple briefing opportunities since that time, the evidentiary record has not been reopened, no party has moved to reopen the evidentiary record, and the Commission, while issuing the Interim Order, did not reopen the evidentiary record.<sup>17</sup> While the evidentiary record has not been reopened, the parties—mainly the Executive Director and Asarco—have developed a significant amount of new information. All of that information—the ED Report,<sup>18</sup> the ED's Response to Comments,<sup>19</sup> and the entirety of Asarco's modeling analyses and related modeling report ("Asarco's Modeling")—is outside the evidentiary record, is clearly in dispute, and cannot be the basis for a final decision in this APA contested case proceeding.

Pursuant to the APA, the final decision in a contested case must include findings of fact ("FOFs") and conclusions of law ("COLs").<sup>20</sup> "Findings of fact may be based only on the evidence and on matters that are officially noticed."<sup>21</sup> The Court of Appeals (Austin) has stated, that while a state agency "is given a broad discretion in arriving at its findings of fact and in utilizing expert advice, the findings must still be based on evidence in the record."<sup>22</sup> In addition,

<sup>16</sup> Interim Order, *supra* note 1, at 1.

<sup>17</sup> See 30 TEX. ADMIN. CODE § 80.265.

<sup>18</sup> Executive Director's Report to the Commission on Renewal of Asarco Inc.'s Air Quality Permit No. 20345, *Application of Asarco Inc. to Renew Air Quality Permit No. 20345*, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR (May 1, 2007).

<sup>19</sup> Executive Director's Response to Comments on Executive Director's Report to the Commission on Renewal of Asarco Inc.'s Air Quality Permit No. 20345, *Application of Asarco Inc. to Renew Air Quality Permit No. 20345*, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, (July 27, 2007).

<sup>20</sup> See TEX. GOV'T CODE § 2001.141(b).

<sup>21</sup> *Id.* § 2001.141(c).

<sup>22</sup> *Flores v. Texas Dep't of Health*, 835 S.W.2d 807, 812 (Tex. App.—Austin 1992). The Appeals Court stated: "It is well settled that an agency's exercise of its expertise must be supported by substantial evidence in the record. The Commission's expertise is not a substitute for proof. Likewise, judicially noticed information, standing alone and without supporting evidence in the record, is not a substitute for

the Commission may only change a FOF or COL made by the presiding ALJs if the Commission determines:

- (1) the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;
- (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
- (3) that a technical error in a finding of fact should be changed.<sup>23</sup>

In this proceeding, the ED Report, Asarco's Modeling, and the ED's Response to Comments are outside the evidentiary record and are not the type of materials of which the Commission can take official notice.<sup>24</sup> As such, they cannot form the basis of FOFs on which a final order or decision can be made. The Commission has previously determined that the evidentiary record does not support renewal of the Permit. The Commission has determined that, with regard to particulate matter less than ten microns in diameter (PM<sub>10</sub>), particulate matter less than 2.5 microns in diameter (PM<sub>2.5</sub>), NO<sub>x</sub>, and SO<sub>2</sub>, Asarco failed to meet its burden of proof in support of renewal of the Permit;<sup>25</sup> thus, the Commission cannot now conclude that the ALJs' FOFs and COLs regarding the emissions of those contaminants should be changed based on the factors identified in Section 2001.058(e) of the Government Code, nor can the Commission change those FOFs and COLs based on information outside the evidentiary record.

A final decision in this proceeding based on the ED Report, the ED's Response to Comments, and/or Asarco's Modeling would be a violation of the City's due process rights.

The procedural rights encompassed by due process of law are generally recognized to be as follows: notice of hearing, the opportunity to present

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proof." *Common Carrier Motor Freight Assoc., Inc. v. Railroad Comm'n of Tex.*, 699 S.W.2d 291, 293 (Tex. App.—Austin 1985).

<sup>23</sup> TEX. GOV'T CODE § 2001.058(e).

<sup>24</sup> The APA placed strict limits on the types of information of which a state agency can take official notice: (1) all facts that are judicially recognized; and (2) generally recognized facts within the area of the state agency's specialized knowledge. See TEX. GOV'T CODE § 2001.090(a). In addition, where a state agency takes official notice of certain information, the parties must be given the opportunity to contest the material that is officially noticed. See *id.* § 2001.090(c).

<sup>25</sup> See Interim Order, *supra* note 1, at 1.

argument and evidence and to rebut and test opposing evidence and argument by cross-examination or other appropriate means; appearance with counsel; and a decision by a neutral decision maker based on evidence introduced into the record of the hearing.<sup>26</sup>

A series of cases has determined that basing a final decision on information outside the evidentiary record is a violation of due process rights.<sup>27</sup> The Appeals Court (Austin) has stated: "A valid exercise of agency expertise, like other agency action, must find ultimate support upon evidence taken at the hearing . . . ."<sup>28</sup>

If the Commission were to base a final decision regarding the Application on the ED Report, the ED's Response to Comments, or Asarco's Modeling, such final decision would not pass the standard set out in the *Smith* and *Lone Star Gas* decisions, and thus would not protect the City's due process rights because the ED Report, the ED's Response to Comments, and Asarco's Modeling are outside the evidentiary record. As such, the Commission can: (1) deny the Permit; or (2) refer the proceeding to SOAH, instructing the ALJs to reopen the evidentiary record pursuant to Texas Administrative Code Title 30, Section 80.265 for further proceedings on specific issues in dispute. To take any other step would be a violation of the City's due process rights to rebut and test opposing evidence and would render meaningless the evidentiary record which clearly shows that Asarco failed to prove that operation of the Plant would not cause or contribute to a condition of air pollution.

### III. CONCLUSION AND PRAYER

For all of the foregoing reasons, the City respectfully requests that the Commission either (1) deny Asarco's application for renewal of the Permit; (2) require Asarco to file an application

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<sup>26</sup> *Smith v. Houston Chem. Services, Inc.*, 872 S.W.2d 252, 278 (Tex. App.—Austin 1994).

<sup>27</sup> In *Smith v. Houston Chem. Services, Inc.*, the Court of Appeals (Austin) concluded that a party's due process rights had not been violated, but in doing so determined that the party had made "no claim that the Commissioner acquired facts, through his consultations [with staff], that were simultaneously (1) outside the evidentiary record and (2) grounds for the decision made by the three Commissioners." *Smith*, 872 S.W.2d at 278; see also *Railroad Comm'n of Tex. v. Lone Star Gas Co.*, 611 S.W.2d 911, 913 (Tex. App. 1981) (finding that the Railroad Commission had acted arbitrarily when its final decision "was determined by ignoring the evidence and espousing a formula not supported by proof").

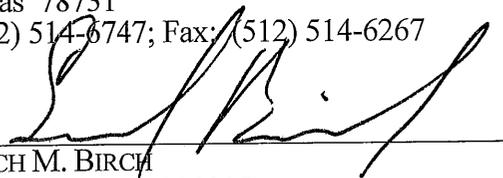
<sup>28</sup> *Lone Star Gas*, 611 S.W.2d at 913.

to amend the Permit for review under EPA's reactivation policy; or (3) refer the proceeding to SOAH, instructing the ALJs to reopen the record pursuant to Texas Administrative Code Title 30, Section 80.265 for further proceedings on specific issues in dispute.

Respectfully submitted,

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**ATTORNEYS FOR THE CITY OF EL PASO**

### **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 TCEQ. I also certify that a true and correct copy of the foregoing document has been served upon all required individuals and entities as identified on the General Counsel's Mailing List for this docket via facsimile, certified mail return receipt requested, hand delivery, overnight delivery, or electronic mail addressed to:

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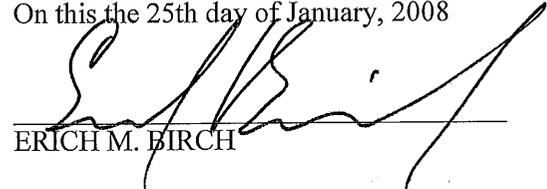
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On this the 25th day of January, 2008

  
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