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October 2, 2007  
For Immediate Release

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## **Environment Department Issues Comments to Texas Commission on Environmental Quality Opposing Permit for Asarco Copper Smelter in El Paso**

(Santa Fe, NM) – The New Mexico Environment Department today issued comments to the Texas Commission on Environmental Quality (TCEQ) expressing concerns about the reopening of the Asarco Inc. copper smelter in El Paso. TCEQ will decide whether to issue an air permit that would allow the reopening of the facility.

NMED sent comments (see below) to TCEQ Executive Director Glen Shankle on June 15 expressing concerns with the director's "Report to the Commission on Renewal of Asarco Inc.'s Air Quality Permit." Others including, Texas Sen. Elliot Shapleigh, the Sierra Club and Sunset Height's ACORN, also commented on the report expressing similar concerns. The executive director dismissed those concerns.

NMED sent additional comments to the commission today because it believes the TCEQ should give its concerns some weight considering the facility could create environmental impacts for New Mexico.

"Air quality and pollution issues stemming from the plant are not just a problem for El Paso and Texas but for New Mexico as well," said New Mexico Environment Department Secretary Ron Curry. "Eight years after the facility shut down, the Sunland Park area of New Mexico is still recovering from soil contamination from past operations at Asarco in El Paso."

NMED's comments state the executive director's report did not include environmental monitoring from Sunland Park, N.M. in determining background concentrations for the facility in its permitting process. In addition, NMED contends the testing monitoring and reporting requirements in the draft permit for Asarco are not sufficient to ensure the federal government can sufficiently enforce the permit because some of the permit conditions are too vague. TCEQ also did not conduct an analysis to determine whether the requirement for Best Achievable Control Technology applies for the facility. In addition, NMED believes citizens of the area should be able to comment on reports related to air quality control equipment. The executive director also ignored the decision of administrative law judges that stated Asarco had not demonstrated substantial compliance with its permit and the Texas Clean Air Act. In addition, TCEQ improperly excluded monitoring data from Sunland Park from consideration.

Governor Richardson sent a letter to Texas Gov. Rick Perry today voicing his opposition to the granting of the permit. The Governor also instructed Secretary Curry and the Environment to submit comments and work on

behalf of the administration to express the state's concerns about the reopening of the plant. The department has openly opposed the issuance of the permit for several years and Secretary Curry has traveled to Texas to discuss the issue with TCEQ.

The department's Air Quality Bureau first opposed the renewal of the permit in January 2005. The department wrote a letter to TCEQ asking it to review how air emissions from the smelter would affect New Mexico's residents and the environment.

The City of El Paso contends the TCEQ should not be able to issue the permit without an additional hearing where their concerns can be heard.

The Asarco El Paso plant shut down in 1999 after the price of copper fell in the 1990s. Air emissions from the smelter during the plant's operation created arsenic and lead soil contamination around the El Paso facility. That contamination posed public health concerns in Sunland Park and other New Mexico communities. Those communities today face other air quality concerns, including elevated levels of airborne particulate matter and ground level ozone pollution.

Asarco operates another copper smelter in Hayden, Arizona. Asarco, American Smelting and Refining Company, organized in 1899, according to the company's Web site. The company began as a consolidation of a number of lead-silver smelting companies but today produces copper and other metals. Asarco's domestic mines produce about 350 to 400 million pounds of copper a year.

For more information, call Marissa Stone at (505) 827-0314 or (505) 231-0475.

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Letter from Secretary Curry to TCEQ  
October 2, 2007

Chairman Buddy Garcia  
Commissioner Larry Soward  
Texas Commission on Environmental Quality  
MC 100  
P.O. Box 13087,  
Austin, TX 78711-3087

Re: ASARCO Inc. Air Quality Permit No 20345

Dear Mr. Garcia and Mr. Soward:

The New Mexico Environment Department (NMED) has long been concerned with the potential restart of the ASARCO smelter in El Paso. Eight years after its shutdown, the Sunland Park area in New Mexico is still in the process of recovering from contamination from previous operations of the ASARCO smelter, as evidenced by the recent EPA-sponsored residential soil removal and remediation project. In addition to being subject to past pollution from an industrial legacy due to various geographic and meteorological factors, the Sunland Park area is particularly susceptible to air pollution problems.

Therefore I am writing to reiterate some of NMED's specific concerns with Texas Commission on Environmental Quality's (TCEQ) permitting process. On June 15, 2007, NMED submitted comments on TCEQ Executive Director Glen Shankle's "Report to the Commission on Renewal of ASARCO Inc's Air Quality Permit No. 20345." The Executive Director also received comments from Sunset Height's ACORN, Senator Eliot Shapleigh, the TCEQ Office of Public Interest Counsel, the Sierra Club, Get the Lead Out, the City of El Paso, Congressman Silvestre Reyes, and ASARCO. On July 27, 2007, the Executive Director issued a response to comments received on that Report. The Executive Director's Response was, in a word, dismissive of all concerns raised by permit renewal opponents.

In light of the City of El Paso's contention that the Executive Director's Report is outside of the evidentiary record, NMED does not concede that the Report and his Response to Comments are properly before the Commission. However, to the extent that the Commission does give any evidentiary weight to those documents, we urge you also to consider the following responses to the ED's responses:

#### **NMED Comment #1 (Executive Director's Response # 46)**

NMED raised again an issue on which we had commented in January, 2005; the failure of TCEQ to provide any analysis of whether Prevention of Significant Deterioration (PSD) requirements should apply to the Asarco plant restart after an extended and indefinite shutdown period. We noted that under applicable U.S. EPA precedent,<sup>1</sup> a shutdown of more than two years is presumed to be permanent, and a restart would thus trigger PSD requirements. To rebut the presumption, the applicant must show a continuous intent to reopen, based on certain factors. ACORN and the City of El Paso made similar comments.

In response, the Executive Director states:

When originally reviewed, the permit was issued to a previously grandfathered facility and resulted in a significant reduction in emissions and, therefore, did not trigger federal review. . . . [T]he only matter under consideration is whether the state permit authorization may be renewed; federal permitting review and whether reactivation of the plant would require that review is a separate permitting action and is not an issue for renewal.

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[T]he threshold requirement for determining applicability of the Reactivation Policy is restart of the ASARCO smelter. Therefore, the ED believes application of the Reactivation Policy should not be considered until ASARCO demonstrates it is ready to restart. . . . If the Commission adopts the ED's Report, ASARCO will provide the ED with a report of certain activities no later than 90 days prior to startup. At that time, the applicable requirements should be applied to the totality of the circumstances surrounding the idling and the reactivation of the smelter. The reactivation policy requires a case-by-case review, which is extremely fact-intensive

The Executive Director's attempt to divorce PSD applicability analysis from state permit renewal and defer it until the time of start up is illogical, inconsistent with federal guidance, and produces an impracticable result.

First, under the cooperative federalism approach embodied in the Clean Air Act, assurance of compliance with federal requirements is inherently part of the state permit renewal process. *See, E.g., National Parks Conservation Ass'n, Inc. v. Tennessee Valley Authority*, 480 F.3d 410, (6th Cir. 2007) (Tenn.). Texas'

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<sup>1</sup> *In the Matter of Monroe Electric Generating Plant, Entergy Louisiana, Inc. Proposed Operating Permit No. 6-99-2.*

regulations governing permit renewals explicitly require the applicant to demonstrate compliance with federal requirements. Specifically, 30 TAC 116.311(b) provides that

In addition to the requirements of subsection (a) of this section, if the commission determines it necessary to avoid a condition of air pollution *or to ensure compliance with otherwise applicable federal or state air quality requirements*, then: (1) the applicant may be required to submit additional information regarding emissions from the facility and their impacts on the surrounding area.

In the context of the restart of a long-idled facility, PSD is an “otherwise applicable federal air quality requirement.” Therefore, TCEQ has the responsibility and authority to require additional information to ensure compliance with federal PSD requirements during the state permit renewal, and the issue cannot be postponed until federal review of the permit is ripe (for example, at the time of approval of the Title V operating permit).

Second, nothing in EPA’s reactivation policy (as embodied in memoranda and administrative decisions) requires or suggests that the source owner or operator must have a state-issued permit in hand and be ready to restart operations before analysis of PSD applicability may begin. Such a notion is at odds with the whole purpose of the policy, which is to determine the regulatory regime under which the source will operate –and therefore what controls will be required – when it does restart.

In positing that the PSD analysis must await issuance of the State permit, TCEQ turns the reactivation policy on its head. If the permit were not due for renewal, application of the reactivation policy would still be ripe, because the facility is seeking to restart after an extended period of dormancy (much longer than two years). The fact that the facility has been inactive for so long that the permit is due for renewal is not a reason for delaying the reactivation analysis.

As we noted in our January 24, 2005 letter and again in our June 15, 2007 comments, under the reactivation policy a shutdown of two years creates a presumption that the shutdown is intended to be permanent. That presumption may be rebutted upon consideration of certain factors, but TCEQ has never demonstrated that it has been in this case. Indeed, as we also pointed out in our June 15 comments, at least one fact – nonpayment of Title V permit fees – appears to support rather than rebut the assumption.

The fact that application of the reactivation policy may be “extremely fact intensive,” as the Executive Director states, only provides further impetus to begin the analysis now rather than waiting until the facility is within 90 days of restarting. It is undisputed that Asarco *now* expresses intent to restart; the relevant facts are those that go to whether the applicant had a continuous intent to restart from the time of shutdown until the present. Such facts exist only in the past; they cannot arise now or in the future. Therefore delay will harm rather than aid the analysis.

Finally, postponing the analysis until 90 days before restart is shortsighted and doomed to produce poor results. The short time frame would make thoughtful analysis difficult and deprive the public of an opportunity for meaningful comment. Moreover, by the time of the analysis, ASARCO would have spent a significant amount of money to comply with TCEQ requirements for restart, prejudicing the analysis. Therefore, it would subvert the PSD process to postpone analysis - those expenditures and imminence of startup would make it extremely difficult for TCEQ to impose meaningful requirements under PSD if determined to be applicable. In order to be unbiased and productive, the BACT analysis should be done as early as possible to provide the facility an opportunity to incorporate requirements into design of facility. By postponing that analysis, TCEQ guarantees a difficult and costly process for ASARCO

### **Executive Director's Response # 30 (to a comment by the City of El Paso)**

The City of El Paso commented that Asarco had excluded the Sunland Park, New Mexico monitoring in determining background concentrations for use in assessing the modeling results. In response the Executive Director states:

The Sunland Park monitor was excluded from further consideration based on information Asarco provided from personal communication with the NMED Air Quality Bureau. Staff at the NMED Air Quality Bureau indicated the Sunland Park monitor is influenced by very localized and unique geographical features that tend to funnel pollutants to the monitor. The ED found the rationale provided by Asarco for excluding [the monitor] to be reasonable.

This response is very troublesome. First, it is remarkable that in making such an important decision, TCEQ would rely on the *applicant's* characterization of NMED's position. That characterization was based on an alleged conversation with an unidentified staff person on an unspecified date. There is no indication that TCEQ made any effort to confirm that characterization with NMED. For the record, NMED never represented to ASARCO that the Agency favored excluding the monitor, and we object to its exclusion now.

The background concentrations observed at the Sunland Park monitor reflect the unique geographical features and thermal inversion that occurs during nighttime in the area where the complex topography (mountains) serves as dispersion barrier. When the thermal inversion begins to develop during nighttime, the airshed and any pollutants in it are compressed down from upper level and trapped in the area until the formation of radiation inversions occur early morning. Such atmospheric stagnation conditions result in pollutant buildup over nighttime. These localized topographical and meteorological influences should be taken into account the modeling analysis.

The fact that pollutants may be "funneled" to the monitor – and therefore to the community it represents – is all the more reason to consider the monitor in determining background concentrations, in order to insure the modeling results are conservative and protective of public health

### **NMED Comment # 2 (Executive Director's Response # 8 & 9)**

NMED commented that the testing, monitoring, and reporting requirements in the draft permit are not sufficient to insure practical and federal enforceability of the permit, as those terms are defined under federal law and guidance. We specifically pointed to the lack of on-going monitoring and recordkeeping requirements to ensure enforceability of process design and work practice requirements, fugitive dust controls, operational limitations, and emissions limitations for point sources not equipped with Continuous Emissions and Opacity Monitoring Systems. (CEMs and COMs). We also requested a requirement for stack testing for all emitting units within 60 days of startup.

In response, the Executive Director recited some of the testing and monitoring provisions that the draft permit does contain, including baghouse performance standards and concentration standards for in-flue acids, use of CEMs on acid plant stacks, and COMs on the fluid bed concentrate dryer baghouse and converter building ventilation baghouse. The Executive Director concluded that "operating parameters, monitors, and recordkeeping requirements have been found to be adequate for determining compliance with the permit

conditions.” With respect to stack testing at all units, the Executive Director notes that if the permit is renewed, he recommends requiring stack test at the units from which “the majority” of pollutants are emitted.

The NMED agrees that the permit conditions cited are necessary, however they are not sufficient to insure compliance. The draft permit, at condition No. 11, requires performance of EPA Method 9 tests for visible emissions only “[a]t the request of the TCEQ.” To ensure compliance at all times, and by all persons, including EPA and citizens, not just when the facility is the object of TCEQ’s attention, the permit should specify an appropriate frequency for performance of Method 5 and 9 tests at each emission point having an emission standard, and require retention of records of such tests.

In addition, provisions are needed to ensure compliance with the process design and throughput requirements and assumptions built into the permit. Permit condition 17.A. requires that “all hooding, duct work, and collection systems will be constructed so that these systems effectively capture fugitive emissions” yet the permit does not specify a frequency for which these systems should be surveyed to determine compliance with the requirement. The absence of a monitoring schedule to survey emission control equipment and of periodic visible emission or stack test(s) from these sources will likely result in chronic noncompliance. This concern applies to other process design requirements specified by permit condition 17 and condition 19B. It is not apparent how the permittee will demonstrate compliance and how TCEQ will verify ASARCO’s compliance with permit conditions 18.D & E. Permit condition 19.B fails to define the phrase “minimize the dust from becoming airborne” with respect to disposal of baghouse dust, and fails to define “sufficient supply of bags.” The permit should be amended to make these conditions practically enforceable.

Finally, the fact that stack testing might be required to assess emission rates of the “majority” of pollutants is not enough, and does not excuse a failure to require stack testing at all points from which criteria or toxic pollutants are emitted, in order to verify that modeling projections showing no adverse impacts are correct.

### **NMED Comment #3 (Executive Director’s Response #11)**

NMED commented that substantive protocols were needed for the evaluation of the applicant’s investigation of the air quality control equipment, because the requirements stated in the Executive Director’s report were general and vague. We also requested that the applicant’s reports for the purpose of demonstrating compliance with these requirements be subject to formal public comment, and that restart not be allowed to occur without the control equipment being in excellent condition.

In response, the Executive Director disagreed that the recommendations in his report were general and vague, and in support of that position cited seven different actions in the way of investigation and reporting that were recommended in the report.

NMED continues to believe that the recommendations lack sufficient specificity regarding the required contents of the applicant’s reports on various investigations and repairs. For example, several of the provisions require ASARCO to report on the “general condition” of control devices. Subjecting such reports to public scrutiny would help insure that the condition of the control devices is adequately scrutinized prior to startup.

### **NMED Comment # 5 (Executive Director’s Response # 15)**

NMED commented that “Asarco’s compliance history and stated future commitments do not provide assurances that public health will be protected.” In support of this assertion, we noted the ASARCO El Paso

plant had a history of non-compliance with emission limits; pointed to the ambiguity in the term “industry standards and practices,” which ASARCO committed to following; and enquired into how recent allegations of illegal hazardous waste burning would be taken into account.

In response, the Executive Director acknowledged that the “ALJs concluded that the evidence does not support a finding that Applicant was in substantial compliance with the permit and with the Texas Clean Air Act.” The Executive Director’s response then goes on to state: “[t]he commission’s current compliance history program in Texas Water Code ch. 5, subch. Q, is not applicable to this renewal. The applicable standards are found in former Tex. Health & Safety Code 382.055(d)(1).”

The SOAH opinion already acknowledges that the statutory section cited above (Section 382.055(d)) applies. It was under this standard that the Administrative Law Judges (ALJ) made their determination that the Applicant had not demonstrated substantial compliance. Therefore it is not clear what point the Executive Director is trying to make by referring to the applicable compliance standard in his response. If it was the Executive Director’s intent to imply that the ALJs compliance determination was made under the wrong standard, or was wrongly decided, the Executive Director must explain why this is the case.

Moreover, the fact that “[t]he Executive Director has been unable to identify any permit renewal application that was denied based upon [the above referenced] standard” is not dispositive. If the lack of a precedent for denying permit renewal were a bar to ever denying renewal, the statutory and regulatory requirement to consider compliance history would be rendered meaningless.

The Executive Director’s response on this issue concludes by stating: “[a]t the time of the SAOH proceeding, the Executive Director took the position that Asarco’s compliance history during the last five years of operation warrants renewal of the permit.” The Executive Director does not explain why its position in the proceeding should trump the opinion of the judges.

The Executive Director’s disregard of the SAOH’s decision borders on contempt. It is particularly striking that the Executive Director should now imply that its prehearing position should prevail, given that, apparently, little more than conclusory statements were offered at the hearing in support of that position. As the ALJs summarized:

The Applicant made conclusory statements about its compliance history. It based its rationale on the number of NOV, or lack thereof, that the applicant had received and on the fact that the TCEQ Staff reviewed the file and concluded it was worthy of renewal. *The Applicant and the Executive Director went so far as to suggest the ALJs need not weigh the evidence of the components, but merely accept the conclusions of the Agency.* The ALJs do not agree.

PFD at p. 127. Rejecting the Executive Director’s assertion that deference was called for, the ALJs noted that the burden of proof was on the applicant. *Id.* at 126. Thus, weighing the nearly 100 violations – some quite serious – that were among the compliance components required for consideration, the expert testimony for the permit opponents, and failure of the applicant to meet its burden of proof, the ALJ held that they “cannot conclude that the Applicant’s compliance history for the last five years of operation of the El Paso Primary Copper Smelter warrants the renewal of Air Quality Permit No. 20345.”

NMED respectfully requests that the Commission accept the ALJs well-considered determination, in the face of the Executive Director’s conclusory positions taken at the hearing and afterward.

Thank you in advance for your consideration of our comments. The NMED will continue to closely monitor and provide input to this permit renewal process. If necessary, we are prepared to pursue other legal avenues as they become available in this matter, in order to protect human health and the environment in New Mexico.

Sincerely,

Ron Curry,  
Secretary

cc: Glen Shankle

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