



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

NOV 10 2011

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RETURN RECEIPT REQUESTED

IN REPLY: AIR-5
REFER TO: Docket No. R9-12-01

Mr. Tom Aldrich
Vice President, Environmental Affairs
Asarco LLC
5285 East Williams Circle, Suite 2000
Tucson, Arizona 85711-7711

Re: Asarco LLC Finding of Violation

Dear Mr. Aldrich:

Enclosed is a Finding of Violation ("FOV") issued pursuant to section 113(a)(3) of the Clean Air Act, 42 U.S.C. §§ 7401-7671q (the "Act"), notifying you that the United States Environmental Protection Agency ("EPA"), Region IX, finds that Asarco LLC ("Asarco") has violated certain sections of the Act's National Emission Standards for Hazardous Air Pollutants for Primary Copper Smelters and Title V Operating Permit Program, at its primary copper smelter located in Hayden, Arizona (the "Facility").

You should be aware that section 113(a)(3) of the Act authorizes EPA to issue an order requiring compliance with the requirements of the Act, issue an administrative penalty order, or commence a civil action seeking an injunction and/or a civil penalty. Furthermore, section 113(c) of the Act provides for criminal penalties in certain cases.

In addition, section 306 of the Act, 42 U.S.C. § 7606, the regulations promulgated thereunder (2 C.F.R. Part 180), and Executive Order 11738 provide that facilities to be utilized in federal contracts, grants and loans must be in full compliance with the Act and all regulations promulgated pursuant to it. A violation of the Act may result in the Facility being declared ineligible for participation in any federal contract, grant, or loan.

If you wish to discuss the enclosed FOV, you may request a conference with EPA within ten (10) working days of receipt of this FOV. The conference will afford Asarco an opportunity to present information bearing on the finding of violation, the nature of the violations, and any efforts it may have taken or proposes to take to achieve compliance.

If you have any questions pertaining to this FOV, please contact Charles Aldred of the Air Enforcement Office at (415) 972-3986, or have your attorney contact Ivan Lieben of the Office of Regional Counsel at (415) 972-3914.

Thank you for your cooperation in this matter.

Sincerely,



Deborah Jordan
Director, Air Division

Enclosure

cc: Mr. Eric Massey, Air Quality Division Director, ADEQ

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In the Matter of) Docket No. R9-12-01
)
Asarco LLC)
) FINDING OF VIOLATION
Hayden, Arizona)
)
Proceeding Under Section)
113(a) of the Clean Air Act,)
42 U.S.C. § 9613(a))

FINDING OF VIOLATION

This Finding of Violation ("FOV") is issued to Asarco LLC ("Asarco") for violations of the Clean Air Act ("CAA" or the "Act"), as amended, 42 U.S.C. §§ 7401-7671q, at its primary copper smelter located in Hayden, Arizona (the "Hayden Smelter" or "Facility"). Asarco violated the National Emission Standards for Hazardous Air Pollutants ("NESHAP") General Provisions and the NESHAP for Primary Copper Smelters. Asarco also violated the Title V Operating Permit Program requirements. This FOV is issued pursuant to section 113(a)(3) of the Act. The authority to take action under section 113(a)(3) of the Act has been delegated to the Regional Administrator of the United States Environment Protection Agency ("EPA") Region IX and further re-delegated to the Director, Air Division, EPA Region IX.

STATUTORY & REGULATORY BACKGROUND

National Emission Standards for Hazardous Air Pollutants

1. Pursuant to section 112 of the Act, the Administrator of

the EPA promulgated the following NESHAP standards:

- a. 40 C.F.R. Part 63, Subpart A -- General Provisions (the "NESHAP Subpart A"), 59 Fed. Reg. 12,430 (Mar. 16, 1994), as amended (40 C.F.R. §§ 63.1 through 63.15);
- b. C.F.R. Part 63, Subpart QQQ -- National Emission Standards for Hazardous Air Pollutants for Source Categories: National Emission Standards for Primary Copper Smelters (the "NESHAP Subpart QQQ"), 67 Fed. Reg. 40491, June 12, 2002 (40 C.F.R. §§ 63.1440 through 63.1459).

2. The NESHAP Subpart A applicability requirements provide, in pertinent part, that the NESHAP standards "regulate specific categories of stationary sources that emits (or have the potential to emit) one or more hazardous air pollutants ("HAPs") listed in this part pursuant to section 112 (b) of the Act." 40 C.F.R. § 63.1.

3. The NESHAP Subpart QQQ applies to each primary copper smelter that is a major source of HAPs. 40 C.F.R. § 63.1440(a).

4. The NESHAP Subpart QQQ defines "primary copper smelter" as "any installation of any intermediate process engaged in the production of copper from copper sulfide ore concentrates through the use of pyrometallurgical techniques." 40 C.F.R. § 63.1459.

5. A NESHAP "major source" is defined as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any [HAP] or 25 tons per year or more of any combination of [HAPs]."

42 U.S.C. § 7412(a)(1); 40 C.F.R. § 63.2.

6. HAPs listed in Section 112(b) of the Act include Arsenic Compounds, Lead Compounds, Antimony Compounds, Beryllium Compounds, Cadmium Compounds, Chromium Compounds, Cobalt Compounds, Manganese Compounds, Nickel Compounds, and Selenium Compounds.

7. Section 112(b) defines a "compound" as "including any unique chemical substance that contains the named chemical (i.e. antimony, arsenic, etc) as part of that chemical's infrastructure."

8. The NESHAP Subpart A provisions define "potential to emit" as "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable." 40 C.F.R. § 63.2.

9. The date for existing sources to come into compliance with the NESHAP Subpart QQQ requirements was June 13, 2005. 40 C.F.R. § 63.1443(a).

10. The NESHAP Subpart QQQ requires, in broad terms, the following:

- (a) specific PM emission limits for the following process units: copper concentrate dryers, smelting furnaces, slag cleaning vessels, the capture systems for the copper converters departments, and the secondary capture system for the copper converter departments, 40 C.F.R. § 63.1444;

- (b) opacity limit of 4% for any visible emissions exiting the roof monitors or roof exhaust fans on the building housing the copper convertor department, 40 C.F.R. § 63.1444(d);
- (c) compliance with an approved fugitive dust control plan, 40 C.F.R. § 63.1445;
- (d) operation and maintenance requirements, 40 C.F.R. § 63.1447;
- (e) initial source testing to prove compliance within 180 days of the effective date of the requirements, 40 C.F.R. § 63.1449; and
- (f) monitoring, recordkeeping and reporting provisions, 40 C.F.R. §§ 63.1450-63.1456.

11. The NESHAP Subpart A requires, in part, that the owner or operator of an affected source subject to a testing requirement by one of the relevant NESHAP source categories, such as the NESHAP Subpart QQQ, performs those tests within 180 days of the compliance date for the relevant NESHAP source category. 40 C.F.R. § 63.7(a)(2).

12. The NESHAP Subpart A requires the development of a written startup, shutdown and malfunction ("SSM") plan that describes (i) procedures for operating and maintaining the source during SSM events; and (ii) a program of corrective action for malfunctioning process, air pollution control, and monitoring equipment used to comply with the relevant standard. 40 C.F.R. § 63.6(e)(3). The owner or operator of an existing major affected source that is a primary copper smelter must develop the SSM plan no later than June 13, 2005. 40 C.F.R. §§ 63.6(e)(3) and 63.1443.

Title V Operating Permit Program

13. Title V of the CAA, 42 U.S.C. §§ 7661-7661f, establishes an operating permit program for certain sources, including "major sources". See Section 502(a) of the Act, 42 U.S.C. § 7661a(a). Regulations implementing the Title V permit program are set forth at 40 C.F.R. Part 70.

14. Pursuant to Title V, it is unlawful for any person to violate any requirement of a permit issued under Title V or to operate a major source except in compliance with a permit issued by a permitting authority under Title V. Section 502(a) of the Act, 42 U.S.C. § 7661a(a).

15. Under Section 502(d)(1) of the Act, states were required to develop and obtain approval to administer Title V programs. 42 U.S.C. § 7661a(d)(1). EPA granted full approval of the Arizona Department of Environmental Quality's ("ADEQ") Title V Operating Permit Program, contained in Arizona Administrative Code Title 18 Chapter 2, Articles 1, 3 and 5, on November 30, 2001. 40 C.F.R. Part 70, Appendix A.

16. Sources subject to Title V and falling under ADEQ's jurisdiction are required to submit to ADEQ timely and complete Title V applications that identify all "applicable requirements," including NESHAP requirements. See 40 C.F.R. § 70.5(a); Arizona Administrative Code R18-2-304(B) through R18-2-304(E).

17. Sources subject to Title V who have submitted an application are required to supplement or correct that application to include applicable requirements that were not included in the original

application. 40 C.F.R. § 70.5(b); Arizona Administrative Code R18-2-304(G).

18. Sources subject to Title V and falling under ADEQ jurisdiction must obtain a Title V permit that: 1) contains such conditions necessary to assure compliance with the applicable requirements; 2) identifies all applicable requirements the source is subject to; and 3) certifies compliance with all applicable requirements, and where a source is not meeting requirements, contains a plan for coming into compliance. Sections 503 and 504 of the Act, 42 U.S.C. §§ 7661b and 7661c(a); 40 C.F.R. §§ 70.1, 70.5 and 70.6; Arizona Administrative Code R18-2-304(J) and R18-2-306.

19. Failure of a source subject to Title V to submit a complete application, supplement that application, submit a proper certification, or to obtain a Title V permit that contains all applicable requirements, such as NESHAP requirements, is a violation of the Act.

FINDINGS OF FACT

20. Asarco is the owner and operator of the Hayden Smelter.

21. The Hayden Smelter produces copper from copper sulfide ore concentrates through a pyrometallurgical process, and therefore is a "primary copper smelter" as that term is defined in 40 C.F.R. § 63.1459.

22. The Hayden Smelter includes, among other units, dryers, smelting furnaces, a slag cleaning vessel, a copper converter department, a concentrator, and other related fugitive emission

sources.

NESHAP Subpart A/NESHAP Subpart QQQ

23. The Hayden Smelter has emitted since June 13, 2005, on an ongoing basis, certain HAPs, including Arsenic Compounds, Lead Compounds, Antimony Compounds, Beryllium Compounds, Cadmium Compounds, Chromium Compounds, Cobalt Compounds, Manganese Compounds, Nickel Compounds, and Selenium Compounds.

24. Based upon information available to EPA, EPA finds that, on June 13, 2005, the Hayden Smelter had the potential to emit 10 tpy or greater of Arsenic and Lead Compounds, individually, and 25 tpy or greater of a combination of HAPs.

25. Based upon information available to EPA, EPA finds that, since June 13, 2005, the Hayden Smelter has been an existing major affected source of HAPs, and thus subject to the requirements of the NESHAP Subpart QQQ and the related provisions of the NESHAP Subpart A.

26. Based upon information available to EPA, EPA finds that, since June 13, 2005, and on an ongoing basis, Asarco has failed to comply with some or all of the requirements of the NESHAP Subpart QQQ and the related provisions of the NESHAP Subpart A, including but not limited to performance testing requirements, ongoing monitoring of emissions and control device performance, recordkeeping requirements, submission of notifications and reports, work practice and operation and maintenance standards, emission and opacity limits, development of an SSM plan, and development and compliance with an approved fugitive dust plan.

Title V Operating Permits Program

27. ADEQ initially issued a Title V operating permit to Asarco for its Hayden Smelter on October 9, 2001.

28. Asarco submitted an application for a Title V permit renewal to ADEQ for its Hayden Smelter on April 10, 2006.

29. Asarco submitted additional or supplemental Title V permit applications to ADEQ at various times since the submission of its Title V renewal application on April 10, 2006.

30. Based upon information available to EPA, EPA finds that Asarco, in its Title V renewal application submitted on April 10, 2006 and in its subsequent Title V permit applications, has failed to identify the requirements of the NESHAP Subpart QQQ and the related provisions of the NESHAP Subpart A as "applicable requirements" that should be included in its Title V permit.

31. Based upon information available to EPA, EPA finds that Asarco's current Title V permit does not contain all "applicable requirements", as it does not contain any requirements of the NESHAP Subpart QQQ or the related provisions of the NESHAP Subpart A.

FINDING OF VIOLATION

NESHAP General Provisions and

Major Source Primary Copper Smelting NESHAP

32. Notice is given to Asarco that EPA finds that it has failed and continues to fail to comply with all requirements of the NESHAP Subpart QQQ or the related provisions of the NESHAP Subpart A, and therefore has been in continuous violation of Section 112 of the Act.

Title V Operating Permit Program

33. Notice is also given to Asarco that EPA finds that it has failed and continues to fail to supplement or correct its Title V application submitted to ADEQ to include all "applicable requirements" of the NESHAP Subpart QQQ or the related provisions of the NESHAP Subpart A or otherwise obtain a Title V permit that includes these requirements, and therefore has been in continuous violation of Title V of the Act.

ENFORCEMENT

34. Section 113(a)(3) of the Act, 42 U.S.C. § 7413(a)(3), provides that the Administrator may, without regard to the period of violation, issue an administrative penalty order, issue an order requiring compliance with the requirements of the Act, or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation that occurs on or before January 30, 1997, not more than \$27,500 per day for each violation that occurs after January 30, 1997, not more than \$32,500 per day for each violation that occurs after March 15, 2004; and not more than \$37,500 per day for each violation that occurs after January 12, 2009. 42 U.S.C. § 7413(a)(3); Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended; 40 C.F.R. Part 19.

35. Section 113(c) of the Act, 42 U.S.C. § 7413(c), provides for criminal penalties, imprisonment, or both for persons who knowingly violate any federal regulation or permit requirement. For violations of the SIP, a criminal action can be brought 30 days after the date of issuance of a Notice of Violation.

36. Section 306 of the Act, 42 U.S.C. § 7606, the regulations promulgated thereunder (2 C.F.R. Part 180), and Executive Order 11738 provide that facilities to be utilized in federal contracts, grants and loans must be in full compliance with the Act and all regulations promulgated pursuant to it. A violation of the Act may result in the Hayden Smelter being declared ineligible for participation in any federal contract, grant, or loan.

PENALTY ASSESSMENT CRITERIA

37. Section 113(e)(1) of the Act, 42 U.S.C. § 9613(e)(1), states that the Administrator or the court shall determine the amount of a penalty to be assessed by taking into consideration such factors as justice may require, including the size of the business, the economic impact of the penalty on the business, the violators full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violations, the economic benefit of noncompliance, and the seriousness of the violation.


38. Section 113(e)(2) of the Act, 42 U.S.C. § 9613(e)(2), allows the Administrator or the court to assess a penalty for each day of violation. Asarco has been in continuous violation of the Act since June 13, 2005, the effective date of the NESHAP Subpart QQQ requirements.

OPPORTUNITY FOR CONFERENCE

39. Asarco may confer with EPA regarding this FOV if it so requests. A conference would enable Asarco to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. If Asarco seeks such a conference, it may choose to be represented by counsel. If Asarco wishes to confer with EPA, it must make a request for a conference within 10 working days of receipt of this FOV. Any request for a conference or other inquiries concerning the FOV should be made in writing to:

Ivan Lieben, Office of Regional Counsel
U.S. EPA (ORC-2)
75 Hawthorne Street
San Francisco, CA 94105
(415)972-3914

Dated: 11-10-11



Deborah Jordan
Director, Air Division