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June 18, 2007

LA DONNA CASTANUELA  
CHIEF CLERK  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
MC 105  
P.O. BOX 13087  
AUSTIN, TEXAS 78711-3087

VIA FAX 512-239-3311  
AND REGULAR MAIL

Re: Application of ASARCO Inc., for Renewal of Air Quality Permit No. 20345, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR

Dear Ms. Castañuela:

Enclosed for filing in the above referenced matter, please find an original and eleven copies of the following documents

- (1) Protestant Sunset Heights Comments on Executive Director's Report.

Please contact me at the number above if you have any questions regarding this filing.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Valdivia".

Enrique Valdivia  
Attorney at Law

cc: Service List

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

IN THE MATTER OF THE § BEFORE THE STATE OFFICE  
APPLICATION OF ASARCO, INC. §  
FOR RENEWAL OF § OF  
AIR QUALITY PERMIT NO. 20345 §  
EL PASO, EL PASO COUNTY § ADMINISTRATIVE HEARINGS

SUNSET HEIGHTS ACORN et al, COMMENTS  
ON EXECUTIVE DIRECTOR'S REPORT

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Protestant Sunset Heights ACORN et al ("ACORN") hereby submits their comments on the Executive Director's Report to the Commission on Renewal of ASARCO's Air Quality Permit No. 20345.

**1. ASARCO's Failure to Meet Interim Order Deadlines Requires Denial of Renewal or a "Show Cause" Contested Case Hearing.**

ACORN joins the City of El Paso's Motion asking the Commission to immediately deny renewal of the permit. Alternatively, ACORN submits that the deadlines included in the Commission's Interim Order are a "schedule" as that term is used in Texas Health & Safety Code Section 382.055(g) which provides that "[i]f the applicant does not meet those requirements in accordance with the schedule, the applicant must show in a contested case proceeding why the permit should not expire immediately." Accordingly, should the Commission deny El Paso's Motion, this matter should be referred to SOAH for contested case hearing. ACORN further requests that it and the other parties represented by counsel for ACORN be granted party status in that proceeding.

## **2. Objections to Proceeding With Actions Recommended in ED Report.**

### **A. Denial of Due Process and Motion to Strike**

Should the Commission decide this case based on evidence adduced in the Report it will be relying on evidence outside the record developed by SOAH. This would also deny Protestants basic due process by precluding cross-examination or indeed any challenge whatsoever. For this reason, ACORN objects to the Commission's consideration of the Report and moves that it be struck from the record in it's entirety.

### **B. The Report's Proposed "Startup" is Subject to PSD Requirements**

The Report makes several references to facility "startup" but does not explain why Applicant should not be required to apply for and receive a prevention of significant deterioration ("PSD") permit. EPA has taken the position that "reactivation of facilities that have been in an extended condition of inoperation may trigger PSD requirements as 'construction' of either a new major stationary source or a major modification of an existing stationary source." See "In The Matter of Monroe Electric Generating Plant Entergy Louisiana, Inc' Proposed Operating Permit; Petition No. 6-99-2; Order Responding to Petitioner's Request that the Administrator Object to Issuance of a State Operating Permit. Available at:

[http://epa.gov/region7/programs/artd/air/title5/t5memos/ccaw\\_ord.pdf](http://epa.gov/region7/programs/artd/air/title5/t5memos/ccaw_ord.pdf)

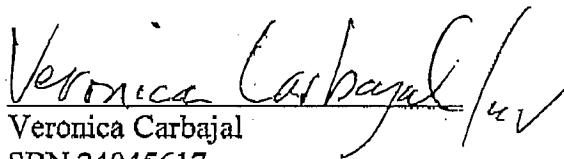
### **C. ED's Deadlines Based on "Startup" or Adoption of the Report by the Commission Are Not Sufficiently Specific to Determine Compliance.**

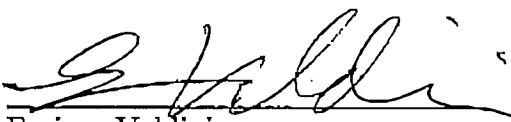
All of the Report's recommendations have contingent deadlines. Applicant is required to act either within a certain time "prior to startup" or "no later than 365 days after commission consideration and action on this report." Texas Health & Safety Code Section 382.055(f)(2)(A)

requires "a final date for meeting the commission's requirement." ACORN submits that the deadlines provided in the Report do not comport with the rule. The effect if not the purpose of the "final date" language in the rule is to make clear when there has not been compliance.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 18, 2007, copies of the document above, was sent by fax, and/or mail to the following as indicated below:

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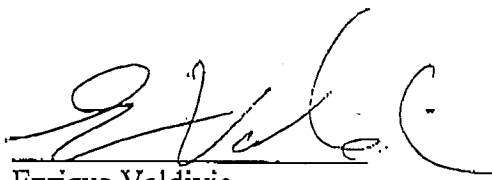
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