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Tuesday, January 22, 2008

VIA HAND DELIVERY

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
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CHIEF CLERKS OFFICE

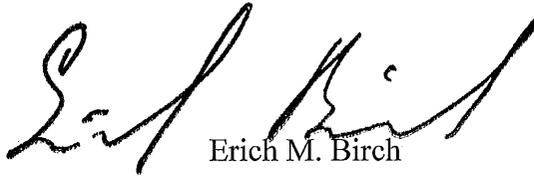
Re: Application of Asarco Incorporated for Renewal of Air Quality Permit No. 20345;
TCEQ Docket No. 2004-0049-AIR; SOAH Docket No. 582-05-0593

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced proceeding is *Protestants', the City of El Paso's, Motion to Continue the Texas Commission on Environmental Quality's Consideration of the Application of Asarco Incorporated for Renewal of Air Permit No. 20345*. 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

2008 JAN 22 PM 1:55

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 COMMISSIONS OFFICE
ON
ENVIRONMENTAL QUALITY

**PROTESTANT'S, THE CITY OF EL PASO'S, MOTION TO CONTINUE
THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S
CONSIDERATION OF THE APPLICATION OF ASARCO INCORPORATED
FOR 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
*Motion to Continue the Texas Commission on Environmental Quality's Consideration of the
Application of Asarco Incorporated for Renewal of Air Quality Permit No. 20345* in the above-
referenced proceeding, and would respectfully present the following:

I. BACKGROUND AND BASIS FOR MOTION FOR CONTINUANCE

On Friday, December 28, 2007, the City received notice from the Texas Commission on
Environmental Quality ("TCEQ" or the "Commission") that the consideration of Asarco
Incorporated's ("Asarco") application for renewal of Air Quality Permit No. 20345 and related
pleadings had been scheduled for the Commissioners' February 13, 2008 public meeting. For
the reasons identified below, the City respectfully requests that the Commissioners' continue
their consideration of Asarco's renewal application until such time as the issues addressed below
have been resolved.

As the Commission is aware, the consideration of the Asarco renewal application is of
the highest importance to the City. Because of the importance of this issue to the citizens of
El Paso, the City believes that it is imperative that the Commission not consider the renewal of
Asarco's permit until such time as other related matters have been resolved. It has now been
almost two years since the parties last appeared before the Commissioners in this proceeding.
The issues below are central to the Commissioners' consideration of Asarco's application, and as

such, delay is justified because it would ensure that the Commissioners have complete information to make their decision on the application. To act on the application, especially if such action resulted in renewal of Air Quality Permit No. 20345, without having complete information could result in harm to the citizens of El Paso. The Commissioners must act to protect the health and environmental quality of the citizens of El Paso. A continuance of this proceeding until the issues identified below have been addressed will ensure that environmental quality and the health and safety of the people of El Paso are protected.

A. EPA Is Expected to Revise the Lead NAAQS Later This Year.

The U.S. Environmental Protection Agency (“EPA”) is now taking steps to tighten the National Ambient Air Quality Standard (“NAAQS”) for lead. The current lead NAAQS, as established by EPA in 1978, has not been updated in nearly thirty years. The NAAQS for lead of 1.5 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) was established in 1978 to ensure “safe” blood-lead concentrations based on a now out-of-date, and unprotective, blood-lead standard.¹ In other words, the health standard for lead in blood, *i.e.*, the blood-lead standard, has been reduced twice in response to ongoing research, but EPA has not lowered the NAAQS for lead in air to correspond to the lowered blood-lead standard. The current lead NAAQS is based on a blood-lead standard three times higher than the currently accepted blood-lead standard.²

In a review of the lead NAAQS released in November 2007, EPA staff concluded that a significant reduction is necessary to protect the public’s health and recommended that the standard be reduced from 1.5 $\mu\text{g}/\text{m}^3$ to a level between 0.02 $\mu\text{g}/\text{m}^3$ and 0.2 $\mu\text{g}/\text{m}^3$.³ Staff of

¹ 40 C.F.R. § 50.12; *see also* Tr. at 1313 (Cross Exam (by Ms. Layla Aflatooni) of Ms. Lucy Fraiser, Ph.D.).

² *See* Tr. at 1313 (Cross Exam (by Ms. Layla Aflatooni) of Ms. Lucy Fraiser, Ph.D.).

³ *See* U.S. Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Lead: Final Staff Paper and Human Exposure and Risk Assessment Report* at 1 (Nov. 2007), available at http://www.epa.gov/ttnnaaqs/standards/pb/data/20071101_pb_fs.pdf.

EPA's Office of Air Quality Planning and Standards ("OAQPS") also recommended that a monthly averaging time (rather than the current quarterly averaging time) be implemented.⁴ In December 2007, EPA released an Advance Notice of Proposed Rulemaking ("ANPR") to invite comment from all interested parties on the adequacy of the current lead NAAQS and potential revisions to the standard.⁵ It is expected that a proposed rulemaking will be published in March 2008, and pursuant to court order, EPA must take final action on the adoption of any new lead NAAQS by September 1, 2008⁶

As the Commission is aware the emission of lead into the air by the Asarco El Paso Plant is a long-term and continuing problem. Air Quality Permit No. 20345 authorizes the Asarco El Paso Plant to emit 4.7 tons of lead into the El Paso air annually, making it one of the highest lead emitters in the entire State of Texas. This high volume of emissions coupled with the historic lead contamination in El Paso, the high levels of lead found in the blood of children in the El Paso and Ciudad Juarez areas in the 1970s, and the on-going cleanup of lead contaminated yards throughout the area, all of which resulted from Asarco's past operations, will aggravate existing health threats from historical lead exposure in the El Paso area.

Based on this new information being considered by EPA, and the potential that EPA will adopt a significantly more stringent lead NAAQS, it is clear that the lead emissions from the Asarco El Paso Plant have been evaluated based on out-dated and unprotective standards. The City requests that the Commission continue this proceeding until such time as EPA acts on a new lead NAAQS and the health effects of the emissions of lead from the Asarco El Paso Plant can be evaluated based on a standard that is protective of the citizens of El Paso and the surrounding area.

⁴ See *id.* at 2.

⁵ See 72 Fed. Reg. 71,488 (Dec. 17, 2007).

⁶ See *id.* at 71,493.

B. The City Desires to File a *Petition for Revocation* of Asarco's Permit.

The City desires to file a *Petition for Revocation* of Air Quality Permit No. 20345 with the Commission. However, as the Commission is aware, Asarco is presently involved in chapter 11 bankruptcy proceedings in the U.S. Bankruptcy Court for the Southern District of Texas in Corpus Christi, and thus an automatic stay has arisen under federal bankruptcy law. The City recently filed a *Motion for Relief from Stay Regarding State Administrative Proceeding* with the Bankruptcy Court.⁷ Because of Asarco's status as a debtor in bankruptcy, the City believes that it is necessary, in an abundance of caution, to obtain a ruling from the Bankruptcy Court on its *Motion for Relief from Stay*, determining that the automatic stay does not apply to the *Petition for Revocation* or granting relief from stay to file the *Petition* before actually filing the *Petition for Revocation* with the Commission.

The City's *Petition for Revocation* would request that the Commission revoke Air Quality Permit No. 20345 pursuant to Texas Water Code Sections 7.302 *et al.* Section 7.302 identifies that the Commission may revoke, suspend, or revoke and reissue an air quality permit issued pursuant to Texas Health and Safety Code Chapter 382 (*e.g.*, Air Quality Permit No. 20345), on any of the following grounds:

- (1) violating any term or condition of the permit, and revocation, suspension, or revocation and reissuance is necessary in order to maintain the quality of water or the quality of air in the state, or to otherwise protect human health and the environment consistent with the objectives of the statutes or rules within the commission's jurisdiction;
- (2) having a record of environmental violations in the preceding five years at the permitted or exempted site;
- (3) causing a discharge, release, or emission contravening a pollution control standard set by the commission or contravening the intent of a statute or rule described in Subsection (a);

⁷ Motion of City of El Paso for Relief from Stay Regarding State Administrative Proceeding, *In re: ASARCO LLC*, et al., Case No. 05-21207 (S.D. Tex. Bankr. Ct.) (Jan. 21, 2008).

(4) including a material mistake in a federal operating permit issued under Chapter 382, Health and Safety Code, or making an inaccurate statement in establishing an emissions standard or other term or condition of a federal operating permit;

(5) misrepresenting or failing to disclose fully all relevant facts in obtaining the permit or misrepresenting to the commission any relevant fact at any time;

(6) a permit holder being indebted to the state for fees, payment of penalties, or taxes imposed by the statutes or rules within the commission's jurisdiction;

(7) a permit holder failing to ensure that the management of the permitted facility conforms or will conform to the statutes and rules within the commission's jurisdiction;

(8) the permit is subject to cancellation or suspension under Section 26.084;

(9) abandoning the permit or operations under the permit; or

(10) the commission finds that a change in conditions requires elimination of the discharge authorized by the permit.⁸

The City's *Petition for Revocation* would identify facts supporting revocation of Air Quality Permit No. 20345 on multiple grounds identified in Section 7.302(b), including:

- Asarco has consistently violated the terms and conditions of Air Quality Permit No. 20345. Asarco violated emissions limitations for numerous permitted parameters during the entire operational life of the Asarco El Paso Plant under the permit. Long-term violations of emissions limitations for sulfur dioxide (SO₂), carbon monoxide (CO), particulate matter (PM) (especially heavy metals such as lead and arsenic), nitrogen oxides (NO_x), and volatile organic compounds (VOCs) have been established. During the 1990s, Asarco demonstrated that it could not operate the Asarco El Paso Plant in compliance with permitted emissions limitations.

⁸ TEX. WATER CODE § 7.302(b).

- From 1993 through at least 1994, emissions of SO₂ from the Asarco El Paso Plant were approximately two times the permitted levels.⁹
- From 1993 through at least 1994, emissions of arsenic from one emission point at the Asarco El Paso Plant were approximately fourteen times the permitted levels. Emissions of other metals from this and other emission points were also significantly higher than permitted levels during this timeframe.¹⁰
- From 1993 through 1999, emissions of NO_x from the Asarco El Paso Plant were approximately two and one-half times the permitted levels.¹¹
- From 1993 through 1999, emissions of CO from the Asarco El Paso Plant were approximately eleven times the permitted levels.¹²

⁹ See Asarco Exh. 27, Maximum Allowable Emission Rates (original vs. current versions of Permit No. 20345) [hereinafter MAER Comparison]; see also Prefiled Testimony of Mr. Larry Castor, *In the Matter of the Application of Asarco LLC for Renewal of Air Quality Permit No. 20345, Copper Smelter, El Paso, El Paso County*, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, at 2; Tr. at 71-76 (Cross-Exam (by Mr. Erich Birch) of Mr. Lawrence Castor). With regard to SO₂ emissions, Mr. Castor testified:

Q. But the fact is your emissions were in excess of your permitted emissions during that entire time [March 1993 through December 1995], is that correct?

A. That is correct.

Id. at 205 (Cross Exam (by Mr. Michael Wyatt) of Mr. Lawrence Castor).

¹⁰ Arsenic emissions from the Water Treatment Plant Spray Dryer were increased by 1545%. See Tr. at 587 (Cross Exam (by Mr. Erich Birch) of Mr. David Cabe, P.E.); see also City of El Paso Exh. 10, Letter from Mr. William R. Campbell, Acting Executive Director, Texas Comm'n on Env'tl. Quality, to Mr. Tom Martin, Environmental Manager, ASARCO, Inc., at 6 (Nov. 4, 1994). In addition, emissions of lead from that source were increased by 3900%, and emissions of zinc from that source were increased by 7700%. See *id.*

¹¹ See MAER Comparison, *supra* note 9; see also Tr. at 76-80 (Cross Exam (by Mr. Erich Birch) of Mr. Lawrence Castor); *id.* at 634-35 (Cross Exam (by Mr. Erich Birch) of Mr. David Cabe, P.E.). With regard to NO_x emissions, Mr. Castor testified:

Q. . . . So during the entire time period from 1993 through 1999, was the Asarco facility actually emitting NO_x at a higher rate than its permitted levels?

A. Well, I don't know that for sure for the entire time, but I would assume that they were higher.

Id. at 76-80 (Cross Exam (by Mr. Erich Birch) of Mr. Lawrence Castor).

¹² See MAER Comparison, *supra* note 9; see also Tr. at 78-81 (Cross Exam (by Mr. Erich Birch) of Mr. Lawrence Castor); *id.* at 635 (Cross Exam (by Mr. Erich Birch) of Mr. David Cabe, P.E.).

- From 1993 through 1999, emissions of volatile organic compounds (VOCs) from the Asarco El Paso Plant were approximately twice the permitted levels.¹³
- From 1993 through 1999, Asarco operated two unpermitted reactors, the ConTop reactors, at the Asarco El Paso Plant.¹⁴ When the ConTop reactors were replaced shortly after start-up of the ConTop facilities, Asarco failed to seek an amendment or other revision to Air Quality Permit No. 20345 to authorize replacement of these major sources of air pollution in violation of TCEQ rules.
- From 1993 through 1997, the Asarco El Paso Plant processed hazardous waste, the “Encycle Concentrate,” in violation of Air Quality Permit No. 20345. EPA identified that the Asarco El Paso Plant had processed the Encycle concentrate at its smelter for the purposes of recovering copper and that the Encycle concentrate was a hazardous waste. The Encycle waste, containing little to no copper, was incinerated at the Asarco El Paso Plant in a process determined to be “sham” recycling by EPA. EPA identified that Asarco illegally burned 5,000 tons of waste including more than 300 tons of chemical warfare agents from the U.S. Army Rocky Mountain Arsenal facility,¹⁵ without having the appropriate authorizations to process the hazardous waste.¹⁶ Asarco was fined \$20 million in penalties by EPA for these sham recycling activities.¹⁷
- In 1996 Asarco circumvented State air quality regulations by increasing its production rates under a Senate Bill SB 1126 (“SB 1126”) modification, coupled with a permit alteration to authorize an increase in its permitted emissions rates resulting from the production rate increase. A SB 1126 permit modification can only be utilized when the modification does not “result in a *net increase* in allowable emissions of any air contaminant.”¹⁸ The increase in emissions authorized by the October 1996 permit alteration was required as a result of the August 1996 SB 1126 increases in production rates of copper anodes and sulfuric acid,¹⁹ and thus, was in violation of SB 1126 requirements.

¹³ See MAER Comparison, *supra* note 9; see also Tr. at 129 (Cross Exam (by Mr. Erich Birch) of Mr. Lawrence Castor).

¹⁴ See Tr. at 369-70 & 425 (Cross Exam of Mr. Lawrence Castor); see also *id.* at 1726 (Cross Exam of Mr. LeRoy “Skip” Clark, P.E.).

¹⁵ See Ralph Blumenthal, *Copper Plant Illegally Burned Hazardous Waste, E.P.A. Says*, N.Y. TIMES (Oct. 11, 2006).

¹⁶ See City of El Paso Exh. 19, Memorandum from Terry Sykes, Senior Enforcement Counsel, EPA Region 6, to Samuel Coleman, Director, Compliance Assurance and Enforcement Division, EPA Region 6, at 1 & 6 (no date)

¹⁷ See *id.*

¹⁸ TEX. HEALTH & SAFETY CODE § 382.003(9)(E) (emphasis added).

¹⁹ See City of El Paso Exh. 12, “SB 1126 Letter, Technical Review” at 1.

- Asarco has failed to ensure that management of the Asarco El Paso Plant conforms or will conform to the statutes and rules within the Commission's jurisdiction.
- Through the bankruptcy process, Asarco is actively seeking plan sponsors to purchase all or substantially all of Asarco's assets, which could include the Asarco El Paso Plant.²⁰ If Asarco is not the future operator of the Asarco El Paso Plant it cannot ensure that the management of the plant will conform to applicable statutes and rules.
- Asarco shutdown the Asarco El Paso Plant in 1999; thus, the plant has not been operational in nearly eight years. As late as 2005, Asarco could not demonstrate that it intended to re-start the Asarco El Paso Plant. Asarco has effectively abandoned operations under the permit.
- The El Paso area has change dramatically since the permit was issued in 1992. The combined population of El Paso County, Texas and Ciudad Juarez, Chihuahua, Mexico has grown from 1,390,109 in 1991 to 2,047,797 in 2005.²¹ The combined population is estimated to be 2,768,277 in 2016.²² The first new medical school in the country in more than thirty years is under construction in El Paso. New companies have located in El Paso, and with the U.S. Army's decision to realign military bases, a significant influx of new people will soon be moving to the El Paso area.
- EPA's reactivation policy is triggered by reopening of the Asarco El Paso Plant. Pursuant to EPA's 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. Because of the required PSD review, Air Quality Permit No. 20345 must be re-evaluated and cannot simply be renewed or allowed to continue in its current form.

Consideration of all of these issues is imperative to the environmental quality and the health and safety of the citizens of El Paso. Therefore, the City requests that the Commission continue these proceedings until such time as the City's *Petition for Revocation* has been filed with, considered, and acted upon by the Commission.

²⁰ See Transcript of Motions Hearing, *In re: ASARCO LLC*, et al., Case No. 05-21207, at 45 & 58 (Testimony of Mr. Joseph Lapinsky, President and CEO of ASARCO, LLC) (S.D. Tex. Bankr. Ct. Apr. 11, 2007); see also ASARCO LLC, Plan of Reorganization Exit Process Timeline, *In re: ASARCO LLC*, et al., Case No. 05-21207 (S.D. Tex. Bankr. Ct).

²¹ Prefiled Testimony of Verónica Rosales, *Application of Asarco Incorporated for Renewal of Air Quality Permit No. 20345*, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR at tbl. A (May 18, 2005).

²² *Id.*

C. The Asarco Permit Renewal Is a Speculative Permit Process until Asarco's Bankruptcy Proceedings Are Complete.

Through the bankruptcy process, Asarco is actively seeking plan sponsors to purchase all or substantially all of Asarco's assets, which could include the Asarco El Paso Plant. At this time it is uncertain as to whom Asarco's plan sponsor might be, what the sponsor's plans would be for the Asarco El Paso Plant, what the timing of those plans might be, *et cetera*. If Asarco is not the future operator of the Asarco El Paso Plant it cannot ensure that the management of the plant will agree to be bound by the applicable statutes and rules. In the interest of judicial efficiency and economy, the Commission should grant this *Motion to Continue* the current permit renewal proceedings until the Commission knows who the future owner/operator, and thus the permittee, of the Asarco El Paso Plant will be, whether the permittee intends to restart the Asarco El Paso Plant, and if so, whether the owner is committed to meeting the permit obligations as required by State and federal law and regulations. The Asarco El Paso Plant has been shutdown for approximately nine years. It is prudent for the Commission to delay further adjudication of this proceeding in order to have greater certainty regarding the ownership of the Asarco El Paso Plant prior to addressing the legal and policy issues demanded by Asarco's renewal application.

II. REQUEST FOR PROMPT RULING BY THE COMMISSION

The Commission's public meeting regarding Asarco's renewal application is currently scheduled to take place in Austin in approximately three weeks, on February 13, 2008. The Asarco permit renewal is of very high importance to people living in the El Paso area, and hundreds of people from the El Paso and surrounding communities are making plans to attend the February 13, 2008 meeting. The City of El Paso is approximately 600 miles from Austin, and making the trip will require planning, travel expenditures, missing work, and other hardships for many of the people that plan to attend. The City therefore requests that the Commission

promptly rule on the City's Motion to Continue the public meeting in this proceeding, and urges the Commission to grant the Motion, in order to facilitate planning by citizens from El Paso and surrounding areas.

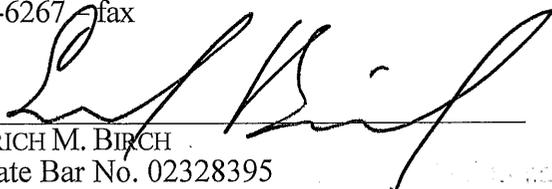
III. CONCLUSION AND PRAYER

For all of these reasons, the City of El Paso respectfully requests that the Commissioners of the Texas Commission on Environmental Quality continue this proceeding, and specifically the Commission's scheduled consideration of Asarco's application to renew Air Quality Permit No. 20345 at its February 13, 2008 Commissioners' Agenda, until such time as (1) the U.S. Environmental Protection Agency has acted on a new National Ambient Air Quality standard for lead and the health effects of the emissions of lead from the Asarco El Paso Plant can be evaluated based on a standard that is protective of the citizens of El Paso and the surrounding area; (2) the City of El Paso's *Petition for Revocation* of Air Quality Permit No. 20345 has been filed with, considered, and acted on by the Commission; and (3) the Commission knows who the future owner/operator, and thus the permittee, of the Asarco El Paso Plant will be, whether the permittee intends to restart the Asarco El Paso Plant, and if so, whether the owner is committed to meeting the permit obligations as required by State and federal law and regulations.

Respectfully submitted,

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PROTESTANT'S, THE CITY OF EL PASO'S, MOTION TO CONTINUE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S CONSIDERATION OF THE APPLICATION OF ASARCO INCORPORATED FOR RENEWAL OF AIR QUALITY PERMIT NO. 20345

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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 Texas Commission on Environmental Quality. 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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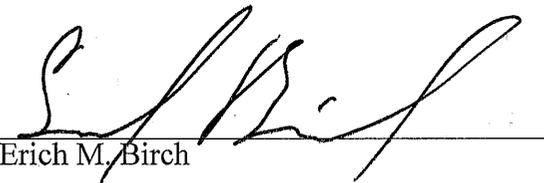
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On this the 22 day of January, 2008


Erich M. Birch

CHIEF CLERKS OFFICE

2008 JAN 22 PM 1:55

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY