

Mr. Birch's Direct Line: (512) 258-9199
Email: ebirch@birchbecker.com

June 18, 2007

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, Comments on the Applicant's Modeling Analyses and Summary of Modeling Results and the Executive Director's Report to the Commission on Renewal of Asarco Incorporated's Air Quality Permit No. 20345, *Application of ASARCO Incorporated for Renewal of Air Quality Permit No. 20345*, TCEQ Docket No. 2004-049-AIR, SOAH Docket No. 582-05-0593..

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced proceeding is an original and eleven copies of *Protestant's, the City of El Paso's, Comments on the Applicant's Modeling Analyses and Summary of Modeling Results and the Executive Director's Report to the Commission on Renewal of Asarco Incorporated's 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**

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**BEFORE THE TEXAS COMMISSION
ON
ENVIRONMENTAL QUALITY**

**PROTESTANT'S, THE CITY OF EL PASO'S,
COMMENTS ON THE APPLICANT'S MODELING ANALYSES
AND SUMMARY OF MODELING RESULTS
AND THE EXECUTIVE DIRECTOR'S REPORT TO THE COMMISSION ON
RENEWAL OF ASARCO INCORPORATED'S AIR QUALITY PERMIT NO. 20345**

JUNE 18, 2007

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TCEQ DOCKET NO. 2004-0049-AIR
SOAH DOCKET NO. 582-05-0593

APPLICATION OF ASARCO
INCORPORATED FOR RENEWAL
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PERMIT NO. 20345

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**PROTESTANT'S, THE CITY OF EL PASO'S,
COMMENTS ON THE APPLICANT'S MODELING ANALYSES
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RENEWAL OF ASARCO INCORPORATED'S 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 *Comments on the Applicant's Modeling Analyses and Summary of Modeling Results and the
Executive Director's Report to the Commission on Renewal of Asarco Incorporated's Air
Quality Permit No. 20345* ("Comments") in the above-referenced proceeding.

I. INTRODUCTION

The impact of a potential restart of ASARCO LLC's ("Asarco") copper smelter in
El Paso ("Asarco El Paso Plant") cannot be overstated. While the *Executive Director's Report to
the Commission on Renewal of ASARCO Incorporated's Air Quality Permit No. 20345*
("ED Report")¹ has boiled down a so-called comprehensive review of the Asarco El Paso Plant
into a thirty page report, nothing about the Asarco El Paso Plant is simple. Instead, as
demonstrated at the Hearing on the Merits in this proceeding, virtually everything concerning the
Asarco El Paso Plant is unique and complex. The Asarco El Paso Plant is the only one of its
kind in Texas and one of only four copper smelters in the United States. The Asarco El Paso
Plant is located immediately adjacent to both a state border and an international border, and it is

¹ Executive Director's Report to the Commission on Renewal of ASARCO Incorporated's Air Quality
Permit No. 20345, *Application of Asarco Incorporated to Renew Air Quality Permit No. 20345*, TCEQ
Docket No. 2004-0049-AIR (May 1, 2007) [hereinafter ED Report].

located immediately adjacent to two thriving and growing metropolitan areas.² No other copper smelter in the United States is located in such a densely populated and growing international metropolitan area. In addition, the Asarco El Paso Plant is located in a complex geographic terrain, in the narrowest section of the “pass” between the Franklin Mountains and the Sierra de Juárez, and is subject to inversions that trap pollutants. The plant is also located in an area with elevated background levels of metals, *e.g.*, lead and arsenic, in the soils.

The complex permitting history and operation of the Asarco El Paso Plant was addressed in detail at the two-week Hearing on the Merits in July 2005. Through the course of thousands of pages of testimony and exhibits, *i.e.*, evidence, the parties focused on multiple controversial issues regarding the Asarco El Paso Plant, and based on that evidentiary record, the Administrative Law Judges (“ALJs”) and the Commissioners of the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”) agreed that Asarco had failed to meet its burden of proof.³ Asarco had failed to prove that operation of the Asarco El Paso Plant pursuant to Air Quality Permit No. 20345 would not cause or contribute to a condition of air pollution.

The Commission then, through its Interim Order, required the Executive Director of TCEQ and Asarco to compile additional information related to Asarco’s past permitting actions in revising Air Quality Permit No. 20345, the condition and effectiveness of existing pollution control equipment and practices, and new air quality modeling, providing specific guidelines on

² As identified at the Hearing on the Merits, the 2005 population of the City of El Paso was 614,261 people. The 2005 population of Ciudad Juárez, Chihuahua, México, was 1,368,175 people. *See* City of El Paso Exh. 2, Prefiled Testimony of Ms. Verónica Rosales, at 10-11. The other three copper smelters in the United States are located in Garfield, Utah, Hayden, Arizona, and Miami, Arizona.

³ *See* Proposal for Decision, *Application of Asarco Incorporated to Renew Air Quality Permit No. 20345*, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, at 2 & 130 (Oct. 27, 2005) [hereinafter PFD]; *see also* Texas Comm’n on Env’tl. Quality, *An Interim Order Concerning Application of ASARCO, Incorporated to Renew Air Quality Permit No. 20345*, TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-593, at 1 (Mar. 10, 2006) [hereinafter Interim Order].

the breadth and details to be included.⁴ The information compiled by the Executive Director and Asarco is included in the ED Report and related attachments, a document filed by the Executive Director with the Commission almost fourteen months after issuance of the Interim Order. The ED Report and Asarco's air modeling analyses and related modeling report fail to address the issues raised by the Commission at its February 8, 2006 Agenda meeting and provide no information on which the Commission can rely in making its final decision in this proceeding.

The City and the other named Protestants to this proceeding have been prejudiced by the extremely short time period they have been allowed in which to conduct their review of a complicated technical report. Asarco, the Executive Director, and reviewing consultants retained by Asarco took over fourteen months from the time the Interim Order was issued to prepare the information summarized in the ED Report, far exceeding the eight-month deadline established by the Commission in the Interim Order. As discussed below, without obtaining approval from the Commission, Asarco and the Executive Director took an additional six months beyond the deadline stated in the Interim Order to prepare the ED Report.

After its initial review of the ED Report and Asarco's air quality modeling analyses, and well in advance of the seven-week review and comment deadline provided for in the Interim Order, the City requested additional time to conduct a thorough review of the ED Report.⁵ However, the City was notified that no extension would be provided prior to the end of the

⁴ See Interim Order, *supra* note 4, at 2.

⁵ See Protestant's, the City of El Paso's, Request for Extension to File Comments on Applicant's Modeling and the Executive Director's Report, *Application of Asarco Incorporated for Renewal of Air Quality Permit No. 20345*, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR (May 22, 2007).

seven-week timeframe;⁶ therefore, the City provides these Comments within the timeframe contemplated by the Commission in the Interim Order. In order to meet the deadline the City could not conduct a complete technical review of the ED Report and Asarco's modeling analyses. Instead, these Comments focus on certain issues either raised by or omitted from the ED Report and Asarco's modeling analyses.

While the City could not complete a comprehensive review of the ED Report and Asarco's modeling analyses, as shown in the comments below, it is clear that the ED Report and Asarco's modeling analyses do not provide additional information on which the Commission can rely as a basis for a final decision in this proceeding. At this time, for the reasons identified below, the Commission should either (1) deny Asarco's application for renewal of Air Quality Permit No. 20345; or (2) refer the proceeding to the State Office of Administrative Hearings ("SOAH"), instructing the ALJs to reopen the record pursuant to Texas Administrative Code Title 30, Section 80.265 for further proceedings on specific issues in dispute.

II. BECAUSE OF ITS FAILURE TO COMPLY WITH THE PERMITTING REQUIREMENTS AS ESTABLISHED BY THE COMMISSION IN THE INTERIM ORDER, ASARCO'S RENEWAL APPLICATION SHOULD BE DENIED

After consideration of the Proposal for Decision ("PFD") and Proposed Order, as prepared by the ALJs who conducted the two week Hearing on the Merits in July 2005, the Commission concluded that Asarco had failed to meet its burden of proof for renewal of Air Quality Permit No. 20345. Specifically, the Commission's Interim Order stated:

⁶ See Letter from Mr. Derek Seal, General Counsel, Texas Comm'n on Env'tl. Quality, to All Persons on the Attached Mailing List (June 5, 2007). The General Counsel's letter did note that the City's Request for Extension, as well as the Executive Director's Request for Extension filed in November 2006, which while never acted on by the Commission had been taken *sua sponte* by the Executive Director without Commission approval, would be considered when the Commission met to consider the ED Report, comments on the ED Report, and the Executive Director's response to comments. *See id.*

. . . the Commission determined that ASARCO Incorporated (Applicant or ASARCO) had not met the statutory requirements for renewal of its permit. Specifically, 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 NO_X 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.⁷

The Commissioners did not deny Asarco's application at that time, but instead, identified in the Interim Order that Asarco and the Executive Director were to compile specified information within explicit timeframes defined by the Commission. The Commission was to again consider this matter after completion of the steps outlined in the Interim Order.

The Interim Order identified two deadlines related to completion of the ED Report:

3. The Executive Director is directed to conduct concurrently within the same six-month period a vigorous investigation of all air quality control equipment at the El Paso Plant, including related practices, and based on that investigation and the results of the information submitted in accordance with Ordering Provision 2 prepare his recommended Report and any related Schedule as required under Section 382.055 of the TCAA, which includes his written assessment of the sufficiency of existing plant control equipment and practices, within eight months of issuance of this Interim Order. In addition, the Executive Director is to assess the appropriateness of a permit amendment application rather than a renewal application for equipment that has not been previously authorized or that requires repair or replacement [*i.e.*, by Friday, November 10, 2006].
4. The Applicant's modeling analyses and the summary of the modeling results and the Executive Director's recommended Report and any related Schedule, which includes his written assessment of existing plant control equipment and practices, shall be made available to all parties by filing a copy in the El Paso regional office and in the Austin Office of the Chief Clerk. In addition, a copy of the summary of the modeling results and the Executive Director's recommended Report and any related Schedule shall be mailed to all parties on the official mailing list for the Proposal for Decision Filings and mailing of documents in accordance with this ordering provision shall occur within two weeks of the end of the eight month period described in Ordering Provision No. 3 [*i.e.*, by Monday, November 27, 2006].⁸

⁷ Interim Order, *supra* note 3, at 1.

⁸ *Id.* at 11-12.

The Executive Director failed to complete and file the required ED Report by the November 10, 2006 deadline and instead filed the *Executive Director's Interim Report and Request for Extension* ("ED's Interim Report") on that date.⁹ As identified in the ED's Interim Report, and as made clear by the information provided in the ED Report when it was finally filed with the Commission on May 1, 2007—almost six months after the deadline established by the Commission, Asarco failed to provide information necessary for the Executive Director to meet his deadlines as established in the Interim Order. Asarco failed to take the steps necessary to ensure that all timeframes, as established in the Interim Order, were met; and thus, Asarco failed to timely provide the information necessary to meet its burden of proof in support of approval of its renewal application. Asarco's application should be denied due to Asarco's failure to meet the permitting requirements as identified by the Commission in the Interim Order.

A. Asarco's Failure to Provide Required Information to the Executive Director Resulted in the ED Report Being Completed Approximately Six Months After the Deadline Established in the Interim Order

As previously detailed by the City in other pleadings that are pending before the Commissioners, within a few weeks of the issuance of the Interim Order, the Executive Director wrote to Asarco, identifying that "because ASARCO has failed to demonstrate the effectiveness of its existing emission control equipment and practices, the investigations required to comply with the Interim Order exceeds the scope of the agency's normal permit renewal process and will require resources beyond those appropriated to the agency for that process"¹⁰ The

⁹ See Executive Director Interim Report and Request for Extension, *Application of Asarco, Inc. to Renew Air Quality Permit No. 20345*, TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-0593 (Nov. 10, 2006) [hereinafter ED's Interim Report].

¹⁰ See Letter from Mr. Glenn Shankle, Executive Director, Texas Comm'n on Env'tl. Quality, to Mr. Lairy Johnson, ASARCO, Inc., at 1 (May 5, 2006) (Attachment C to the ED Report) [hereinafter May 5 ED Letter].

Executive Director required Asarco to retain one or more qualified independent third parties to complete certain tasks identified in the letter:

- a qualified modeler to perform an audit of all modeling performed by ASARCO in accordance with the attached modeling protocol;
- a process engineer to determine the condition and effectiveness of all air quality control equipment and related practices located at the Copper Smelter pursuant to Ordering Provision 3 of the Interim Order; and,
- a process engineer to review all air quality control equipment in comparison with all requirements of ASARCO's existing permit 20345 pursuant to Ordering Provision 3 of the Interim Order. Additionally, the process engineer will review and determine whether the Copper Smelter will operate in accordance with industry standards and practices.¹¹

The Executive Director's letter established a September 8, 2006 deadline for Asarco to provide "all information obtained and assessments performed" as required by the Interim Order and the May 5, 2006 letter.¹²

Over the next several months, the Executive Director, through correspondence to Asarco, reiterated Asarco's responsibility to obtain the appropriate third party consultants, at one point stating:

[S]taff has been unable to determine that existing plant control equipment and practices are sufficient and that the plant can operate in accordance with permit conditions and with industry standards and practices. Without such a finding, I cannot recommend approval of the renewal of ASARCO's permit.

The options of a third party process engineer assessment of ASARCO's equipment and practices and a third party audit of any modeling results that ASARCO [*sic*] are not viable if my staff does not have sufficient time to review and prepare the report required under the Interim Order. The lack of process on hiring third party contractors has significantly affected my ability to comply with the prescribed timeframes for the preparation of the report as required by the

¹¹ *Id.* at 2.

¹² *Id.*

Interim Order. *As the party with the burden of proof, ASARCO is responsible for ensuring that it provides the information necessary for commission evaluation.*¹³

The above statement was provided in a letter to Asarco on September 12, 2006—four days after the deadline originally established by the Executive Director in his May 5 letter. While Asarco was well-aware of the timeframes established in the Interim Order and as interpreted by the Executive Director and while Asarco has repeatedly asserted the importance of this permit and decried the length of the permitting process, it repeatedly failed to take steps to ensure compliance with the Interim Order.

Asarco blamed its failure to meet the requirements of the Executive Director's May 5 letter on its bankruptcy status, but yet Asarco did not file an application with the Bankruptcy Court regarding a third party consultant until September 15, 2006¹⁴—over six months after the date of the Interim Order and one week after the Executive Director's deadline for the third party consultant review *to be completed*. Asarco's September 15 application to the Bankruptcy Court only addressed retention of a third party consultant to audit the air quality modeling, so while filed over four months after the Executive Director's May 5 letter, Asarco's petition to the Bankruptcy Court did not even seek to comply with the entirety of the Executive Director's requirements regarding third party consultants.¹⁵

In addition, the professional services agreements between Asarco and the two third-party consultants, EHP Consulting, Inc. ("EHP") and Arnold Srackangast, were not executed until

¹³ Letter from Mr. Glenn Shankle, Executive Director, Texas Comm'n on Env'tl. Quality, to Mr. Lairy Johnson, ASARCO, Inc. (Sept. 12, 2006) (emphasis added).

¹⁴ See ASARCO LLC's Expedited Application for Order under 11 U.S.C. §§ 327(a) and 328(a) Authorizing the Retention and Employment of Special Purpose Environmental Professional, *In re: ASARCO LLC, et al.*, Case No. 05-21207 (S.D. Tex. Bankr Ct. Sept. 15, 2006).

¹⁵ As identified above, the Executive Director's May 5, 2006 letter identified that third party consultants were needed to complete multiple tasks, but Asarco's application to the Bankruptcy Court only sought permission "to retain and employ Arnold Srackangast as special purpose environmental professional to conduct, at the request of the Texas Commission on Environmental Quality (the "TCEQ"), an air quality modeling audit for the El Paso smelter" *Id.* at 1.

January 2007 and February 2007, respectively.¹⁶ The process engineer third party consultant, EHP, did not inspect the Asarco El Paso Plant until January 2007,¹⁷ and EHP's report to TCEQ is dated April 9, 2007.¹⁸ The report from the third party consultant responsible for auditing Asarco's air quality modeling, Mr. Srackangast, was provided to TCEQ even later, dated April 23, 2007.¹⁹ All of these events related to the third-party consultants occurred weeks and months after the Commission's deadline of November 10, 2006 for *completion* of the ED Report.

B. Asarco Failed to Provide the Completed and Final Modeling Analyses by the Deadline Established by the Commission in the Interim Order

While Asarco's foot-dragging made it impossible for the Executive Director to meet the deadlines established in the Interim Order, it is more disturbing that Asarco also failed to meet the deadline established in the Interim Order for it to complete new modeling. The Commission required Asarco to "submit additional information regarding all emissions from and related to the El Paso Plant and their impacts on surrounding areas, including current modeling results, within six months of issuance of this Interim Order,"²⁰ or by September 11, 2006. While the Commissioners' discussion at the February 8, 2006 Agenda meeting made it clear that new,

¹⁶ See Professional Services Agreement Contract No. _____ for Project Name El Paso Smelter Air Pollution Control Audit for TCEQ by and between Asarco LLC and EHP Consulting, Inc. at 12 (Attachment E to the ED Report) [hereinafter EHP Professional Services Agreement]; Professional Services Agreement Contract No. _____ for Project Name El Paso Smelter Air Quality Modeling Audit for TCEQ by and between Asarco LLC and Arnold R. Srackangast at 12 (Attachment E to the ED Report) [hereinafter Srackangast Professional Services Agreement].

¹⁷ See ED Report, *supra* note 1, at 19.

¹⁸ See Eric Partelpoeg, EHP Consulting, Inc., Asarco El Paso Smelter Review and Comments (Apr. 9, 2007) (Attachment K to the ED Report) [hereinafter EHP Review].

¹⁹ See Arnold R. Srackangast, Independent Third Party Audit of the Air Quality Analysis for ASARCO Incorporated El Paso Smelter Plant Renewal of TCEQ Permit No. 20345 (Apr. 23, 2007) (Attachment L to the ED Report). With Mr. Srackangast's report dated April 23, 2007, at most, TCEQ would have had only one week to review and fully evaluate Mr. Srackangast's third-party audit of Asarco's modeling. Such a short review period calls into question the completeness of TCEQ's evaluation of Mr. Srackangast's report and recommendations.

²⁰ Interim Order, *supra* note 3 at 11.

significantly more detailed modeling would be required of Asarco within six months of issuance of the Interim Order, it appears that Asarco did not meet with the Executive Director's staff regarding modeling until May 2006.²¹ It also appears that Asarco met with the Executive Director's permitting and modeling staff again in late July or August to review Asarco's modeling approach and interim report.²² Asarco then submitted what should have been its final air quality modeling analyses to the Executive Director on September 11, 2006.²³ But, while Asarco had met with the Executive Director on several occasions between May 2006 and its "final" modeling submittal on September 11, 2006, the Executive Director found a number of deficiencies in Asarco's "final" modeling analysis.²⁴

The letter from TCEQ to Mr. David Cabe, P.E., Asarco's consulting engineer that completed the modeling, raised a number of deficiencies with the "final" modeling analysis and stated that "additional information is needed to complete our review of your air quality analysis."²⁵ Regarding both meteorological input data and background monitoring data, TCEQ requested additional information because, based on the information provided by Asarco, TCEQ could not "determine the appropriateness and reasonableness of the analysis."²⁶ In addition, TCEQ raised concerns that numerous discrepancies regarding the elevations of receptor locations would result in serious errors regarding predicted concentrations of emissions, stating: "A discrepancy of this magnitude will significantly alter the predicted concentrations at these

²¹ See Letter from Mr. Lairy Johnson, P.G., Plant/Environmental Manager, ASARCO LLC, to Mr. Glenn Shankle, Executive Director, Texas Comm'n on Env'tl. Quality at 1 (July 18, 2006).

²² See Letter from Mr. David Cabe, P.E., Zephyr Env'tl. Corp., to Mr. Glenn Shankle, Executive Director, Texas Comm'n on Env'tl. Quality (July 24, 2006).

²³ See ED Report, *supra* note 1 at 16.

²⁴ See Letter from Mr. Robert Opiela, Air Permits Division, Texas Comm'n on Env'tl. Quality, to Mr. David Cabe, P.E., Zephyr Env'tl. Corp. (Oct. 9, 2006).

²⁵ *Id.* at 1.

²⁶ *Id.* at 1-2.

locations.”²⁷ Basically, based on the incomplete information submitted by Asarco on September 11, 2006, TCEQ air quality permitting staff were unable to determine how Asarco reached its modeling conclusions and had identified serious discrepancies with certain data that could result in critical errors in the modeling conclusions. Asarco did not provide a corrected modeling analysis until November 22, 2006, over two and one-half months after the Interim Order deadline.

C. **Asarco’s Violation of the Ordering Provisions of the Interim Order Should Result in the Immediate Denial of Asarco’s Application for Renewal of Air Quality Permit No. 20345**

While Asarco missed the modeling deadline under the Interim Order and forced the Executive Director to miss the deadlines regarding the ED Report due to Asarco’s failure to timely provide third party consultants, it never petitioned the Commission, or even the Executive Director, for an extension of the timeframes, nor did Asarco ever provide any explanation as to why the deadlines were being missed. Asarco has not filed a single document in over a year to address concerns that the deadlines as established in the Interim Order would be missed. As with any other Commission-established deadlines, the deadlines set out in the Interim Order are binding on Asarco, and Asarco failed to comply with the requirements of the Interim Order, apparently without remorse and with apparent disdain that the deadlines were applicable to them at all. Asarco ignored the deadlines established by the Commission and the Executive Director, hindered the Executive Director’s processing of the renewal application pursuant to the Interim Order, and delayed this proceeding for months.

Pursuant to Commission rules and policies, applicants do not have open-ended timeframes for providing required information to the Commission for the processing of their

²⁷ *Id.* at 2.

applications. Applicants who delay the processing of their own applications are not given multiple opportunities for further delay. Instead, their applications are returned, voided, or denied. These same policies must be applied to Asarco after these months of delay. Asarco's failure to timely provide the information required by the Interim Order, thus violating the Ordering Provisions of the Interim Order, should result in the immediate denial of Asarco's application.

III. THE ED REPORT INACCURATELY SUMMARIZES ASARCO'S PAST PERMITTING ACTIONS

Through the Interim Order, the Commission directed the Executive Director to "assess the appropriateness of a permit amendment application rather than a renewal application for equipment that has not been previously authorized or that requires repair or replacement."²⁸ Pages six through fifteen of the ED Report provide the Executive Director's review of the changes made by Asarco to Air Quality Permit No. 20345 for the Asarco El Paso Plant during its operation from 1993 to 1999.²⁹ This section of the ED Report is replete with deficiencies regarding the analysis of certain key changes made to the Asarco El Paso Plant during that time period. Each one of the changes identified below was improperly approved at the time, was a circumvention of TCEQ regulations, and should have been approved through a permit amendment with public notice and an opportunity for public participation.

²⁸ Interim Order, *supra* note 3, at 11.

²⁹ See ED Report, *supra* note 1, at 6-15.