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BY HAND DELIVERY

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CHIEF CLERKS OFFICE

2008 APR - 8 PM 3: 35

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: ASARCO L.L.C.'s Response to Petition by the City of El Paso and the State of New Mexico Environment Department For Revocation of Air Quality Permit No. 20345

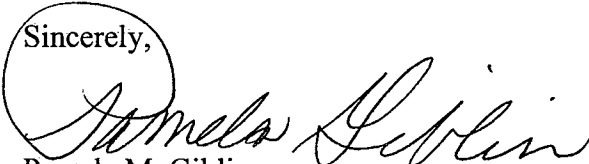
Dear Ms. Castañuela:

Enclosed for filing in the above-referenced and numbered proceeding please find an original and twelve (12) copies of ASARCO L.L.C.'s Response to Petition by the City of El Paso and the State of New Mexico Environment Department for Revocation of Air Quality Permit No. 20345.

Please file the original and 11 copies of this document and return one file-stamped copy to the messenger. A copy of the above referenced document is being served on the persons in the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions concerning this filing, please do not hesitate to contact me at the number above.

Sincerely,


Pamela M. Giblin

Enclosures

cc: Attached Service List

TCEQ DOCKET NO. _____

2008 APR -8 PM 3:35

PETITION BY THE CITY OF EL PASO §
AND THE STATE OF NEW MEXICO §
ENVIRONMENT DEPARTMENT §
TO REVOKE AIR QUALITY §
PERMIT NO. 20345 §

BEFORE THE TEXAS
CHIEF CLERKS OFFICE
COMMISSION ON
ENVIRONMENTAL QUALITY

**ASARCO L.L.C.'S RESPONSE TO PETITION BY THE CITY OF EL PASO
AND THE STATE OF NEW MEXICO ENVIRONMENT DEPARTMENT
FOR REVOCATION OF AIR QUALITY PERMIT NO. 20345**

TO THE HONORABLE COMMISSIONERS AND GENERAL COUNSEL OF THE TEXAS
COMMISSION ON ENVIRONMENTAL QUALITY:

ASARCO, L.L.C. ("Asarco") hereby files its response to the Petition of the City of El Paso ("the City") and the State of New Mexico Environment Department ("NMED") for revocation of Air Quality Permit No. 20345, ("the Petition") and would respectfully show the following:

I. Introduction

With much media fanfare but no legal authority, the City and NMED have petitioned the Commission to revoke the very same permit that the Commission just voted unanimously to renew: Air Quality Permit No. 20345. The Petition lacks any convincing explanation for such an extraordinary request. The Petitioners assert the very same arguments that have been rejected by the Commission time and time again. The Petition adds nothing of substance to the Commission's very thorough consideration of Air Quality Permit No. 20345, and its filing — immediately following the renewal of the permit and before the Petitioners have exhausted their procedural rights to seek review of that sound decision — simply borders on an abuse of the administrative process.

The Petitioners argue unconvincingly that recasting their past arguments into a new filing "provides the Commission a legal process whereby it can fully evaluate the potential negative impacts of the Asarco El Paso Plants [sic], outside of the possible legal constraints associated with Section 382.055."¹ Stated plainly, this means that the Petitioners would like to change the outcome produced by the legal process for evaluating the renewal of Air Quality Permit No. 20345 that is defined in the Texas Clean Air Act ("TCAA"). They would like the Commission to start over, but not with the TCAA's rules that govern renewal and the accompanying procedural rules that provide the City with an opportunity to move for rehearing and possibly seek judicial review. The Petitioners would rather petition the Commission in an effort to "provide" their own "legal process," apparently one that is free from the "legal constraints" that led to renewal of the permit just weeks ago.

Any process for the Commission to act upon the Petition will need to be "provided" by some source other than the Commission's rules, because no TCEQ rule provides for a petition such as the one that the City and NMED have filed. The Petitioners have not pointed to any example of the Commission ever granting or even considering such a petition. What is the basis that the Petitioners provide in this desperate plea for the Commission to take such unprecedented action? Nothing but the same information that the Petitioners have already given to the Commission, copied directly from multiple filings over the course of the lengthy renewal proceeding that just concluded. Accordingly, for the reasons set forth below, the Commission should reject the Petition.

¹ Petition at 4.

II. Argument

A. Air Quality Permit No. 20345 Just Saw a Lengthy and Rigorous Review

In renewing Air Quality Permit No. 20345, the Commission followed the statutory process that governs permit renewal evaluations as set forth in TCAA Section 382.055.² In doing so, the Commission did not, as Petitioners suggest, blindly follow an inadequate statutory process that left the need to "more fully evaluate" the air quality impacts of emissions from the El Paso Plant.³ To the contrary, the Commission exercised considerable discretion to ensure that the process was rigorous, comprehensive, and protective of air quality.

Despite the fact that the TCAA does not provide for a contested case hearing in "no-increase" renewals such as Asarco's, the Commission exercised its plenary authority to refer two limited issues concerning Asarco's application for a contested case hearing to inform the renewal process.⁴ After the hearing, the Commission ordered the Executive Director to assess the appropriateness of a permit amendment rather than a renewal application and to complete a rigorous investigation of all air quality control equipment and related practices at the El Paso Plant.⁵ The Commission ordered Asarco to conduct modeling across a fifty-kilometer area according to a TCEQ-designed protocol, with consideration given to impacts in Texas, New Mexico, and Mexico.⁶

The conclusions of the Executive Director's extensive investigation and his review of Asarco's modeling are detailed in a report published by the Executive Director on May

² See Tex. Comm'n of Env't'l Quality, *An Order Concerning the Application of ASARCO Incorporated for Renewal of Air Quality Permit No. 20345* at 1 (Mar. 27, 2008).

³ See Petition at 4.

⁴ See Tex. Comm'n on Env't'l Quality, *An Interim Order Concerning the Application of ASARCO Incorporated to Renew Air Quality Permit No. 20345* at 1 (May 14, 2004).

⁵ Tex. Comm'n on Env't'l. Quality, *An Interim Order Concerning the Application of ASARCO Incorporated to Renew Air Quality Permit No. 20345*, Ordering Provision 3 (Mar. 10, 2006).

⁶ *Id.* at 11, Ordering Provision 2.

1, 2007 ("Executive Director's Report").⁷ After detailed investigations by TCEQ staff and an independent industry expert, the Executive Director concluded that all major process and abatement equipment and components are present, intact, and in generally satisfactory condition.⁸ The Executive Director recommended maintenance and rehabilitation work that Asarco should complete prior to restarting the smelter.⁹ The Executive Director also concluded that past actions do not necessitate an amendment application.¹⁰ Asarco's air dispersion modeling, which was reviewed by both TCEQ staff and an independent modeling expert, demonstrated that emissions from the Plant will comply with applicable federal and state air quality standards.¹¹ TCEQ's toxicology section confirmed that adverse health effects are not expected to occur as a result of exposure to the proposed emissions from the facility.¹² Using the comprehensive air dispersion modeling, and with the expertise of TCEQ's Air Dispersion Modeling Team, Toxicology Section, and an independent auditor, the Executive Director concluded that emissions from the Asarco El Paso Plant are not expected to cause or contribute to a condition of air pollution.¹³ All of this information supported the Commission's decision to renew Air Quality Permit No. 20345 on February 13, 2008. In fact, the Executive Director's Report was specifically adopted by the Commission.¹⁴

⁷ Tex. Comm'n on Env't'l Quality, *Executive Director's Report to the Commission on Renewal of ASARCO Incorporated's Air Quality Permit No. 20345* (May 1, 2007) (hereinafter "Executive Director's Report").

⁸ *Id.* at 24.

⁹ *See id.* at 24-26.

¹⁰ *Id.* at 26.

¹¹ *Id.* at 24.

¹² Executive Director's Report at 24 (citing Memorandum from Jong-Song Lee, TCEQ Toxicology Section, to Dois Webb, TCEQ Air Permits Division, *Health Effects Review of Emissions from Asarco, Inc., El Paso, El Paso County, Texas* (Apr. 12, 2007) (Executive Director's Report Attachment J)).

¹³ *Id.* at 24.

¹⁴ Tex. Comm'n of Env't'l Quality, *An Order Concerning the Application of ASARCO Incorporated for Renewal of Air Quality Permit No. 20345* at 2, Ordering Provision 1 (Mar. 27, 2008).

B. TCEQ Responded to Petitioners' Arguments During the Renewal Process

The Commission's full evaluation of Air Quality Permit No. 20345 did not stop with the investigation and Asarco's comprehensive modeling. After the Executive Director's Report was issued, the Commission accepted public comments on the Report. Both the City and NMED took the opportunity to comment. The Executive Director in turn provided a detailed response to comments submitted by parties to the 2005 contested case hearing, including the City, as well as certain other parties, including NMED.¹⁵

The factual allegations in the recently-filed Petition are remarkably similar to the City of El Paso's June 18, 2007 Comments on the Executive Director's Report. Nearly all of the substantive arguments in the Petition are present in the City's June 18, 2007 Comments, recast here under the statutory grounds for which the Commission "may" revoke a permit. In several instances, the Petitioners have not even bothered to re-phrase their arguments, doing nothing more than pasting the City's old arguments into a new 40-page filing in an effort to dodge the "legal constraints" of the last proceeding that led to unanimous renewal of Air Quality Permit No. 20345.

In their hollow attempt to convince the Commission to undo the renewal of Air Quality Permit No. 20345, the Petitioners are effectively requesting that the Commission reconsider arguments that were rejected by the Commission when it approved the Executive Director's July 2007 Response to Comments. A comparison of the Executive Director's July 27, 2007 Response to Comments and the Petition leaves little doubt about the redundant and frivolous nature of the current Petition.

¹⁵ *Executive Director's Response to Comments on Executive Director's Report to the Commission on Renewal of Asarco Incorporated's Air Quality Permit No. 20345 (Jul. 27, 2007).*

- Factual allegations contained in Section II.A. of the Petition were considered and addressed by the Executive Director in Responses 20, 22, and 24 of his July 27, 2008 Response to Comments.
- Factual allegations contained in Section II.B.1 were addressed in Responses 18, 20, 21, 22, and 24 of the Executive Director's Response to Comments.
- Factual allegations contained in Section II.B.2 were addressed in Response 17 of the Executive Director's Response to Comments.
- Factual allegations contained in Section II.C were addressed in Response 30 of the Executive Director's Response to Comments.
- Factual allegations contained in Section II.D were addressed in Response 8 of the Executive Director's Response to Comments.
- Factual allegations contained in Section II.E.1 were addressed in Response 21 of the Executive Director's Response to Comments.
- Factual allegations contained in Section II.E.2 were addressed in Response 18 of the Executive Director's Response to Comments.
- Factual allegations contained in Section II.F were addressed in Response 43 of the Executive Director's Response to Comments.
- Factual allegations contained in Section II.G were addressed in Response 46 of the Executive Director's Response to Comments.
- Factual allegations contained in Section II.H.1 were addressed in Response 7 of the Executive Director's Response to Comments.
- Factual allegations contained in Section II.H.2 were addressed in Responses 2 and 3 of the Executive Director's Response to Comments.
- Factual allegations contained in Section II.H.3 were addressed in Response 46 of the Executive Director's Response to Comments.

Asarco emphatically disputes the substantive arguments in the Petition, and the company would certainly reassert its position in the appropriate setting. But this duplicative Petition does not present an appropriate setting. The arguments in the Petition were rejected by the Commission during the renewal proceeding and through the Commission's approval of the Executive Director's Response to Comments. Nothing has changed since then.

The Commission's approval of the Executive Director's Response to Comments came shortly after TCEQ's action to reject a similarly groundless plea for enforcement against Asarco from the El Paso County Attorney in yet another proceeding. The County Attorney sought enforcement against Asarco with an October 29, 2007 letter to the TCEQ Executive Director that was a clear effort to influence the renewal proceeding.¹⁶ Inexplicably, the County Attorney argued that Asarco's effort to renew Air Quality Permit No. 20345 was reason for enforcement against Asarco.¹⁷ The Executive Director rejected the County Attorney's request, concluding that civil or administrative remedies are adequately and appropriately addressing the alleged environmental violations.¹⁸ Much like the County Attorney's request that has already been rejected by the Commission, the current Petition is an unsupportable effort to shop old, unconvincing arguments in a different and unnecessary process. The effort is a waste of Commission resources and nothing more.

C. There is No Legal Process for Petitioners' Request

The Petitioners' hasty repackaging of their old arguments is particularly unconvincing when one considers that they are asking the Commission to take an action that is outside the well-established framework for Commission issuance, oversight, and enforcement of air permitting in Texas. For this reason, Commission action on a third-party petition for revocation of an air permit is, to Asarco's knowledge, unprecedented. The Texas Water Code provides that the Commission—acting solely in its discretion—"may" revoke several types of

¹⁶ Letter from Jose Rodriguez, El Paso County Attorney to Glenn Shankle, TCEQ Executive Director (Oct. 29, 2007).

¹⁷ *See id.* at 10.

¹⁸ Letter from Glenn Shankle, TCEQ Executive Director to Bruce Manvell, Office of the El Paso County Attorney (Feb. 8, 2008). *See also*, Press Release, El Paso County Attorney, TCEQ Rejects Request for Criminal Enforcement Against Asarco (Feb. 27, 2008).

permits, including air permits, for several statutorily-listed grounds.¹⁹ But there is no third-party right in the Water Code, the TCAA, or any other Texas environmental statute, to petition the Commission for revocation of an air permit, as has been done here. Nor do the Commission's rules provide for a third-party petition for revocation of an air permit. This absence of procedural rules in the air permitting context stands in marked contrast to the Consolidated Permit regime in Chapter 305 of the Commission's rules, where the Commission has promulgated rules for affected persons to petition for revocation of water and waste permits.²⁰ With no rules in place to govern it and no past example of the Commission ever granting a third-party petition for revocation of an air permit, such a petition is simply an attempt to circumvent due process and the established rules governing air permits.

While the Petitioners cannot point to specific legal authority authorizing a third-party petition to revoke an air permit, there is well-established legal authority that should prevent the Commission from even considering such a petition. Coming just days after the Commission acted to renew the permit, the Petition is an illegal collateral attack on that action. The Texas Supreme Court held that “[p]ermittting relitigation offends the policy reasons supporting the doctrines of res judicata and collateral estoppel.”²¹ Unless expressly allowed by statute or in limited situations of changed circumstances, an administrative agency cannot reconsider a previous final order.²² Here, the Petitioners cannot assert that there have been "changed

¹⁹ See TEX. WATER CODE § 7.302.

²⁰ See 30 TAC §§ 305.66, 305.68.

²¹ *Coalition of Cities for Affordable Utility Rates v. Public Utility Comm'n of Texas*, 798 S.W.2d 560, 565 (Tex. 1990).

²² *Coalition of Cities*, 798 S.W.2d at 565; *Ramirez v. Texas State Board of Medical Examiners*, 99 S.W.3d 860, 864-865 (Tex. App. - Austin 2003, pet. denied); *West Texas Utilities Company v. Public Utility Commission of Texas*, 896 S.W.2d 261, 269 (Tex. App. - Austin 1995, writ dismissed); *Young Trucking, Inc. v. Railroad Comm'n of Texas*, 781 S.W.2d 719, 721 (Tex. App. - Austin 1990, no writ); *Al-Jazrawi v. Texas Bd. of Land Surveying*, 719 S.W.2d 670, 671 (Tex.App.-Austin 1986, writ refused n.r.e.); *South Texas Indus. Services, Inc. v. Texas Dept. of Water Resources*, 573 S.W.2d 302, 304 (Tex.Civ.App.-Austin 1978, writ refused n.r.e.).

circumstances" simply because they have restyled their past briefs and sought a new TCEQ docket number.

Moreover, in advocating an undefined revocation process, the Petitioners seek to circumvent the well-established processes by which the Commission regulates Texas air permit holders. The periodic review afforded by renewal proceedings at the end of each permit's limited term is an important step in this process, and, as described above, the Commission exercised considerable discretion during the recently completed renewal proceeding to ensure a thorough and comprehensive review. This periodic review complements the Commission's ongoing enforcement role, which is conducted by the Commission with defined criteria for enforcement initiation and defined processes to govern enforcement proceedings once they begin. The Petitioners would have the Commission ignore its existing processes for oversight and review of the regulated community in favor of an undefined, unprecedented revocation proceeding.

III. Conclusion: The Commission Should Deny the Petition.

There no basis for a third-party petition to revoke an air permit in Texas environmental statutes, TCEQ rules, or in TCEQ's past practices. Unsupported by Commission rules as it is, the Petition at hand is even less justified coming directly on the heels of the Commission's recent unanimous decision to renew Air Quality Permit No. 20345. In making this decision, the Commission was fully informed of the arguments contained in the current Petition. To reconsider them now would be to allow an illegal collateral attack on a final Commission order that has barely been issued, let alone seen Motions for Rehearing.

With no reasonable basis for the Petitioner's unjustifiable and duplicative request, the Commission should deny the Petition without further consideration. The Commission has provided effective oversight of Air Quality Permit No. 20345 using its existing processes in the

past, and those same processes will provide for Commission oversight in the future. A prompt denial of the Petition would provide clear resolution to the Petition and prevent the waste of any further Commission resources on past issues that have been resolved. However, the Commission need not act upon the Petition at all. The Commission is under no obligation to do so, and the Executive Director responded directly to the allegations contained in the Petition during the renewal proceeding.

IV. Prayer

For the foregoing reasons, Asarco requests that the Commissioners deny the Petition of the City of El Paso and the State of New Mexico Environment Department for revocation of Air Quality Permit No. 20345. Asarco requests all further relief to which it may be entitled.

Respectfully submitted,

BAKER BOTTS L.L.P.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on the following parties on this 8th day of April, 2008.

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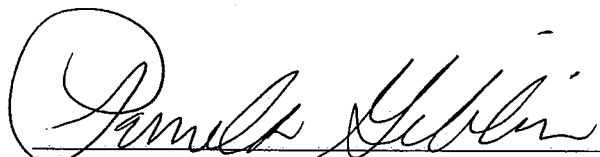
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