

# BIRCH, BECKER & MOORMAN, LLP

7000 NORTH MOPAC EXPRESSWAY, SECOND FLOOR, AUSTIN, TEXAS 78731 ■ (512) 514-6747 ■ FAX (512) 514-6267

Mr. Birch's Direct Line: (512) 258-9199  
E-mail: [ebirch@birchbecker.com](mailto:ebirch@birchbecker.com)

FRIDAY, JANUARY 25 2008

b|b|m  
2008 JAN 25 AM 11:33  
CHIEF CLERKS OFFICE  
TEXAS COMMISSION  
ON ENVIRONMENTAL  
QUALITY

## 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

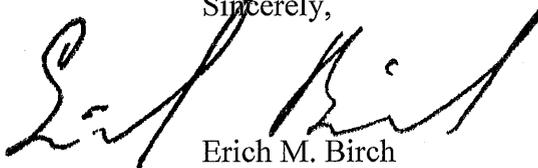
Re: Protestant's, the City of El Paso's, Supplement to Its Motion to Continue the Texas Commission on Environmental Quality's Consideration of the Application of Asarco Incorporated for Renewal of Air Quality Permit No. 20345, *Application of ASARCO Incorporated for Renewal of Air Quality Permit No. 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, Supplement to Its 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*.

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

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

BEFORE THE TEXAS COMMISSION  
ON  
ENVIRONMENTAL QUALITY

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
JAN 22 AM 11:33  
CHIEF CLERK'S OFFICE

**PROTESTANT'S, THE CITY OF EL PASO'S, SUPPLEMENT  
TO ITS 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 its *Supplement to Its 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 SUPPLEMENT TO MOTION FOR CONTINUANCE**

On Tuesday, January 22, 2008, the City filed its *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*. Specifically, the City requested that the Commissioners' continue their consideration of Asarco's renewal application until such time as certain issues identified in the Motion had been resolved. Since the City filed the *Motion to Continue* new public information has been released regarding the ownership and future operation of the Asarco El Paso Plant.

As identified in the *Motion to Continue*, Asarco LLC (previously known as Asarco Incorporated), the owner of the Asarco El Paso Plant and the applicant in this proceeding, is in chapter 11 bankruptcy proceedings. A public announcement made just yesterday demonstrates that the Asarco El Paso Plant may never be reopened and the pending request for renewal of Air Quality Permit No. 20345 may be withdrawn.

ASARCO Inc., the owner of Asarco LLC, publicly announced that it will not seek to restart the Asarco El Paso Plant and will not seek to renew Air Quality Permit No. 20345 if it regains control of Asarco LLC.<sup>1</sup> ASARCO Inc. owns 100% of the equity of Asarco LLC and is seeking to regain control of the business through the bankruptcy proceeding. ASARCO Inc. has publicly stated that the Asarco El Paso Plant does not fit into its overall business strategy, “has committed to keep the smelter closed,” and “will work with the community and the appropriate regulatory agencies to remediate environmental contamination at the site” if it is able to regain control through the bankruptcy proceedings.<sup>2</sup>

Whether the Asarco El Paso Plant will ever reopen operations is highly uncertain at this time. Until the owner/operator of the plant is determined through the bankruptcy proceedings, the Commission cannot even be sure that the Asarco El Paso Plant will be operated in the future. The permit renewal process should not move forward until the very basic owner/operator issues have been addressed.

In the interest of judicial efficiency and economy, the Commission should grant the City’s *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. Indeed, if ASARCO Inc., the current owner of Asarco LLC (the applicant), is successful in retaining its ownership and regaining control, it has publicly announced that it will withdraw the request for renewal of Air Quality Permit No. 20345 and not reopen the Asarco El Paso Plant.

---

<sup>1</sup> Press Release, “ASARCO Inc. Commits to Keep El Paso Smelter Closed and Remediate Site if It Regains Control of Plant Owner ASARCO LLC” (Jan. 24, 2008), attached hereto and incorporated herein as Exhibit A.

<sup>2</sup> *Id.*

As noted in the *Motion to Continue*, the Asarco El Paso Plant has already been shutdown for approximately nine years. Currently hundreds of people are making plans to attend the Commission meeting in February, all of whom will have made a needless trip to Austin, regardless of the Commission decision, if the eventual owner of the Asarco El Paso Plant has no plans to operate the plant or renew the air quality permit. It is prudent for the Commission to delay further adjudication of this proceeding in order to have greater certainty regarding the ownership and future operations of the Asarco El Paso Plant prior to addressing the legal and policy issues demanded by Asarco's renewal application.

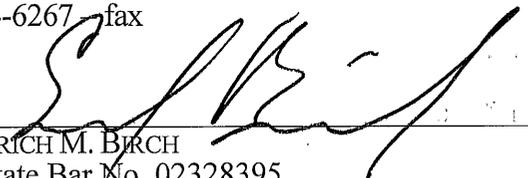
## II. CONCLUSION AND PRAYER

For the above reasons as well as all of the reasons addressed in the City's *Motion to Continue*, 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 the issues surrounding the ownership and future operation of the Asarco El Paso Plant have been determined.

Respectfully submitted,

**Birch, Becker & Moorman, LLP**  
7000 North MoPac Expressway  
Plaza 7000, Second Floor  
Austin, Texas 78731  
(512) 514-6747  
(512) 514-6267 fax

By:

  
ERICH M. BIRCH  
State Bar No. 02328395

ANGELA K. MOORMAN  
State Bar No. 24007700

CHARLIE McNABB, CITY ATTORNEY  
City of El Paso

By: Laura Prendergast Gordon  
Deputy City Attorney  
State Bar No. 00791192  
#2 Civic Center Plaza  
El Paso, Texas 79901-1196  
(915) 541-4550  
(915) 541-4190 Fax

**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 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:

Ms. Celeste A. Baker  
Assistant General Counsel (MC-101)  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087 (mail)  
12100 Park 35 Circle, Building F  
Austin, Texas 78753 (delivery)  
Fax: (512) 239-5533

Docket Clerk  
Office of Chief Clerk (MC-105)  
Texas Comm'n on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087 (mail)  
12100 Park 35 Circle, Building F  
Austin, Texas 78753 (delivery)  
Fax: (512) 239-3311

*Representing the Office of Public Interest  
Counsel:*

Ms. Emily A. Collins  
Assistant P.I.C. (MC-103)  
Texas Comm'n on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087 (mail)  
12100 Park 35 Circle, Building F  
Austin, Texas 78753 (delivery)  
Fax: (512) 239-6377

*Representing the Executive Director:*

Mr. Booker Harrison  
Ms. Stephanie Bergeron  
Environmental Law Division (MC-173)  
Texas Comm'n on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087 (mail)  
12100 Park 35 Circle, Building F  
Austin, Texas 78753 (delivery)  
Fax: (512) 239-0606

Mr. William Newchurch  
Administrative Law Judge  
300 West 15th Street, Suite 502  
P.O. Box 13025  
Austin, Texas 78711-3025  
Fax: (512) 475-4994

Ms. Veronica S. Najera  
Administrative Law Judge  
401 East Franklin Avenue  
Suite 580  
El Paso, Texas 79901  
Fax: (915) 834-5657

*Representing ASARCO LLC:*

Ms. Pamela M. Giblin  
Mr. Derek R. McDonald  
Baker Botts LLP  
1500 San Jacinto Center  
98 San Jacinto Blvd.  
Austin, Texas 78701-4078  
Fax: (512) 322-8342

*As the Designated Representative of the  
Sierra Club, et al. Group:*

Mr. Richard Lowerre  
Ms. L. Layla Mansuri  
Lowerre & Kelly  
44 East Avenue, Suite 101  
Austin, Texas 78701  
Fax: (512) 482-9346

*As the Designated Representative for the  
Sandoval, et al. Group:*

Mr. Taylor Moore  
7108 Portugal  
El Paso, Texas 79912  
Fax: None listed  
Email: [taylormoor8432@msn.com](mailto:taylormoor8432@msn.com)

Mr. Steve Niemeyer  
TCEQ Governmental Relations (MC-121)  
P.O. Box 13087  
Austin, Texas 78711-3087 (mail)  
12100 Park 35 Circle, Building \_\_\_\_  
Austin, Texas 78753 (delivery)  
Fax: (512) 239-0664

*As the Designated Representatives for the  
ACORN, et al. Group:*

Mr. Enrique Valdivia  
Texas Rio Grande Legal Aid, Inc.  
1111 North Main Avenue  
San Antonio, Texas 78212  
Fax: (210) 212-3774

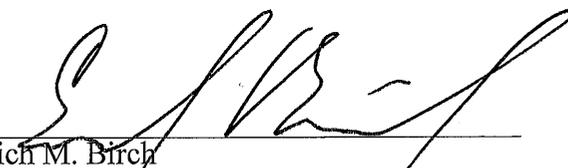
Ms. Veronica Carbajal  
Texas Rio Grande Legal Aid, Inc.  
1331 Texas Avenue  
El Paso, Texas 79901  
Fax: (915) 533-4108

The Honorable Eliot Shapleigh  
Texas Senate District 29  
800 Wyoming Avenue, Suite A  
El Paso, Texas 79902-5330  
Fax: (512) 463-0218

Ms. Bridget C. Bohac  
TCEQ Office of Public Assistance (MC-108)  
P.O. Box 13087  
Austin, Texas 78711-3087 (mail)  
12100 Park 35 Circle, Building F  
Austin, Texas 78753 (delivery)  
Fax: (512) 239-4007

Mr. Kyle Lucas  
TCEQ Alternative Dispute Resolution  
Program (MC-222)  
P.O. Box 13087  
Austin, Texas 78711-3087 (mail)  
12100 Park 35 Circle, Building F  
Austin, Texas 78753 (delivery)  
Fax: (512) 239-4015

On this the 25th day of January, 2008

  
\_\_\_\_\_  
Erich M. Birch

FOR IMMEDIATE RELEASE

**ASARCO INC. COMMITS TO KEEP EL PASO SMELTER CLOSED  
AND REMEDIATE SITE IF IT REGAINS CONTROL OF PLANT  
OWNER ASARCO LLC**

Phoenix, AZ, January 24, 2008 - ASARCO Inc., an indirect subsidiary of Grupo Mexico, S.A.B. de C.V., announced today that it will not seek to restart the copper smelter located in El Paso, Texas or seek to renew the air permit for the facility if it regains control of ASARCO LLC. ASARCO LLC, which owns the El Paso smelter, is in a Chapter 11 bankruptcy case in Corpus Christi, Texas. ASARCO Inc., which owns 100% of the equity of ASARCO LLC, is seeking to regain control of the business. ASARCO Inc. does not currently control ASARCO LLC, but it has been active in the bankruptcy case in attempting to be more involved in decisions made by ASARCO LLC.

ASARCO Inc. also announced that should it regain control, it would have ASARCO LLC work with the community and the appropriate regulatory agencies to remediate environmental contamination at the site. The smelter has been dormant since 1999.

ASARCO Inc. is committed to developing ASARCO LLC into a competitive mining operator as part of the Americas Mining Corporation family. ASARCO Inc. has determined that the El Paso smelter does not fit into its overall business strategy and has committed to keeping the smelter closed if it succeeds in reestablishing control of ASARCO LLC.

-ends-

Contacts:

Tom Johnson / Winnie Lerner, The Abernathy MacGregor Group  
T: (212) 371-5999

**EXHIBIT A**