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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 18, 2007

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

2007 JUN 18 PM 3:31
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

RE: Asarco Incorporated
TCEQ Docket No. 2004-0049-AIR; SOAH Docket No. 582-05-0593

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Comments on the Executive Director's Report to the Commission in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Emily A. Collins".

Emily Collins, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

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APPLICATION OF ASARCO,
INCORPORATED TO RENEW
AIR QUALITY PERMIT NO.
20345

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S COMMENTS ON THE
EXECUTIVE DIRECTOR'S REPORT TO THE COMMISSION**

The Office of Public Interest Counsel of the Texas Commission on Environmental Quality (TCEQ or Commission) files these Comments on the Executive Director's ("ED") Report to the Commission in this matter. The Commission has determined that ASARCO "failed to demonstrate the effectiveness of its existing emission control equipment and practices as provided in section 382.055(d)(2)."¹ The Commission then directed the ED to conduct an investigation to determine the condition and effectiveness of existing emission control equipment and practices to establish the basis and schedule of any Commission requirements for renewing the permit.² The Commission also required the ED to examine ASARCO's equipment and facilities to assess the need for an amendment application rather than the pending renewal.³

¹ TCEQ Interim Order ("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 (issued March 10, 2006).

² *Id.*

³ *Id.*

I. Preliminary Statement

As a preliminary matter, OPIC finds that the Commission erred in requesting the ED's current report. As a result, OPIC re-urges our position stated at the February 8, 2006, Commission Agenda regarding the applicability of Texas Health and Safety Code section 382.055 to this proceeding. In its March 10, 2006, Interim Order the Commission determined that "a remand of ASARCO's permit application to the Executive Director by interim order is required under subsection (d)(2) and (e) of Section 382.055 as well as subsection (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." Such a remand to the Executive Director for the purpose of a second review of the application and second opportunity for the Applicant to carry its burden of proof, especially at this stage, requires a strained interpretation of section 382.055 which OPIC cannot support.

Section 382.055 applies to the Executive Director's initial technical review of the renewal application,⁴ rather than to a review of the application following issuance of an ALJ's proposal for decision. THSC section 382.055 and 30 TAC section 116.314 set out two distinct review phases of the renewal process for air applications. First, once an application is filed, the Executive Director must *review* the renewal application considering, at a minimum, the owner or operator's compliance history and "the condition and effectiveness of existing emission control equipment and practices."⁵ As a result of the ED's review, conditions or requirements for renewal may be instituted to the extent that such conditions are neither more stringent than those

⁴ 30 TEX. ADMIN. CODE (hereinafter "TAC") § 116.314(a), (b) (referring to the Executive Director's review of the renewal application and potential report establishing a schedule with the renewal requirements being forwarded to the permit holder no later than 180 days after receipt of the application).

⁵ THSC § 382.055(d) (2006).

of the existing permit, unless necessary to avoid a condition of air pollution or to “ensure compliance with otherwise applicable federal or state air quality control requirements nor less stringent than those of the existing permit unless the change will meet section 382.0518 and 382.0541.”⁶ Second, upon the expiration of 180 days from the date the application is filed, the ED must either renew the permit, or issue a report and schedule for meeting any conditions for renewal.⁷ Both of these procedures fall within the time period allowed for the ED’s technical review of renewal applications. The Commission’s rules confirm this by stating that “the executive director shall provide notice to the permit holder with a report which describes the basis for denial,” and “the report shall be forwarded to the permit holder no later than 180 days after the commission receives a completed application.”⁸ In this case, the ED found that ASARCO met all the applicable requirements for renewal, and, consequently, eliminated the need for issuance of a further report under section 382.055.

OPIC asserts that the Commission misconstrued the applicability of section 382.055. At a stage where the ED has completed a report that he disagrees should be issued at all, the procedural error in applying section 382.055 to the Commission’s review of the ED’s decision is especially apparent, and the Commission’s duty to “safeguard the state’s air resources from pollution”⁹ must be given effect.¹⁰

⁶ THSC § 382.055(e) (2006).

⁷ THSC § 382.055(f) (2006).

⁸ 30 TAC § 116.314(b)(1)(A) (2006).

⁹ THSC § 382.002.

¹⁰ *Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985) (holding that “literal statutory construction is inappropriate if it would produce a result in conflict with the legislative purpose clearly manifested in an entire statute or statutory scheme”...and “[w]hen Congress amends a law the amendment is made to effect some purpose...a court should go beyond the literal language of the statute if reliance on that language would defeat the

The Executive Director made a determination through the power delegated to him¹¹ that ASARCO's El Paso facility met the requirements for renewal based on 30 TAC section 116.311(a) and (c).¹² 30 TAC sections 116.310 through 116.314 implement THSC section 382.055.¹³ The ED's determination alleviated the need to pursue the requirements, as the Commission has now mandated, of THSC section 382.055(f)(1), (2), and (h). In addition to the delegation provisions and the ED's own representations that he made a determination under the renewal review provisions,¹⁴ the time period stated in 382.055(f) and indicated in 382.056(a) and (g) locate the 382.055 renewal procedures within the ED's technical review and consideration of public comments rather than after a contested case hearing.

The rules of statutory construction stating that an isolated provision must be construed harmoniously and consistently with the statute as a whole,¹⁵ and the rule that the Commission

plain purpose of the statute"); *Walker v. City of Georgetown*, 86 S.W.3d 249, 259 (Tex.App. – Austin 2002, *pet. denied*) (stating that a statute must be construed to give effect to its purpose).

¹¹ The Commission has actively exercised its powers under 382.061 to delegate Chapter 116 air quality permitting matters, including section 382.055 renewals, to the Executive Director in 30 TAC section 50.131.

¹² Executive Director's Response to Public Comment, Response 1, dated November 13, 2003 (stating that "[t]he review of the renewal permit application consists of compiling and reviewing the compliance history so that compliance issues can be addressed, and review of applicable state and federal air quality control requirements so that new or amended requirements can be incorporated into the permit." The substance of the ED's review comes directly from 30 TAC section 116.311, a section that implements THSC section 382.055).

¹³ 23 Tex.Reg. 6973 (July 3, 1998) (stating that the commission is "readopting [section 116.310-116.314] because they implement the TCAA requirements in § 382.055, concerning renewals of NSR permits."

¹⁴ Executive Director's Response to Public Comment, Response 1, dated November 13, 2003 (stating that "[t]he review of the renewal permit application consists of compiling and reviewing the compliance history so that compliance issues can be addressed, and review of applicable state and federal air quality control requirements so that new or amended requirements can be incorporated into the permit." The substance of the ED's review comes directly from 30 TAC section 116.311, a section that implements THSC section 382.055).

¹⁵ *Helena Chemical Co. v. Kenneth Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (citing *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex.1978)) (stating that "[w]e should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone."); TEX. GOV'T CODE § 311.021(2) (2005).

must give effect to the entire statute support an interpretation that restricts the 180-day technical review and reporting requirements to the ED.¹⁶ Indeed, the Commission's own rules establish a "review schedule" for renewals that limit the ED's review to 180 days after receipt of a completed application.¹⁷ Interestingly, section 382.055 requires a report to be sent to the applicant "on or before the 180th day after the date on which an application for renewal is filed."¹⁸ 30 TAC section 116.314 (Review Schedule) also provides that any report promulgated by the Executive Director must occur within 180 days,¹⁹ and does not (nor would any rule) dictate procedures that must be taken upon the Commission's use of its plenary power.

In further support of such an interpretation, THSC section 382.056(a) categorizes the 382.055 process as "permit renewal review" and locates such review within the time the applicant publishes its notice of intent to obtain the permit review, which always falls into the ED's review period.²⁰ In addition, THSC section 382.056(g) also categorizes 382.055 as "permit renewal review" and recognizes that the review process extends to any publishing of the notice of preliminary decision, which is procedurally located at the end of the ED's review.²¹ As

¹⁶ *Id.*

¹⁷ 30 TAC § 116.314(b)(1)(A).

¹⁸ THSC § 382.055(f) (2006).

¹⁹ Considering a timeline starting with the date the application is filed and culminating in the Executive Director's preparation and mailing of its Response to Public Comments and draft permit, the Executive Director may, complete his review prior to 180 days.

²⁰ THSC § 382.056(a) (2006) (stating that "[e]xcept as provided by Section 382.0518(h), an applicant for a permit or permit amendment under Section 382.0518 or a permit renewal review under Section 382.055 shall publish notice of intent to obtain the permit, permit amendment, or permit review not later than the 30th day after the date the commission determines the application to be administratively complete.")

²¹ THSC § 382.056(g) (2006) (stating that "if in response to the notice published under Subsection (a) for a permit or permit amendment under Section 382.0518 or a permit renewal review under Section 382.055, a person requests during the period provided by commission rule that the commission hold a public hearing and the request is not withdrawn before the date the preliminary decision is issued, the applicant shall publish notice of the preliminary decision in a newspaper, and the commission shall seek public comment on the preliminary decision.")

382.055 applies to the Executive Director's review of air renewal applications; the section does not apply to an air renewal once the Commission refers the matter to the State Office of Administrative Hearings based upon the Commission's plenary power. Therefore, the Commission may make a determination that ASARCO's renewal application should be granted or denied without regard to THSC section 382.055 technical review requirements.

Furthermore, even if a statutory provision lacks facial ambiguity, the Commission may consider the "object sought to be obtained," such as safeguarding the state's air resources, and any "consequences of a particular construction."²² The consequence of applying the reporting requirement of 382.055 to the Commission's review of the ED's 382.055 decision and the ALJ's subsequent PFD produces an illogical result:²³ the Commission has made a determination based on THSC section 382.055(d)(2) that the Applicant failed to demonstrate the effectiveness of its existing emission control equipment and practices due to the findings made by the Administrative Law Judges on predicted exceedances of the significance level for PM₁₀, PM_{2.5}, and NO₂, and the SO₂ area control plan, but then finds that it must direct the ED to conduct an investigation so that the Commission may make the determination required by section 382.055(d)(2). The Commission also determined more generally that ASARCO "had not met the statutory requirements for renewal of its permit."²⁴ Specifically, the Commission found that ASARCO had not met the requirements of 382.055(d)(2) and had not shown the condition and

²² TEX. GOV'T CODE § 311.023(1), (5) (2005); *Helena Chemical* at 493.

²³ *Barshop v. Medina Cnty Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996) (citing *McKinney v. Blankenship*, 154 Tex. 632, 282 S.W.2d 691, 698 (Tex. 1955)) (holding that courts should not apply a statute to create an absurd result).

²⁴ TCEQ 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 (issued March 10, 2006).

effectiveness of pollution control practices and equipment. Despite making this finding in the Interim Order – a finding properly made based on a complete evidentiary record – the Commission then states it needs an investigation and modeling to make the finding it just made. Such a perplexing outcome may come from the inability to reconcile the procedures in 382.055 with a Commission referral to SOAH with its plenary powers. Based on the illogical result that comes from applying the ED’s review procedures to a matter sent to hearing on the Commission’s plenary powers, the most legally reasonable interpretation of section 382.055 is that it applies strictly to the Executive Director’s initial review of the renewal application.

Nevertheless, OPIC provides the following comments on the report that has been produced pursuant to this apparent misunderstanding of the provision of Chapter 382 of the Texas Health and Safety Code.

II. The ED’s Report Fails to Adequately Analyze the Appropriateness of an Amendment Application.

During the public interest hearing regarding ASARCO’s renewal application, an ASARCO witness testified that the ConTop reactors permitted in 1992 were replaced with reactors designed and built by ASARCO itself after the reactors began leaking water.²⁵ The originally installed reactors were licensed and built by an entity unaffiliated with ASARCO.²⁶ In closing arguments, OPIC, the City of El Paso, and all of the Protestants raised the issue of ASARCO’s re-build and replacement of its reactors as a significant change that was never before brought to TCEQ’s attention prior to the 2005 hearing. In response, the Commissioners ordered the ED to “assess the appropriateness of a permit amendment application rather than a renewal

²⁵ Tr. at 206, 368-369.

²⁶ Tr. at 368-369.

application for equipment that has not been previously authorized or that requires repair or replacement.”²⁷

Permittees must apply for an amendment if a change will cause: “a change in the method of control of emissions; (B) a change in the character of the emissions; or (C) an increase in the emission rate of any air contaminant.”²⁸ Even as a “qualified facility,”²⁹ ASARCO must provide enough information to the ED for a determination that the “change does not result in: (A) a net increase in allowable emissions of any air contaminant; and (B) the emission of any air contaminant not previously emitted”...through consideration of, *inter alia*, “any air pollution control method applied to the qualified facility.”³⁰

The ED’s recommended report has ignored sworn testimony regarding significant changes to ASARCO’s facility, and, instead, opted to review its “permit files” and conduct an external investigation to determine if an amendment is appropriate.³¹ This approach is absolutely illogical. ASARCO has already sworn to the truth of the statements made at the hearing regarding complete redesign and reconstruction of its air pollution control method.³² The ED’s own witness at the hearing testified that ASARCO should have at least notified the agency that a re-build and replacement of the reactors took place.³³ The burden to demonstrate the details of the sworn-to change in emission control equipment is not on the ED. In addition, it is not the

²⁷ Interim Order, page 11.

²⁸ 30 TAC § 116.116(b)(1).

²⁹ 30 TAC § 116.10(16); 30 TAC § 116.10(11)(E).

³⁰ 30 TAC § 116.116(e)(1), (2)(A).

³¹ ED’s Recommended Report, page 14.

³² Tr. at 37.

³³ Tr. at 1726.

ED's duty under 382.055(d)(2) to give the Applicant the benefit of the doubt regarding the effect of any modifications to the ConTop reactors. Even if the process engineer could not carry out a "detailed inspection of the ConTop system,"³⁴ staff does not have to allow such doubt to operate as a presumption of normal operation and equipment conditions. This is especially true when an ASARCO witness testified that changes were made.

Under TCEQ permitting procedures, the ED assesses the application to determine if its representations provide enough information for the ED to determine if the modifications triggered an amendment.³⁵ If that application (or statement) is not sufficient, the ED sends out a NOD requiring ASARCO to provide any information necessary on the re-build to allow the ED to determine the appropriateness of an amendment.³⁶ Under the Commission's Interim Order procedure, the ED's on-site investigation should have merely supplemented existing testimony and the information in the existing application.³⁷ Instead of giving the Applicant the benefit of the doubt regarding the ConTop modifications, the Commission's report should essentially represent a Notice of Deficiency with regard to the amendment issue. The Applicant has not shown how the modifications to ConTop have affected the condition and effectiveness of its emission control equipment, and must do so within a reasonable amount of time. The current permit requires recordkeeping for "[a]ll maintenance and repair activities undertaken with respect to air pollution control equipment."³⁸ Therefore, all records, including the ConTop

³⁴ ED's Recommended Report, Attachment K, page 10, section 5.3.

³⁵ 30 TAC § 116.114(a)(1).

³⁶ *Id.*

³⁷ Interim Order, page 11.

³⁸ ASARCO Ex. 26, page 15.

redesign and reconstruction, should be on file with the Applicant. OPIC sees no reason to allow ASARCO any more time than 45 days for submitting any additional information necessary to determine: (1) if any change in the method of control of emissions has occurred, and (2) if any air quality effects result because of the rebuild.³⁹

Furthermore, simply comparing equipment to the permit to “determine if equipment had been removed or added, as well as whether equipment had been repaired or replaced”⁴⁰ ignores sworn statements by ASARCO personnel and disregards any effect of the changes described in those sworn statements. Indeed, the permit does not even reflect the condition and effectiveness of emission control equipment as of 1992.⁴¹ In addition, the ED has stated that his investigation during the “phase” in which he compared equipment to the permit was “an external review of process equipment and pollution control equipment,”⁴² which OPIC understands to mean a review that did not examine the internal condition, effectiveness, or workings of the reactors. Such a review would necessarily not discover any modifications to the ConTop reactors, which are very much internal,⁴³ or other control equipment.

³⁹ 30 TAC § 116.10(16); 30 TAC § 116.10(11)(E); 30 TAC § 116.116(e)(1), (2)(A). OPIC notes that TCEQ normally only allows 30 days to respond to a NOD. 30 TAC § 281.18(a).

⁴⁰ ED’s Recommended Report, page 6.

⁴¹ ASARCO Ex. 26 (listing emission sources without any description of their condition).

⁴² ED’s Recommended Report, page 6.

⁴³ ED’s Recommended Report, Phase I Regional Investigation report, ASARCO, conducted April 11 & 20, 2006, Submitted by TCEQ Investigation Team, April 28, 2006, Attachment G, page 6 (describing the ConTop Reactor System as vessels where “dried concentrate is vertically injected into the cyclone reactors, where smelting takes place”...and “oxygen and natural gas are tangentially injected.”).

III. The ED's Report Merely Re-urges Arguments Made at the Hearing as a Party Supportive of the Renewal Application Without Regard to the Commission's Interim Order Determination.

The ED argued during the contested case hearing on this matter that ASARCO's permit should be renewed and that a report does not need to be issued based on the ED's technical review, the fact that the Applicant only asked for a renewal, and the evidence admitted at the hearing. The ED's stance has not changed, but has only been made to fit within the procedural stance of the Commission's Interim Order.

The Commission's Interim Order states that "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 PM₁₀, PM_{2.5}, and NO₂, and of the SO₂ 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."⁴⁴ Part of the ALJs' findings with regard to particulate matter exceedances involved a number of emission sources described as "contrivances" by the ALJs.⁴⁵ The Oglebay Norton source, which processes ASARCO's slag after it cools, is located immediately adjacent to ASARCO and operates on land owned by ASARCO.⁴⁶ Both the Protestants' expert witness and ASARCO's expert testified that PM emissions would come from Oglebay Norton's slag handling activity.⁴⁷ As a result, the ALJs found that the two companies were so "interconnected and interdependent that it seems

⁴⁴ Commission's Interim Order, page 1.

⁴⁵ PFD at 80-87.

⁴⁶ PFD at 80-81.

⁴⁷ El Paso Ex. 1, p. 41; Tr. at 2243.

extremely close to a contrivance.”⁴⁸ Oglebay Norton’s PM emissions, therefore, contributed to the ALJs’ finding regarding particulate matter emissions. As the Commission based its 382.055(d)(2) determination on the ALJs’ findings regarding PM₁₀, PM_{2.5}, and the SO₂ area control plant, the ED should have required the Oglebay Norton emission source to be included in the modeling.

Similarly, the matte pouring area constitutes yet another emissions source which the ED and ASARCO had argued should not be considered during the contested case hearing.⁴⁹ It is unclear to OPIC that the ED required that the SO₂ emissions from the matte pouring area be considered as part of ASARCO’s newest modeling. However, if the SO₂ emissions from the matte pouring area were not considered, this contravenes the intent of the Commission’s Interim Order, which found that ASARCO failed to demonstrate the effectiveness of its emission control equipment and practices with regard to the ALJs’ assessment of the SO₂ area control plan.⁵⁰

Interestingly, the modeled emissions inventory included ASARCO’s Permit 4151,⁵¹ which the ALJs’ also considered as violative of the Commission’s circumvention rule.⁵² It appears that the ED and ASARCO handpicked the emission sources they felt were appropriate without regard to the Commission’s reliance on the ALJs’ findings to construct the Interim Order.⁵³ The Report needs to address these emission sources to explain and justify the basis of

⁴⁸ PFD at 81.

⁴⁹ PFD at 90-92.

⁵⁰ Interim Order at 1-2.

⁵¹ Independent Third Party Audit of the Air Quality Analysis for ASARCO Incorporated El Paso Smelter Plant Renewal of TCEQ Permit 20345, ED’s Recommended Report, Attachment L, page 12.

⁵² PFD at 81-85.

⁵³ Interim Order at 1-2.

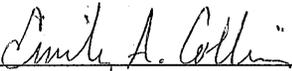
the Commission's determination that ASARCO has "failed to demonstrate the effectiveness of its existing emission control equipment and practices"... "based on the evidentiary record from SOAH and particularly, the findings of the ALJs' with regard to predicted exceedances of the significance level for PM₁₀, PM_{2.5}, and NO₂, and the SO₂ area control plan compliance standard."⁵⁴

IV. Conclusion

OPIC finds that the Commission erred in requesting the ED's current report. Nevertheless, if the Commission insists on pursuing this procedural path, OPIC requests that the Commission revise the ED's Recommended Report to include emission sources identified by the ALJs' as contributing to potential PM and SO₂ exceedances and to include provisions for review of the ConTop re-design and re-construction to determine if an amendment is necessary.

Respectfully submitted,

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⁵⁴ *Id.*; see also Tex. Gov't Code § 2001.141(d); *Goeke v. Houston Lighting & Power Co.*, 797 S.W.2d 12, 15 (Tex. 1990) (holding that a final agency order must include findings of underlying facts that "inform the parties and the courts of the basis for the agency's decision so that the parties may intelligently prepare an appeal and so that the courts may properly exercise their function of review").

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2007, the original and eleven true and correct copies of the Office of the Public Interest Counsel's Comments were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Emily A. Collins

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