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IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ARIZONA

United States of America, Plaintiff, v. Asarco, LLC, Defendant.	No. _____ **COMPLAINT**

COMPLAINT

The United States of America ("United States"), by the authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), files this Complaint and alleges as follows:

NATURE OF THE ACTION

1. This is a civil action against Asarco, LLC ("Defendant" or "Asarco") for violations of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. §§ 7401 *et seq.*, at Asarco's primary copper smelter in Hayden, Arizona (the "Smelter" or the "Facility"). Pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), the United States seeks injunctive relief and civil penalties for Asarco's violations of the Act's requirements to control and monitor hazardous air pollutants from the Smelter, such as lead and arsenic. Asarco's failure or refusal to comply with the Act's program for hazardous air pollutants violates Section 112 of the CAA, 42 U.S.C. § 7412, and EPA's implementing regulations. Asarco is also illegally operating the Smelter by failing to comply with the operating permit obligations for such sources of hazardous air pollutants, as specified in Title V of the Act, 42 U.S.C. §§ 7661-7661f, and the implementing regulations. The violations alleged in this Complaint continue to occur at Defendant's Smelter.

2. Primary copper smelters can potentially emit significant amounts of toxic metals that Congress deemed hazardous air pollutants in Section 112(b)(1) of the Act, 42 U.S.C. § 7412(b)(1). These metals include antimony, arsenic, beryllium, cadmium, cobalt, lead, manganese, nickel and selenium. Exposure to these substances has been demonstrated to cause adverse health effects such as diseases of the lung, kidney, central nervous system, and cancer. In recognition of these risks, EPA issued a rule to control hazardous air pollution from primary copper smelters. This rule, which went into effect in 2005, is referred to as the National Emission Standards for Hazardous Air Pollutants for Primary Copper Smelters, 40 C.F.R. Part 63, Subpart QQQ ("Smelter NESHAP"). Asarco has failed or refused to comply with the Smelter NESHAP. Because the Facility was a major source of hazardous air pollutants as of the

first compliance date of the Smelter NESHAP, Asarco was obligated to comply with that rule on a continuous basis.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b) and pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and 1395(a).

4. Venue is proper in this District pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1391(b) and (c) because the violations which constitute the basis for this Complaint occurred and are occurring in this District, and Defendant operates the Smelter in this District.

5. The United States is providing notice of the commencement of this action to the Arizona Department of Environmental Quality ("ADEQ"), as required by Section 113(b) of the Act, 42 U.S.C. § 7413(b).

AUTHORITY

6. Authority to bring this action is vested in the Attorney General of the United States by CAA Section 305, 42 U.S.C. § 7605, and pursuant to 28 U.S.C. §§ 516 and 519.

PARTIES

7. Plaintiff is the United States, acting at the request and on behalf of the EPA Administrator.

8. Defendant is a limited liability company formed in the State of Delaware.

9. As a corporate entity, Asarco is a "person" within the meaning of CAA Section 302(e), 42 U.S.C. § 7602(e).

10. Defendant is the owner and/or operator of the Facility located in Hayden, Gila County, Arizona, and adjacent to Winkelman, Arizona, and Arizona State Route 177.

DESCRIPTION OF THE FACILITY

11. Asarco is the owner and operator of the Facility, which comprises material handling operations (including tailings impoundments), a concentrator, and a smelter. The Facility occupies more than 2,400 acres. Each year, it produces almost half a billion pounds of copper anodes.

12. The copper production process begins at Asarco's Ray mine, a 250,000 ton-per-day open pit mine for copper sulfide ore. Once removed from the ground, the ore is crushed and then transported by rail four or five times a day to the track hopper at the Facility in trains that can carry up to 5,000 tons of ore. The trains are dumped at the track hopper and the crushed ore is carried under State Route 177 through a conveyor tunnel to the secondary and tertiary crusher, where it is further reduced in size. The crushed ore is then processed at the adjacent concentrator by further grinding, blending with lime, and treatment in flotation cells with water and reagents to create concentrate, a fine grained powder containing 25% to 30% copper. This concentrate, which is bound by the reagent and floats to the top of the flotation cells, is skimmed for further processing. The concentrator has a capacity of at least 27,400 tons of ore per day.

13. The remainder of the ore after the useful copper concentrate is removed becomes waste "tailings" that is transferred as a wet slurry to one of the two nearby large active tailings impoundments where it is disposed of permanently. Tailing Pond AB/BC is located south of State Route177 and north of the Gila River and Tailing Pond D is located south of the Gila River. Tailing Pond AB/BC is approximately two and a half miles long, one mile wide at its

widest point and 200 feet high. Tailing Pond D is approximately two miles long, 1,500 feet wide and 150 feet high.

14. The useful copper concentrate is transferred from the concentrator via an outdoor, open-air conveyor belt onto an outdoor pile. Concentrate remains in outdoor piles until transfer offsite or to the bedding plant for use at the smelter.

15. Copper concentrate, whether coming from the concentrator or elsewhere, is further refined before smelting by blending with fluxes at the bedding plant. The bedding plant essentially contains "layered" piles of concentrate and other fine particulate materials, including fines collected by baghouses used to treat process gases exiting smelter furnaces. These piles are located outdoors in a partial wind break. The concentrate is then dried in fluid bed dryers before being fed into an International Nickel Company (INCO) flash furnace. The INCO flash furnace is a continuous smelting furnace that smelts copper ore concentrates and fluxes in the presence of oxygen, without the need for additional fuel, to form molten copper matte and waste slag.

16. After the dried concentrate is mixed with 95 percent pure oxygen in one of the four INCO flash furnace burners and instantly ignited, the resulting molten copper matte is transferred to one of the five converter furnaces with moving ladles. These converters, which were manufactured by Pierce-Smith, are open-topped cauldrons where the matte is converted to blister copper by blowing oxygen into the unit through "tuyere" nozzles. The five converter units are used on a rotational basis in 6-8 hour "batch" cycles that include periods of "charging", when the matte is added to the unit, and "blowing", when the oxygen is injected into the unit. During the converting process, the oxygen reacts with the sulfur in the matte to form large quantities of gaseous SO_2.

17. The blister copper produced in the converter units is transferred to one of the three anode furnaces for further processing prior to producing copper anodes, which are large copper bars cast from the molten copper that are 99% pure. These anodes are shipped offsite for final processing.

18. Waste slag, largely containing iron oxide, created at both the INCO flash furnace and convertor units, is captured and disposed of southeast of the Smelter in an area that is close to the Winkelman high school.

19. The active smelter building, which houses the flash furnaces, converter units, and anode furnaces, is approximately eleven stories tall. The various process units generally use hooding to capture some of the off-gases.

20. The largest sources of SO_2 emissions, the five converter units, utilize primary and secondary hooding systems to capture process off-gases. The captured off-gases from the converter units are sent to either a double-contact sulfuric acid plant or a secondary gas treatment stream and then vented to the atmosphere through a 1,000-foot-tall stack. The SO_2 and particulate matter (PM)-laden gases that are sent to the sulfuric acid plant are treated to remove PM and then the SO_2 is largely converted to sulfuric acid, which is removed from the gas stream for sale or internal use as a secondary product, prior to release to the atmosphere. Otherwise, the SO_2- and PM-laden gases are sent to a secondary gas treatment stream, which includes some lime injection that removes a limited amount of SO_2 prior to capture of PM in a baghouse.

21. Not all process gases are captured, however, and those gases not captured typically exit the smelter building as process emissions through vents on the building's roof opening directly to the atmosphere.

22. The ores, concentrates, and tailings processed or produced at the Facility contain heavy metals such as lead, arsenic and beryllium. These heavy metals become airborne as hazardous air pollutants during various stages of the smelting process, including both during material handling operations as dust and during the smelting process as off-gases.

STATUTORY AND REGULATORY BACKGROUND

23. As set forth in Section 101(b)(1), 42 U.S.C. § 7401(b)(1), the Act establishes a regulatory program designed to protect and enhance the quality of the nation's air so as to promote the public health and welfare.

National Emission Standards For Hazardous Air Pollutants ("NESHAPs")

24. Section 112 of the Act, 42 U.S.C. § 7412, establishes a program for controlling emissions of hazardous air pollutants ("HAPs"), also known as air toxics, called the National Emission Standards for Hazardous Air Pollutants (or "NESHAPs"), through the use of maximum achievable control technology ("MACT") to minimize HAP emissions.

25. HAPs are pollutants that present, or may present, a threat of adverse human health effects such as cancer and birth defects. 42 U.S.C. § 7412(b)(2). HAPs are listed in Section 112(b) of the Act, 42 U.S.C. § 7412(b), and include, *inter alia*, arsenic compounds, lead compounds, antimony compounds, beryllium compounds, cadmium compounds, chromium compounds, cobalt compounds, manganese compounds, nickel compounds, and selenium compounds.

26. A "major source" of HAPs is "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 hazardous air pollutant or 25 tons per year or more of any combination of hazardous air

pollutants." Section 112(a)(1) of the Act, 42 U.S.C. § 7412(a)(1); 40 C.F.R. § 63.2 (definition of "major source").

27. "Potential to emit" is defined 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.

28. "Stationary source" means "any building, structure, facility or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3); *id.* 7412(a)(3); 40 C.F.R. § 63.2 (definition of "stationary source").

29. Under Section 112(d)(1) of the CAA, 42 U.S.C. § 7412(d)(1), Congress directed EPA to promulgate regulations establishing emission standards for each category or subcategory of "major sources" of HAPs listed under Section 112(c). These emission standards must require "the maximum degree of reduction in emissions of the hazardous air pollutants … including a prohibition on such emissions where achievable …" that the EPA Administrator determines is achievable, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements. 42 U.S.C. § 7412(d)(2).

30. Section 112(h) of the CAA, 42 U.S.C. § 7412(h), provides that if the EPA Administrator determines that an emission standard under Section 112(d) is not feasible, the Administrator may promulgate "a design, equipment, work practice, or operational standard, or combination thereof …. In the event the Administrator promulgates a design or equipment

standard … the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element or design or equipment."

31. The standards promulgated pursuant to Section 112 of the Act, 42 U.S.C. § 7412, are known as the NESHAPs for Source Categories. NESHAPs are also referred to as MACT standards. 40 C.F.R. Part 63.

32. Section 112(i)(3) of the Clean Air Act expressly prohibits operation of a stationary source in violation of an applicable NESHAP that has gone into effect. "After the effective date of any … [NESHAP] applicable to a source, no person may operate such source in violation of such standard …." 42 U.S.C. § 7412(i)(3).

NESHAP General Provisions at 40 C.F.R. Part 63, Subpart A

33. On March 16, 1994, EPA promulgated the NESHAPs General Provisions, codified at 40 C.F.R. Part 63, Subpart A ("Subpart A"). 59 Fed. Reg. 12430.

34. Subpart A includes general requirements that may be incorporated into NESHAPs such as the one at issue. 40 C.F.R. Part 63, Subpart QQQ, Table 1 (listing provisions of Subpart A that have been incorporated by reference, including Section 63.4).

35. Section 63.4 of Subpart A provides, in relevant part, that: "No owner or operator subject to the provisions of this part must operate any affected source in violation of the requirements of this part." 40 C.F.R. § 63.4(a)(1).

36. Section 63.2 of Subpart A defines "owner or operator" as "any person who owns, leases, operates, controls, or supervises a stationary source." 40 C.F.R. § 63.2 (definition of "owner or operator").

37. Section 63.2 of Subpart A defines "affected source" as "the collection of equipment, activities, or both within a single contiguous area and under common control that is

included in a section 112(c) source category or subcategory for which a section 112(d) standard or other relevant standard is established pursuant to section 112 of the Act." 40 C.F.R. § 63.2 (definition of "affected source").

NESHAP for Primary Copper Smelting, 40 C.F.R. Part 63, Subpart QQQ

38. Pursuant to Section 112 of the Act, 42 U.S.C. § 7412, EPA promulgated on June 12, 2002 the NESHAPs for Primary Copper Smelters. 67 Fed. Reg. 40478. This NESHAP is codified at 40 C.F.R. Part 63, Subpart QQQ ("Smelter NESHAP"), 40 C.F.R. §§ 63.1440 – 63.1459.

39. The Smelter NESHAP applies to persons who own or operate a primary copper smelter that:

A. is (or is part of) a major source of HAPs emissions on the first compliance date that applies under the Smelter NESHAP, and

B. uses "batch copper converters," as defined in Section 63.1459.

40 C.F.R. § 63.1441.

40. The Smelter NESHAP defines "primary copper smelter" as "any installation or 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.

41. The Smelter NESHAP requirements apply to "each new and existing affected source" at a primary copper smelter, which includes each copper concentrate dryer, smelting furnace, slag cleaning vessel, and copper converter department, as well as the entire group of fugitive emission sources as defined in Section 63.1459. 40 C.F.R. § 63.1442(a). An affected source at a primary copper smelter is an existing source if construction or reconstruction of it was commenced before April 20, 1998. 40 C.F.R. § 63.1442(b).

42. The "first compliance date" for existing primary copper smelters under the Smelter NESHAP was June 13, 2005. 40 C.F.R. § 63.1443.

43. "Batch copper converter" is defined, in relevant part as "a Pierce-Smith converter …. in which copper matte is oxidized to form blister copper by a process that is performed in discrete batches using a sequence of charging, blowing, skimming, and pouring." 40 C.F.R. § 63.1459.

44. An owner or operator of an existing affected source subject to the Smelter NESHAP must (1) comply with each applicable emission limitation, work practice standard, and operation and maintenance requirement set forth in the Smelter NESHAP no later than June 13, 2005, 40 C.F.R. § 63.1443(a); and (2) otherwise comply with the rest of the requirements of the Smelter NESHAP, including notification, monitoring, recordkeeping. Specific Smelter NESHAP requirements include, but are not limited to, the following:

A. The operation of capture systems meeting the specifications set forth in the Smelter NESHAP for each smelting furnace, each slag cleaning vessel, and each copper converter department using Pierce-Smith converters. 40 C.F.R. §§ 63.1444 (b)(2), (c)(3) and (d)(2). The capture system for the copper converter department must include use of a primary hood that covers the entire mouth of the converter vessel when the copper converter is positioned for blowing and must be designed as needed to achieve the opacity limit of 4% set forth in Section 63.1444(d)(4).

B. No discharge to the atmosphere of emissions in excess of the following: (i) for each copper concentrate dryer, any gases containing total PM of 50 milligrams per dry standard cubic meter ("mg/dscm"); (ii) for each smelting furnace, any

process off-gas containing nonsulfuric acid PM of 6.2 mg/dscm; (iii) for each smelting furnace when tapping copper matte or slag, any emissions captured by the capture system containing total PM of 23 mg/dscm; (iv) for each copper converter department, any process off-gases captured by the required primary hood capture system containing nonsulfuric acid PM of 6.2 mg/dscm; and (v) for each copper converter department, any process off-gases captured by any secondary capture system containing total PM of 23 mg/dscm. 40 C.F.R. §§ 63.1444(a)-(d).

C. No opacity of any visible emissions exiting the roof monitors or roof exhaust fans on the building housing the copper converter department in excess of 4 percent as determined by a performance test conducted according to Section 63.1450(c). 40 C.F.R. § 63.1444(d)(4).

D. Annual performance tests to demonstrate continuous compliance with each PM emission or opacity limit set forth in the Smelter NESHAP. 40 C.F.R. §§ 63.1453(a) and (b)(4).

E. Preparation and operation at all times according to a written operation and maintenance plan for each capture system and control device subject to standards in the Smelter NESHAP, including the following: (i) written procedures for performing preventative maintenance for each capture system and control device, which includes a preventative maintenance schedule that is consistent with the manufacturer's instructions for routine and long-term maintenance; (ii) procedures to conduct monthly inspections of the equipment components of each capture system that can affect the performance of the system to collect the gases and

fumes emitted from the affected source (e.g., hoods, exposed ductwork, dampers, fans); and (iii) operating limits for each capture system that are representative and reliable indicators of the performance of the capture system when it is used to collect the process off-gas vented from batch copper converters during blowing, including (a) selection of appropriate operating limit parameters, (b) designation of the value or setting for the parameter at which the capture system operates during batch copper converter blowing, and (c) documentation to support the selection of the operating limits established for the capture system. 40 C.F.R. § 63.1447(b).

F. Development and implementation of a written startup, shutdown, and malfunction (SSM) plan according to the provisions in Section 63.6(e)(3), that includes (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) and 63.1448(c).

G. Controlling PM emissions from fugitive dust sources at the primary copper smelter by operating according to a written fugitive dust control plan, containing control measures that are applicable and appropriate for site conditions, that has been approved by the designated authority. 40 C.F.R. § 63.1445(a).

H. The semiannual submittal of a compliance report in accordance with the schedule set forth in Section 1455(b) containing the information set forth in Section 1455(c). 40 C.F.R. § 1455(a)(1).

I. "For each copper converter department for which construction commenced on or after April 20, 1998, the use of batch copper converters is prohibited." 40 C.F.R. § 63.1444(e).

Title V Operating Permit Program

45. Title V of the Act, 42 U.S.C. §§ 7661-7661f, establishes an operating permit program for certain sources, including "major sources" as defined in 42 U.S.C. § 7661(2)(A). EPA's regulations implementing the Title V permit program are set forth at 40 C.F.R. Part 70.

46. "Major Source" for Title V purposes is defined in EPA regulations, in part as "a major source under section 112 of the Act" or a major stationary source of air pollutants "that directly emits, or has the potential to emit, 100 tpy or more of any air pollutant subject to regulation." 40 C.F.R. § 70.2.

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

48. Under Sections 503(c) and (d) and 504(a) of the Act, sources subject to Title V must: 1) identify all applicable requirements the source is subject to in a "timely and complete" application for an Title V permit submitted to the permitting authority; 2) certify compliance with all applicable requirements, and where a source is not meeting requirements, submit a plan for coming into compliance; and 3) obtain a Title V permit that contains such enforceable emission limitations and other conditions necessary to assure compliance with all "applicable

requirements" under the CAA. 42 U.S.C. §§ 7661b(c) and (d) and 7661c(a); 40 C.F.R. §§ 70.1, 70.5 and 70.6; AAC R18-2-304(B)-(E) and (J) and R18-2-306.

49. A "timely and complete" Title V application is one that identifies all "applicable requirements". *See* 40 C.F.R. § 70.5(a); Arizona Administrative Code R18-2-304(B) through R18-2-304(E). Applicable requirements for Title V purposes under the Act include, but are not limited to, "any standard or other requirement under section 112 of the Act", such as requirements of the Smelter NESHAP. *See* 40 C.F.R. § 70.2.

50. 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).

51. Pursuant to Section 502(a) of the CAA, 42 U.S.C. § 7661a(a), it is unlawful for any person to operate a source subject to Title V requirements except in compliance with a permit issued by the permitting authority under Title V. The regulations at 40 C.F.R. § 70.1(b) and AAC R18-2-306 require that all sources subject to the Title V regulations have an operating permit that assures compliance with all applicable requirements, such as the Smelter NESHAP. *See also* 40 C.F.R. § 70.6(a).

ENFORCEMENT OF THE CAA

52. Sections 113(a)(3) and 113(b) of the Act, 42 U.S.C. §§ 7413(a)(3) and 7413(b), authorize U.S. EPA's Administrator to commence a civil action for appropriate relief, including injunctive relief and civil penalties, against any person who has violated or is in violation of any requirement or prohibition of any rule promulgated under the CAA, including Section 112 of the Act, 42 U.S.C. § 7412, or Title V of the Act, 42 U.S.C. §§ 7661-7661f.

53. Section 113(b) of the Act, 42 U.S.C. § 7413(b), authorizes the Court to enjoin a violation, to require compliance, to assess a civil penalty, and to award other appropriate relief for each violation.

54. Section 113(b) of the Act, 42 U.S.C. § 7413(b), authorizes civil penalties of up to $25,000 per day for each violation of the Act. The Debt Collection Improvement Act, 31 U.S.C. § 3701 *et seq*., requires EPA to periodically adjust its civil penalties for inflation. On December 31, 1996, February 13, 2004, and December 11, 2008, EPA adopted and revised regulations entitled "Adjustment of Civil Monetary Penalties for Inflation," 40 C.F.R. Part 19, to adjust the maximum civil penalty under the Act. For each violation that occurs between January 31, 1997 and March 15, 2004, inclusive, civil penalties of up to $27,500 per day may be assessed; for each violation that occurs between March 16, 2004 and January 12, 2009, inclusive, penalties of up to $32,500 per day may be assessed; and for each violation that occurs on or after January 13, 2009, penalties of up to $37,500 per day may be assessed. 61 Fed. Reg. 69360 (Dec. 31, 1996); 69 Fed. Reg. 7121 (Feb. 12, 2004); 73 Fed. Reg. 75340 (Dec. 11, 2008).

GENERAL ALLEGATIONS

55. The Facility emits air pollutants, and is therefore a "stationary source," as defined at 42 U.S.C. § 7412(a)(3) and 40 C.F.R. § 63.2.

56. Defendant owns and operates the Facility, and has owned and operated the Facility since prior to the first compliance date, and Defendant is therefore the "owner or operator" of the Facility, as defined in Section 112(a)(9) of the Act, 42 U.S.C. § 7412(a)(9), and 40 C.F.R. § 63.2.

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

58. The Facility uses five Pierce-Smith converters to oxidize copper matte in a process that is performed in discrete batches using a sequence of charging, blowing, skimming, and pouring, and therefore "uses batch copper converters," as that term is defined in the Smelter NESHAP. 40 C.F.R. § 63.1459.

59. The Facility, including all of its affected sources, is an "existing" primary copper smelter under the Smelter NESHAP because it was constructed or reconstructed before April 20, 1998. 40 C.F.R. § 63.1442(b).

60. The Facility emits or has the potential to emit several HAPs, including, but not limited to the following: arsenic compounds, lead compounds, antimony compounds, beryllium compounds, cadmium compounds, chromium compounds, cobalt compounds, manganese compounds, nickel compounds, and selenium compounds.

61. As of the first compliance date for existing primary smelters, June 13, 2005, the Facility was a "major source" of HAPs within the meaning of the Act as that term is defined at Section 112(a)(1) of the Act, 42 U.S.C. § 7412(a)(1), and 40 C.F.R. § 63.2. Specifically, the Facility had the potential to emit 10 tons per year (tpy) or greater of arsenic and lead compounds, individually, and 25 tpy or greater of a combination of HAPs.

62. The Facility's status as a "major source" of HAPs is based on its "potential to emit," meaning the "maximum capacity" of the Facility "to emit a pollutant under its physical and operational design." 40 C.F.R. § 63.2 (definition of "potential to emit"). The Facility had, as of the first compliance date for the Smelter NESHAP, the potential to emit more than major

source levels. For example, Asarco's past maximum production rates for the Facility, Asarco's internal data on the maximum concentrations of HAPs present in the ores, concentrates, and/or tailings at the Facility, and maximum emission rates measured by Asarco for the Facility all demonstrate that the Facility is a major source of HAPs. Indeed, in 1995, Asarco performed a study that concluded that the Facility qualified as a "major source" of HAPs based on its potential to emit.

63. The Facility is also a "major source" permitted under Title V of the Act, and therefore is subject to the operating permit requirements of Title V. ADEQ initially issued a Title V operating permit to Defendant for the Facility on October 9, 2001.

64. Defendant submitted an application for a Title V permit renewal to ADEQ for the Facility on April 10, 2006, which was after the effective date of the Smelter NESHAP, and submitted additional or supplemental Title V permit applications to ADEQ for the Facility at various times since the submission of its Title V renewal application on April 10, 2006.

65. Defendant failed to comply and continues to fail to comply with the Smelter NESHAP and the related Subpart A requirements. For instance, although its Title V permit renewal application was submitted after the Smelter NESHAP's effective date of June 13, 2005, Defendant failed to identify the Smelter NESHAP requirements or the related Subpart A requirements as "applicable requirements" for purposes of Title V in that application or later supplements to that application.

66. Because the Facility was a "primary copper smelter" using "batch copper converters" that was a "major source" of HAPs as of the "first compliance date," i.e., June 13, 2005, each existing "affected source" at the Facility was subject to requirements of the Smelter NESHAP and the related requirements of Subpart A starting on the first compliance date.

FIRST CLAIM FOR RELIEF
(Smelter NESHAP)

67. The United States re-alleges and incorporates by reference Paragraphs 1 through 66, as if fully set forth herein.

68. The Facility, as an existing major stationary source for HAPs that is a primary copper smelter using batch copper converters, has been subject to the Smelter NESHAP and the related Subpart A requirements, on a continuous basis, since June 13, 2005.

69. Since June 13, 2005, Defendant has failed to comply, on a continuous basis, with the requirements of the Smelter NESHAP and the related Subpart A requirements, including, but not limited to, the following:

A. Operation of capture systems meeting the specifications set forth in the Smelter NESHAP for the copper converter department at the Facility, as required by 40 C.F.R. § 63.1444(d)(2);

B. Ongoing and continuous compliance with the PM and opacity limits set forth in 40 C.F.R. § 63.1444;

C. Preparation and operation of the Facility in accordance with a written operation and maintenance plan that covers each capture system and control device subject to standards in the Smelter NESHAP, as required by 40 C.F.R. § 63.1447(b);

D. Development and implementation of a written start-up, shutdown and malfunction ("SSM") plan, as defined in 40 C.F.R. § 63.6(e)(3) and required by 40 C.F.R. § 63.1448(c);

E. Control of fugitive dust at the Facility pursuant to an approved fugitive dust control plan, as required by 40 C.F.R. § 63.1445(a); and

F. Submittal of semi-annual compliance reports, as described in 40 C.F.R. § 1455(c) and required by 40 C.F.R. § 1455(a)(1).

70. Defendant's conduct has violated and continues to violate Section 112(i)(3) of the CAA, 42 U.S.C. § 7412(i)(3), and the requirements of the Smelter NESHAP and the related Subpart A requirements, and each violation of these requirements subjects Defendant to liability under the Act.

71. Unless enjoined by an order of this Court, Defendant will continue to violate these requirements.

72. Pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), and 40 C.F.R. Part 19, Defendant must perform injunctive relief and is liable for civil penalties for each day of violation.

SECOND CLAIM FOR RELIEF
(Title V)

73. The United States realleges and incorporates by reference Paragraphs 1 through 72, as if fully set forth herein.

74. The operating permit program of Title V of the CAA imposes an ongoing duty to submit complete and timely operating permit applications and to supplement or correct those applications if they are deficient or incorrect. 40 C.F.R. § 70.5(a)-(b); Arizona Administrative Code R18-2-304(G). Defendant failed to identify the requirements of the Smelter NESHAP and the related Subpart A requirements as "applicable requirements" in any of its Title V applications, certify compliance with those requirements, or provide a plan for coming into compliance with them. .

75. Defendant's current Title V permit neither identifies the Smelter NESHAP or the related Subpart A requirements as "applicable requirements" for the Facility nor contains any

conditions implementing the requirements of the Smelter NESHAP or the related Subpart A requirements.

76. Defendant's conduct has violated and continues to violate Sections 502(a), 503(c) and (d), and 504(a) of the Act, 42 U.S.C. §§ 7661a(a), 7661b(c) and (d), and 7661c(a), and the Title V implementing regulations including 40 C.F.R. §§ 70.5-70.6, and AAC R18-2-304(B)-(G) and (J) and R18-2-306, and each violation of these requirements subjects Defendant to liability under the Act.

77. Unless enjoined by an order of this Court, Defendant will continue to violate these requirements.

78. Pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), and 40 C.F.R. Part 19, Defendant must perform injunctive relief, and is liable for civil penalties for each day of violation..

PRAYER FOR RELIEF

WHEREFORE, based upon all the allegations set forth above, the United States of America requests that this Court:

79. Enjoin Defendant from operating its Facility except in compliance with the CAA, including the NESHAPs and Title V permitting program requirements;

80. Order the Defendant to take other appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused by the violations of the Clean Air Act alleged above;

81. Assess a civil penalty in favor of the United States of America against Defendant for each day of violation;

82. Award the United States its costs of this action; and

83. Grant such other relief as the Court deems just and proper.

Respectfully Submitted,

/s/ John C. Cruden
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