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**RON CURRY**  
SECRETARY

**CINDY PADILLA**  
DEPUTY SECRETARY

June 15, 2007

Office of the Chief Clerk, MC 105  
Texas Council on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-13087

Re: Executive Director's Report to the Commission on Renewal of ASARCO, Inc.'s  
Air Quality Permit No. 20345  
TCEQ Docket # 2004-0049 AIR

Dear Sir/Madam:

The New Mexico Environment Department (NMED) has reviewed the Texas Commission on Environmental Quality Executive Director's (TCEQ ED) May 1, 2007 report on the renewal of ASARCO, Inc.'s air quality permit for the El Paso Plant (Permit No. 20345). For the reasons discussed below, NMED opposes issuance of the permit under the terms and conditions specified in the ED Report.

NMED provided comments to TCEQ on January 24, 2005 regarding the potential renewal of this permit. We noted in those comments that the area affected by the El Paso Plant has been subjected to serious environmental degradation for a long time. Specifically, the Paso del Norte airshed adjacent to El Paso has historically experienced elevated levels of ozone and particulate matter. In fact, the area may soon be designated nonattainment for the revised National Ambient Air Quality Standard for particulate matter less than or equal to 2.5 microns in aerodynamic diameter (PM<sub>2.5</sub>). The area also suffers every year from elevated levels of particulate matter less than or equal to 10 microns aerodynamic diameter (PM<sub>10</sub>). In addition to these criteria pollutant issues that are common to many parts of the country, the region and Sunland Park in particular have suffered the more acute and pernicious effects of lead and arsenic contamination in soils. This contamination is directly attributable, in part, to the ASARCO El Paso Plant.<sup>1</sup>

<sup>1</sup> For example, according to U.S. EPA Toxic Release Inventory reports for the ASARCO plant, lead emissions in 1989 (the first year reported) were 38,000 pounds from stacks and 6,800 pounds from fugitive emissions. See <http://www.epa.gov/cgi-bin/epaprintonly.cgi>. Although lead emissions declined substantially in the subsequent decade before the smelter was shut down, by 1989 the smelter had already been in operation for almost a century.

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In light of the environmental vulnerability of the communities in this area, and the historical role of the ASARCO plant in contributing to air quality related problems, NMED is not satisfied that the requirements set forth in the ED Report are adequate to protect the health and welfare of New Mexicans affected by emissions from the facility. Specifically, NMED has the following concerns:

1. TCEQ has still not provided an analysis of PSD applicability under *Entergy Monroe*.

In our letter of January 24, 2005, we noted with concern that the TCEQ had failed to provide an analysis of whether the proposed restart of this long shut-down facility constitutes either construction of a new facility or a major modification and is therefore subject to review under the Prevention of Significant Deterioration (PSD) program. The January 24, 2005 letter (attached and incorporated herein by reference) described in some detail the criteria for such an analysis as set forth by the U.S. EPA in the *Entergy Monroe* case.<sup>2</sup>

We respectfully requested the TCEQ to make public an analysis of PSD applicability under the *Entergy Monroe* factors. Although in response to our letter NMED received correspondence from ASARCO Inc. purporting to address this issue, we received no response from TCEQ. On July 21, 2005, after receiving ASARCO's opinion, we renewed our request to the TCEQ to perform its own *Entergy Monroe* analysis and make it public. To date, the TCEQ has not done so.

The ASARCO El Paso Plant has been shut-down for eight years. Under *Entergy Monroe* a shutdown of more than two years is presumed to be permanent unless the owner can demonstrate a *continuous* intent to reopen. If it is found that the shutdown was intended to be permanent, restarting the facility constitutes a construction of a new source and is subject to PSD review.

Among the factors for determining the operator's intent is the status of the source's operating permit and whether permit fees have been paid. According to statements by TCEQ staff ASARCO has not paid its Title V fees and has allowed the permit to lapse. The payment of permit fees and the maintenance of active permits were among the conditions stipulated by TCEQ in its April 19, 1999 letter to ASARCO, as a prerequisite for the shutdown to be considered temporary on an indefinite basis. Therefore, ASARCO has failed to even comply with the conditions set by TCEQ to avoid PSD review.

NMED again renews its request that TCEQ provide an *Entergy Monroe* analysis as part of its response to public comments on the ED Report. As part of this analysis, the TCEQ should consider: projected budgets and actual maintenance expenditures related to the shutdown of the smelter, projected budgets and actual line item expenditures including labor incurred by ASARCO to rehabilitate the plant to make it operable, projected and actual amount of time in

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<sup>2</sup> *In the Matter of Monroe Electric Generating Plant, Entergy Louisiana, Inc. Proposed Operating Permit No. 6-99-2.*

months necessary to make repairs to rehabilitate the plant, the date(s) and operating permit fees paid by ASARCO since 1999, the permit issuance date of ASARCO's Title V permit and the date of any subsequent permit renewal, emissions inventory data reported by ASARCO since 1999, and ownership changes since 1999.

2. Additional testing, monitoring, and recordkeeping requirements are required to assure practical and federal enforceability.

If this permit is issued, NMED strongly encourages the Commission to impose more stringent permit requirements as allowed by statute to ensure compliance with emission limits and ambient standards. The testing, monitoring and reporting requirements are not sufficient to ensure practical and federal enforceability of the permit.

The criteria for practical enforceability of permit terms are well established. EPA summarizes the criteria as follows:

In general, practical enforceability for a source-specific permit term means that the provision must specify (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, annually); and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting.

*Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits*, January 25, 1995, at 6.<sup>3</sup> In addition, EPA notes that "permit terms must be practically enforceable in order to be considered federally enforceable." *Id.* at 5.

The proposed ASARCO permit falls short of the requirements for practical enforceability. The permit is essentially void of any on-going monitoring and recordkeeping requirements to ensure enforceability of process design and work practice requirements, fugitive dust controls, operational limitations, and most importantly, emission limitations for sources not equipped with Continuous Emissions or Opacity Monitoring Systems.

To ensure practical and therefore federal enforceability, NMED recommends that the Commission review each permit condition and verify that adequate monitoring, periodic compliance testing, recordkeeping and reporting are included.

Finally, with respect to stack testing, NMED supports the recommendation for testing of units CU/STK and CU/STK/AN. This recommendation should be enhanced by requiring stack testing to determine compliance with applicable emission limitations for all emitting units, using appropriate U.S. EPA stack testing methods within sixty (60) days of startup.

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<sup>3</sup> <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/potoem.pdf>.

3. Specific protocols are needed for the investigation of the control equipment.

With respect to ASARCO's startup plan for the air quality control equipment, the ED Report contains the statement "[t]he ED concludes ASARCO will not meet the requirements for renewing its permit and does not recommend issuance." ED Report at 24. NMED agrees with this conclusion. However, the Report goes on to provide that a permit of five years duration may be issued if certain requirements are met. NMED objects to the issuance of a permit because the requirements provided are not sufficient to protect public health and prevent further degradation of the El Paso, Juarez and Southern New Mexico air shed.

Specifically, NMED believes that substantive protocols should be established for the evaluation of the Investigation of Air Quality Control Equipment. The stated requirements are general and vague. Results of this investigation and reports submitted by ASARCO demonstrating compliance with these recommendations should be subject to formal public comment. Commencement of startup should not take place without the control equipment being in excellent condition.

4. The air quality modeling analysis is not sufficiently conservative.

In the Air Quality Analysis, ASARCO assesses compliance with ambient air quality standards by adding predicted concentrations resulting from the facility to background monitored concentrations. Although this is consistent with the modeling protocol specified by TCEQ, NMED believes that a more conservative approach is called for, especially given the elevated levels of PM<sub>10</sub> and PM<sub>2.5</sub> in the area.

Monitoring data, especially for particulate matter, is representative only of a specific place and time. Except for ozone, monitoring data cannot accurately represent a regional background concentration due to concentration variations in space and time. In addition, monitoring data more likely reflects particles formed secondarily from precursor gases, rather than primary emissions of particles. Thus monitoring data may not be representative of background concentrations near the source. For example, local conditions may be dominated by particles directly emitted from activities such as aggregate processing, entrained road dust, and fuel combustion. Conversely, by explicitly modeling nearby facilities, as well as including a background concentration that may represent sources of air pollution not explicitly modeled, the modeler can insure that the prediction of maximum concentrations is conservative.

Therefore, NMED recommends that TCEQ use the following approach to insure that the modeling results may be relied upon to protect human health: In addition to the applicant source, all neighboring sources within the radius of impact plus 50 km of the source, or within 65 km (whichever is greater) should be included in modeling the maximum predicted concentration. For the particulate analysis, this cumulative impact concentration should then be added to the monitored background for comparison to the applicable standard. This method will ensure that all nearby sources, as well as transported pollutants and precursors, are accounted for in an appropriately conservative manner.

In addition, we note that whereas the modeling protocol specified by TCEQ calls for reporting of the maximum predicted concentration, ASARCO's analysis utilizes the "controlling concentration" in its report. In the case of PM<sub>2.5</sub>, this is the highest seventh high concentration of 8.9 ug/m<sup>3</sup>, which when added to the background concentration of 21 ug/m<sup>3</sup> results in a total concentration of 29.9 ug/m<sup>3</sup>. TCEQ notes the absence of reporting of the highest predicted concentration in its modeling audit of April 13, 2007. Using the highest predicted PM<sub>2.5</sub> concentration of 14 ug/m<sup>3</sup> in combination with the background concentration of 21, TCEQ reports a total concentration of 35 ug/m<sup>3</sup>, which is exactly equal to the newly promulgated National Ambient Air Quality Standard (NAAQS) for that pollutant.

While the use of the highest seventh high predicted PM<sub>2.5</sub> concentration is appropriate and acceptable, TCEQ should also explain the significance of the finding that the highest predicted PM<sub>2.5</sub> concentration pushes the area to the brink of exceeding the NAAQS.

5. ASARCO's compliance history and stated future commitments do not provide assurances that public health will be protected.

The construction permitting history included in the ED's report to the TCEQ reveals a pattern of ASARCO's non-compliance with emission limits and recurring need to increase allowable emissions after permit issuance. The Process Engineer's significant findings<sup>4</sup> related to the current control equipment condition, projected operator experience levels and past compliance history call into question the ability of ASARCO to ensure compliance with the permit conditions requisite to protect public health.

Moreover, NMED questions whether, for a facility that emits toxic air pollutants (arsenic, lead, copper dust, silver and others), the goal of operating "in accordance with industry standards and practices" is sufficiently protective of public health. See ED Report at 18. Given that most smelters of this vintage have been permanently shut down and dismantled, it is not clear what industry standards and practices are considered applicable by the applicant. In the absence of modern industry standards and practices, is the applicant allowed to employ the industry standards that existed at the turn of the century when the smelter began operation? These outdated industry standards and practices have been shown to be woefully inadequate to protect public health and the environment.<sup>5</sup>

Finally, allegations of illegal hazardous waste incineration at the El Paso Plant in the 1990's further erode confidence in ASARCO's willingness and ability to comply with environmental laws and regulations.<sup>6</sup> Such allegations, as contained in an internal EPA

<sup>4</sup> See April 9, 2007 ASARCO El Paso Smelter Review and Comments report prepared by EHP Consulting, Inc.

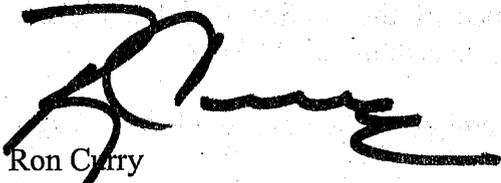
<sup>5</sup> (See, e.g., The ASARCO El Paso Smelter: A source of Local Contamination of Soils in El Paso (Texas), Ciudad Juarez (Chihuahua, Mexico), and Anapra (New Mexico), Michael E. Ketterer, Ph.D, January 27, 2006 (Using atomic spectrometric techniques to determine that emissions from the ASARCO smelter account for at least 50% of the total concentrations of lead, arsenic, and cadmium in all soil sample taken in the named communities).

<sup>6</sup> See e.g., "EPA Memo: ASARCO Burned Waste," Arizona Daily Star, October 12, 2006, <http://www.azstarnet.com/allheadlines/150684>.

memorandum, were not made public until October 2006, after the TCEQ had issued its Interim Order. The TCEQ should explain how this new evidence of an adverse compliance history will be taken into account in considering whether to renew the permit.

NMED appreciates this opportunity to comment and looks forward to working with the TCEQ to protect air quality and the environment in the El Paso/Sunland Park region. If you have any questions, please contact Mike Schneider of the Air Quality Bureau at 505-955-8000 or Bill Grantham of the Office of General Counsel at 505-827-2824.

Sincerely,



Ron Curry  
Secretary



BILL RICHARDSON  
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DERRITH WATCHMAN-MOORE  
Deputy Secretary

July 21, 2005

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CHIEF CLERKS OFFICE

2007 JUN 18 PM 2:29

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**Re: Asarco Incorporated - El Paso Plant  
TCEQ Air Quality Permit #20345 (Renewal)  
TCEQ Docket #2004-0049-AIR**

Dear Mr. Long,

On January 24, 2005, the New Mexico Environment Department ("Department") submitted comments to the Texas Commission on Environmental Quality ("TCEQ") regarding Asarco's application to renew the air quality permit for the El Paso Smelter. On April 7, 2005, the Department received a response from Asarco (copy attached). While it is interesting to hear Asarco's perspective, the Department does not assume that Asarco speaks for the TCEQ. Accordingly, the Department respectfully requests that TCEQ consider the comments and place its analysis in the public record during the permit renewal process.

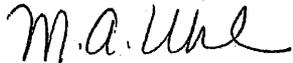
For the record, the Department is not persuaded by Asarco's response. The Department did not (and does not now) "claim procedural error" by the TCEQ. Rather, the Department simply requested that TCEQ apply the *Entergy Monroe* criteria to Asarco's restart of the El Paso Smelter and place its analysis in the public record. With respect to the *Entergy Monroe* criteria, Asarco makes no effort to satisfy the various tests for determining whether the restart constitutes the construction of a new source or the modification of an existing source. Instead, Asarco asserts that in 1999, the TCEQ exempted the El Paso Smelter from future PSD review. In 1999, the TCEQ did issue a letter that appeared to exempt the El Paso Smelter from future PSD review. However, the letter addressed only whether the restart would constitute a new source. Moreover, the letter rejected any presumption regarding the length of shutdown, and was based solely on Asarco's representation that it would pay fees, file inventories, and retain permits. In short, the letter did not address whether the restart constitutes the modification of an existing source, while apparently overlooking the *Entergy Monroe* criteria for evaluating whether the restart constitutes the construction of a new source. Therefore, the Department

respectfully requests that the TCEQ withdraw the letter and reevaluate the PSD issue. Asarco also argues that *Entergy Monroe* was based on alleged considerations regarding the subject facility that are not present at the El Paso Smelter. Nothing in *Entergy Monroe* suggests that these alleged considerations are relevant to the various tests for determining whether restart of the El Paso Smelter is subject to PSD review.

Asarco's response is no substitute for a reasoned agency decision regarding PSD applicability. The Department respectfully renews its request that the TCEQ place an analysis of this issue in the public record during the permit renewal process.

The Department appreciates your consideration of these comments. If you have any questions, please call Mike Fowler at (505) 955-8041 or Eric Ames of the Office of General Counsel at (505) 827-2982.

Sincerely,



Mary Uhl  
Acting Bureau Chief  
Air Quality Bureau

cc: Glenn Shankle, Executive Director, TCEQ  
Richard Hyde, P.E., Air Permits Division, TCEQ  
Ron Curry, Secretary, NMED  
Jim Norton, Director, Environmental Protection Division, NMED  
Michael Fowler, Air Quality Bureau, NMED  
Gail Cooke, Air Quality Bureau, NMED  
Eric Ames, Esq., Office of General Counsel, NMED  
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Thomas L. Aldrich, Asarco Incorporated



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**RON CURRY**  
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29  
CHIEF CLERK OFFICE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

January 24, 2005

Office of the Chief Clerk, MC 105  
TCEQ  
P.O. Box 13087  
Austin, Texas 78711-3087

RE: Contested Case Hearing for Asarco Incorporated El Paso Plant  
TCEQ Air Quality Permit # 20345 (Renewal)  
SOAH Docket # 582-05-0593  
TCEQ Docket # 2004-0049-AIR

Dear Sir/Madam:

The New Mexico Environment Department (NMED) has received notice that Asarco Incorporated (Asarco) has applied to the Texas Commission on Environmental Quality (TCEQ) to renew the air quality permit for its El Paso, Texas primary copper smelter (El Paso Plant). The El Paso Plant, which was shut down in February 1999, is less than one mile from New Mexico's border, and NMED is concerned about the environmental and public health impacts of restarting the facility. According to TCEQ's draft permit, the facility would emit almost 7,000 tons of sulfur dioxide, 350 tons of particulate matter, 250 tons of nitrogen oxides, and 8 tons of lead each year. Emissions of this magnitude, particularly from a facility that has been shut down for more than six (6) years, allowed without mitigation by state-of-the-art pollution controls or a complete evaluation of the impacts of the emissions on ambient air, may violate applicable law and pose an unjustified and avoidable health risk to the citizens of New Mexico.

The area affected by the El Paso Plant is environmentally sensitive. Lead and arsenic contamination in the soils around the El Paso Plant are a significant public health concern. In addition, the El Paso and Sunland Park areas are experiencing a number of air quality concerns, especially elevated levels of airborne particulate matter and ozone. In the past several years New Mexico has monitored levels of particulate matter in the Sunland Park area that far exceed national standards, and the area has grappled with high ozone concentrations for decades. In this light, NMED questions whether this facility should be restarted without a thorough review.

The federal Prevention of Significant Deterioration (PSD) program is designed to protect public health and the environment by requiring installation of best available control technology (BACT) on all new and modified major sources of air pollution, and by requiring a complete analysis of

the impacts of such sources on ambient air quality. The PSD program is codified at Title 40, Part 52, of the Code of Federal Regulations (40 CFR Part 52), and incorporated into the Texas State Implementation Plan (SIP) at Title 30, Part 1, Chapter 116 of the Texas Administrative Code (30 TAC 116). TCEQ has the authority under 30 TAC 116.311(b) to impose applicable PSD requirements in the permit to restart the El Paso Plant. Applicable PSD requirements may include a requirement for the El Paso Plant to employ BACT and to limit emissions to levels below those necessary to prevent significant deterioration of ambient air quality.

The PSD regulations do not completely specify the applicability requirements for the restart of a shutdown facility, but the Administrator of the United States Environmental Protection Agency (EPA) has consistently applied a standard set of criteria to determine whether a restart is subject to review under the PSD program. The Administrator articulated these criteria in her decision upholding an objection to the operating permit for the Entergy Louisiana, Inc. Monroe Plant. *In the Matter of Monroe Electric Generating Plant, Entergy Louisiana, Inc. Proposed Operating Permit, Petition No. 6-99-2 (Entergy Monroe)*. In *Entergy Monroe*, the Administrator evaluated the applicability of PSD requirements to the restart of an electrical generating station that had been shut down for ten (10) years. During the shutdown, which was initially projected to last no more than five (5) years, the station was placed in extended reserve shutdown and regularly maintained. Relevant environmental permits were maintained. The Administrator determined that the restart of the Entergy Monroe facility required PSD review.

In *Entergy Monroe* the Administrator held that:

1. The restart of a shutdown source constitutes construction of a new source subject to PSD review if the owner intended the shutdown to be permanent. A shutdown of more than two (2) years is presumed to be permanent unless the owner can demonstrate a continuous intent to reopen, including concrete plans to restart within a reasonably foreseeable time. In evaluating the intent of a source to reopen, the following factors may be relevant:
  - a. The extent to which emissions from the source have been included in the state's emission inventory;
  - b. Statements made by the source's owner to the Securities and Exchange Commission;
  - c. The status of the source's operating permit and whether or not operating permit fees have been paid;
  - d. Public statements made by the owner of the source;
  - e. Other regulatory filings made by the owner of the source that may address its intent to restart; and
  - f. SIP calls or other regulatory actions in the area of the source.
2. The restart of a shutdown source constitutes a major modification subject to PSD review if the restart involves a physical change that would result in a significant net emission increase of a regulated pollutant. A physical change includes changes made in order to restart the source because those changes are inherently non-routine. A significant net

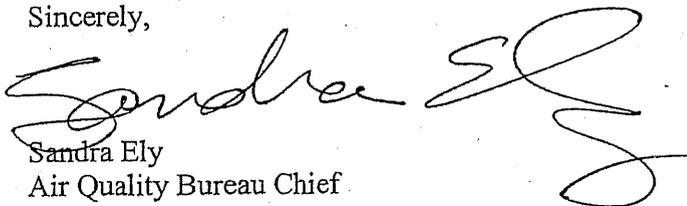
emission increase, measured by comparing allowable emissions after the restart with actual emissions prior to the restart, is an increase greater than the PSD significance levels, which in this case would be 40 tons per year of nitrogen oxides, 40 tons per year of sulfur dioxide, 25 tons per year of particulate matter, and 0.6 tons per year of lead. (30 TAC 116.160(a) and 40 CFR 52.21(b)(23)). Because actual emissions from the El Paso Plant have been essentially nil for six (6) years, the allowable emissions under TCEQ's draft permit may constitute a significant net emission increase for nitrogen oxides, sulfur dioxide, particulate matter, and lead.

3. The restart of a shutdown source constitutes a major modification subject to PSD review if the restart involves a change in the method of operation that would result in a significant net emission increase of a regulated pollutant. In general, the restart of a source represents a change in the method of operation unless that change qualifies as an increase in the hours of operation or production rate in response to short-term market fluctuations. An increase in the hours of operation or production rate in response to long-term market fluctuations, particularly if the increase would disturb a prior assessment of source's environmental impact, constitutes a change in the method of operation.

NMED respectfully requests that TCEQ apply the *Entergy Monroe* criteria to Asarco's proposal to restart the El Paso Plant and place its analysis in the public record. The available information suggests that the restart of the El Paso Plant requires PSD review as either the construction of a new source or the major modification of an existing source. Please contact Mike Fowler of my staff at (505) 955-8041 or Eric Ames of NMED's Office of General Counsel at (505) 827-2982 if you would like to discuss these comments.

We request that you inform us periodically of the status and progress of your permitting action for this facility.

Sincerely,



Sandra Ely  
Air Quality Bureau Chief  
New Mexico Environment Department

cc: Ron Curry, Secretary, New Mexico Environment Department  
Skip Clark, OPRR/Air Permits/Mechanical, TCEQ  
Lairy Johnson, Environmental Manager, El Paso Plant, Asarco Incorporated