

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
(Corpus Christi Division)**

In re	§	Case No. 05-21207
	§	
ASARCO, LLC, et al.	§	Chapter 11
	§	
Debtors	§	Jointly Administered
	§	

**UNITED STATES' OPENING PRE-TRIAL BRIEF
REGARDING ESTIMATION OF ENVIRONMENTAL CLAIMS AT THE
UNITED STATES SECTION, INTERNATIONAL BOUNDARY AND WATER
COMMISSION, UNITED STATES AND MEXICO SITE**

I. INTRODUCTION

ASARCO, LLC ("Debtor") operated a lead smelter ("Asarco Smelter") in El Paso, Texas for over 100 years - from at least 1887 until 1999. Throughout Debtor's history, the Smelter emitted pollution into the air that settled into earth nearby, resulting in the contamination of soils and groundwater. The United States Section, International Boundary and Water Commission Site ("USIBWC Site") is immediately adjacent to the Smelter, and its property has been contaminated by metals such as arsenic, cadmium, lead and selenium, which have migrated from the Smelter.^{1/} Debtor does not dispute that the origin of the contaminants on the USIBWC Site was the Asarco Smelter. Debtor's own experts agree that the emissions from the Asarco Smelter are the primary source of lead and arsenic contamination found at the USIBWC Site, as they

^{1/}Allen J. Medine, Analysis of Contamination on the United States Section International Boundary and Water Commission (USIBWC) Property in Relation to the ASARCO El Paso Smelter, July 27, 2007, p. 5 (USIBWC004055) Exhibit No. USIBWC032.

allocated a 90% share to Debtor.^{2/}

The dangers of lead and arsenic contamination in soils and ground water are well-known, and the contamination in the El Paso area is well-documented.^{3/} Debtor executed a state enforcement order with the Texas Commission on Environmental Quality (“TCEQ”) in 1996 (“1996 Order”) relating to the Asarco Smelter, but has still not implemented any corrective actions to eliminate the off-site migration of metals from the Asarco property.^{4/} Continuing contamination from the Asarco property has forced USIBWC to address the dangers of lead and arsenic in carrying out its responsibility to regulate and conserve the waters of the Rio Grande, and to resolve sanitation and border water quality problems. The USIBWC is forced to face these dangers due to the high contaminant levels that exist and the potential threat to the Rio Grande which serves as both a significant source of El Paso’s drinking water and as a vital source of irrigation water.^{5/}

^{2/}Jeffrey Zelikson and Richard Lane White, Supplemental Expert Report, November 5, 2007, p. 7 (IBWC015966), Exhibit No. USIBWC035; Expert Report of Robert Powell Ph.D., P.E., William Desvousages, Ph.D., and ENVIRON International Corporation, July 27, 2007, p. 9. (IBWC011596), Exhibit No. USIBWC038.

^{3/}Ketterer, M.E., 2006. The ASARCO El Paso Smelter: A Source of Local Contamination of Soils in El Paso (Texas), Ciudad Juarez (Chihuahua, Mexico), and Anapra (New Mexico), prepared for The Sierra Club, January 27, 2006 (IBWC003778-3835) Exhibit No. USIBWC027; Drexler, J.W., 2003. The Source of Anomalous Lead and Arsenic Concentrations in Soils from the El Paso Community - El Paso, Texas, prepared for the USEPA, June 5, 2003 (IBWC000552-614), Exhibit No. USIBWC012.

^{4/} The Texas Commission on Environmental Quality (TCEQ) was previously named the Texas Natural Resources Conservation Commission (TNRCC). The name was changed September 1, 2002, pursuant to House Bill 2912, 77th Texas Legislature.

^{5/}Medine, July 27, 2007 Report at p. 7 (IBWC004057) Exhibit No. USIBWC0132; ENCON, 2001. Final Environmental Assessment for “Replacement of the Old American Canal,” Located in El Paso, Texas, prepared for the United States Section, International Boundary and Water

II. SITE HISTORY

A. SITE CONTAMINATION

The Site is located on the Rio Grande in El Paso, Texas. The Site consists of a diversion dam (“the American Dam”), a canal (“the American Canal”), and an office/equipment maintenance/storage complex (“the American Canal Complex”). USIBWC’s purpose at the Site is to apply and oversee the rights and obligations which the Governments of the United States and Mexico assume under numerous boundary and water treaties and related agreements. These rights and obligations include the distribution of the United States’ share of Rio Grande water under the provisions of a treaty with Mexico, regulation and conservation of the waters of the Rio Grande, and resolution of sanitation and border water quality problems. The USIBWC is authorized by statute, 22 U.S.C. 227, to undertake construction project for a variety of purposes which include; maintaining flood control, preserving water resources, conserving and efficiently utilizing the water, and preventing pollution.

The United States’ share of the Rio Grande water provides approximately 40-50 percent of El Paso’s drinking water during the period when the City draws water from the Canal and also serves as a vital source of irrigation water for nearby agribusinesses.⁹

The USIBWC Site is situated down-gradient and across the road from the Asarco Smelter. The Asarco Smelter began operating in 1887 and, although it shut down in 1999, the facility’s more than a century of operations caused, and continues to cause, significant contamination of the surrounding soil and groundwater. In 1967 Debtor built an 828-foot stack

Commission, December 6 (IBWC002287-2724), Exhibit No. USIBWC023.

⁹Medine, July 27, 2007 Report at p. 7. (IBWC004057), Exhibit No. USIBWC032.

designed to help alleviate local air pollution. Between 1969 and 1971, the smelter emitted approximately 1,116 tons of lead, 560 tons of zinc, 1.2 tons of arsenic, and 12 tons of cadmium. Unsafe lead concentrations led to the closure of the nearby community of Smelertown in the 1970s.⁷

While the Asarco Smelter closed in 1999, the continuing contamination migrating from the facility to the adjacent properties remains a serious concern. For example, data from a 1997 Asarco oil spill indicate a diesel plume extending from the Asarco Smelter down the Rio Grande flood plain.⁸ Additional diesel spills from the Asarco property into the American Canal have occurred in the past, and Debtor is still conducting recovery efforts in 2007.⁹

In July 2000, TCEQ notified Debtor that data indicated arsenic concentrations in the groundwater had migrated from the Asarco Smelter onto adjacent properties.¹⁰ TCEQ directed Debtor to conduct interim corrective measures to prevent arsenic from migrating off-site.¹¹ In May 2005, TCEQ required, by July 30, 2005, that Debtor start an initial groundwater remediation system to prevent contaminated groundwater from migrating beyond Debtor's

⁷Medine, July 27, 2007 Report at p. 9 (IBWC00459) Exhibit No. USIBWC032; ATSDR Report (IBWC003962-3973), Exhibit No. USIBWC029.

⁸Zelikson, July 27, 2007 Report, App. B-17 at p. 7 (IBWC004258), Exhibit No. USIBWC035; Gayle S. Koch, Expert Report Concerning Future Costs at the International Boundary and Water Commission (IBWC) Site in the Asarco LLC Chapter 11 Bankruptcy Matter, July 27, 2007, p. 3 (IBWC003994), Exhibit No. USIBWC031.

⁹Thomas Klempel Deposition, November 9, 2007 at pp. 40-42, Exhibit No. USIBWC091.

¹⁰Letter to Lairy Johnson from Brad Wilkinson, dated, July 13, 2000 (IBWC011638-11640), Exhibit No. USIBWC039.

¹¹Id. at p. 2 (IBWC011639), Exhibit No. USIBWC039

boundaries. To date, Debtor has yet to seek approval or to implement a groundwater remediation system designed for heavy metals in order to comply with TCEQ's requirement, and has not provided any information predicting when the application will be submitted.^{12/}

B. AMERICAN CANAL PROJECT

In 2001, the USIBWC identified the need to renovate the outdated and decaying American Canal. The USIBWC prepared an Environmental Assessment ("EA") that identified and assessed potential contaminants, and simultaneously, USIBWC contracted with Montgomery Watson Harza ("MWH") to analyze the extent of the contamination. The EA identified the possibility of localized hydrocarbon or heavy metal contamination encountered during the construction. The EA also identified the possibility of contaminated water and fines migrating through the concrete lining, resulting in the potential threat to the canal water, groundwater and USIBWC construction workers in the area.^{13/}

MWH also conducted sampling of the soil and water on the Site in 2001. The results, taken from 18 soil borings, showed excessive arsenic, cadmium and lead levels.^{14/} More recent sampling has confirmed MWH's results. Using the MWH wells, and Debtor's own monitoring wells near the American Canal's Upper Open Channel area, recent Asarco sampling has indicated arsenic and selenium contamination exceeding safe drinking water levels. Elevated

^{12/} Thomas Klempel Deposition, November 9, 2007 at pp. 130-31, Exhibit No. USIBWC091.

^{13/}Final Environmental Assessment for "Replacement of the Old American Canal" located in El Paso, TX prepared by ENCON International, Inc., December 6, 2001 (IBWC002287-2724), Exhibit No. USIBWC023.

^{14/}Medine, July 27, 2007 Report at p. 12 (IBWC004062), Exhibit No. USIBWC032.

arsenic and selenium levels have also been detected in the Middle Open Channel of the Canal.^{15/}

MWH ultimately prepared a Conceptual Design Report (“MWH Report”) to evaluate the additional costs associated with contamination of soils and groundwater with lead, arsenic, cadmium, and hydrocarbons relating to the construction of the Canal project.^{16/} These additional costs (on top of the estimated project cost if there were no contamination) are driven primarily by the need to dispose of large volumes of contaminated soil while preventing worker exposure; to dewater the canal and surrounding groundwater; and to treat the contaminated water safely before discharge.^{17/} The MWH Report concluded that much of the contamination at the USIBWC Site was attributable to the Asarco smelter, a fact which is not contested. This Report also contained various alternative response actions for USIBWC’s consideration. USIBWC publicly made available the findings of the EA process and the MWH studies, and Debtor was specifically invited to join in the discussions.^{18/}

In addition to the Canal contamination, Asarco sampling results of the soils have

^{15/}Medine, July 27, 2007 Report at pp. 10, 14. (IBWC004060, 4064), Exhibit No. USIBWC032, Thomas Klempel Deposition, November 9, 2007 at p0 169-74., Exhibit No. USIBWC091, Environmental Services - Semi Annual Sampling, ASARCO's Remedial Investigation, Winter 2006 (IBWC001092-1146), Exhibit No. USIBWC094, Environmental Services - Semi Annual Sampling, ASARCO's Remedial Investigation, Winter 2007, (IBWC001039-1076) Exhibit No. USIBWC095.

^{16/}MWH, 2001. Technical Memorandum: Environmental Issues and Concerns, Conceptual Design Study of Replacement Canal Lining, American Canal, American Dam to International Dam, Prepared for U.S. IBWC, October 15 (IBWC000227-338), Exhibit No. USIBWC011.

^{17/}Koch, July 27, 2007 Report at pp. 4-5, (IBWC003995-3997), Exhibit No. USIBWC023.

^{18/}Final Environmental Assessment, December 6, 2001 (IBWC002287-2724).

identified potential concerns in the Office and Island areas.^{19/} USIBWC is seeking to remediate the soils in this area to address worker safety concerns.

The remedy proposed in the Conceptual Design Report relating to the canal may not be the final action to be selected at this Site, as federal regulations require USIBWC to update the studies. Moreover, additional study and review is needed relating to the Office and Island portions of the Site. USIBWC is continuing to evaluate information and data in order to make a final remedy decision.

III. SUMMARY OF CLAIMS

A. PAST COSTS

Not including United States Department of Justice (“DOJ”) costs, the USIBWC thus far has incurred approximately \$268,219 in past costs. This figure does not include interest, which, under the statute, continues to accrue up to the date of judgment.^{20/} The past costs include expenditures for environmental and remediation measures associated with the construction of a guardhouse and a wash rack, as well as for Site investigation and testing. DOJ has incurred approximately \$26,331 through June 23, 2007 and based on DOJ estimates, will incur response costs totaling \$61,284 through November 1, 2007.^{21/}

B. FUTURE COSTS

The United States estimates its future costs for the Site at approximately \$27 million, not including costs incurred by the Department of Justice. This amount reflects the government’s

^{19/}Medine, July 27, 2007 Report at p. 13 (IBWC004063), Exhibit No. USIBWC032.

^{21/}Proffer of Direct Testimony of William M. Kime, Exhibit No. USIBWC120.

estimate of costs for three categories of future remediation associated with the Site:²²

1. **Additional costs incurred due to site contamination during the planned renovation of the American Canal - \$23,963,800**
 - ▶ Handling and treating contaminated groundwater
 - ▶ Handling and disposing of contaminated soils
 - ▶ Preventing worker exposure to contaminants

2. **Excavating and replacing contaminated soils at the American Dam Compound - \$734,745**
 - ▶ Removal of 24 inches of soil and replacement with clean fill
 - ▶ Does not include soils under building and asphalt

3. **Excavating and replacing contaminated soils at the “island” area used for equipment storage - \$1,851,031.**
 - ▶ Removal of contaminated soils and replacement with clean fill

IV. GOVERNING ENVIRONMENTAL LAW

The United States and the Debtor previously have submitted materials to this Court presenting general background briefing as to the liability scheme established by the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9601 *et seq.*, often called the “Superfund” law. See, Docket #4657 “United States’ General Background Brief” and Docket #4745 “United States’ Reply to ASARCO LLC’s Brief Regarding Environmental Liabilities.” Also, on June 1, 2007, the United States submitted a Motion and Supporting Memorandum of Law For Determination That Environmental Claims of the Government Will be Estimated in Accordance with Applicable Non-Bankruptcy Law on Joint and Several Liability and Divisibility. See, Docket #4855.

The purpose of these prior submissions was to address issues common to many of the

²² Koch Report, July 27, 2007, at pp. 4-6 (IBWC003995-3997), Exhibit No. USIBWC031.

environmental claims at issue in this bankruptcy and the arguments presented in those submissions will not be made anew here. However, certain of the over-arching issues discussed in those briefings are highly pertinent to this Site.

In particular, as discussed in the United States' General Background Brief, the purpose, intent and liability scheme created under CERCLA is blunt and clear. At the time the Superfund law was enacted the United States faced - and still faces - a legacy of serious environmental problems arising from over a century of industrial operations and the contamination to air, water, and soils resulting therefrom. Congress was extremely clear in its intent to create a statute where the costs of addressing that contamination would be borne by the parties identified in the statute. Congress was also clear in its intent to create a statute in which the United States is entitled to recover one hundred percent of its costs at any site:

[S]ociety should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator who has profited or otherwise benefitted from commerce involving these substances and now wishes to be insulated from any continuing responsibilities from the present hazards to society that have been created.

S. Rep. No. 96-848, 96th Cong. 2d Sess. 13, 98 (1980).

For these reasons, Congress intended that monies expended by the federal government to respond to the release or threatened release of hazardous substances be recovered, whenever possible, from responsible parties through the liability scheme set out in Section 107 of CERCLA, 42 U.S.C. § 9607. See In the Matter of Bell Petroleum Services, Inc., 3 F.3d 889, 897 (5th Cir. 1993).

CERCLA also confers upon the President sweeping powers to respond to hazardous substances released in the environment. See CERCLA § 104(a), 42 U.S.C. § 9604(a). The

United States is required to respond once a release or threatened release of hazardous substances is identified. Federal agencies with land management authority have been delegated broad authority to respond to releases or threatened releases which are not listed on the National Priorities List (“NPL”) with a remedial action or by undertaking a removal action, if the release is on a property under the jurisdiction, custody and control of those agencies. Executive Order 12580, Sec. 2(e)(1), provides,

Subject to subsections (a), (b), (c), and (d) of this Section, the functions vested in the President by Sections 104(a), (b), and (c)(4), and 121 of the Act are delegated to the heads of Executive departments and agencies, with respect to remedial actions for releases or threatened releases which are not on the National Priorities List (“the NPL”) and removal actions other than emergencies, where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of those departments and agencies, including vessels bare-boat chartered and operated. The Administrator shall define the term “emergency”, solely for the purposes of this subsection, either by regulation or by a memorandum of understanding with the head of an Executive department or agency.

For over one hundred years, Asarco emitted substantial amounts of lead and arsenic into the atmosphere and into the adjacent USIBWC property. While Asarco has ceased its operations, it has left behind lead and arsenic contamination in both the soil and the groundwater, thus threatening the Rio Grande and worker safety. The United States, whether USIBWC, or another federal agency, has the authority to respond to contamination found on this Site and to identify responsible parties. The USIBWC, as a federal land managing agency, has the authority and right to be reimbursed for its costs, even if not originally identified as CERCLA costs.^{23/}

^{23/} United States v. Rohm & Haas Co., 2 F.3d 1265 (3rd Cir. 1993) (holding that the EPA’s costs were recoverable under CERCLA even though the EPA invoked RCRA as statutory authority for the removal action.) (overruled by United States v. E.I. Dupont De Nemours, 423 F.3d 161, on other grounds). United States v. Chrysler Corp., 168 F. Supp. 2d 754, 778 (N.D. Ohio 2001)

V. ARGUMENT

A. **DEBTOR IS STRICTLY LIABLE FOR THE RELEASE AND POTENTIAL RELEASE OF HAZARDOUS SUBSTANCES AT THE USIBWC SITE CAUSED BY PAST AND PRESENT OPERATIONS OF THE ASARCO SMELTER.**

CERCLA imposes strict liability when there is: 1) a release or substantial threat of a release; 2) of a hazardous substance; 3) from a facility; 4) caused by a responsible party. Section 107(a) of CERCLA, 42 U.S.C. 9607(a). Debtor's El Paso lead smelter and the surrounding area where contaminants migrated is a facility within the meaning of CERCLA Section 101(9), 42 U.S.C. 9601(9), and Debtor is also a potentially responsible party as it is the current owner or operator of the Asarco Smelter.

1. **A release or threatened releases of hazardous substances from the Asarco Smelter has contaminated the USIBWC Site and poses a serious risk to human health.**

a. **A Release and Threatened Release of Hazardous Substances from Asarco Affects the Rio Grande and the American Canal.**

Soil and groundwater data collected by MWH in 2001 and Asarco's more recent monitoring wells have identified elevated levels of contaminants along the American Canal, resulting in a risk to El Paso's drinking water.^{24/} The Rio Grande is a vital source of drinking water for the City of El Paso. The Rio Grande water provides approximately 40-50 percent of El

(holding that in a removal action EPA and subsequently the National Park Services's actions were consistent with the NCP in the area of selecting a remedy, preparing a report, inviting public participation and incurring costs.)

^{24/} Medine, July 27, 2007 Report, Table 2, at p. 14 (IBWC0004064), Exhibit No. USIBWC032, and Thomas Klempel Deposition, November 9, 2007 at p. 169-74, Exhibit No. USIBWC091, Environmental Services - Semi Annual Sampling, ASARCO's Remedial Investigation, Winter 2006 (IBWC001092-1146), Exhibit No. USIBWC094, Environmental Services - Semi Annual Sampling, ASARCO's Remedial Investigation, Winter 2007, (IBWC001039-1076) Exhibit No. USIBWC095.

