



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2007 JUN 18 PM 4:16

The Senate of the State of Texas

CHIEF CLERKS OFFICE

COMMITTEES:

Health and Human Services
Nominations
Transportation and Homeland Security
Veterans Affairs & Military
Installations - Vice Chair
Subcommittee on Base Realignment
and Closure - Chair
Sunset Advisory Commission

Senator Eliot Shapleigh
District 29

June 18, 2007

MAIN DISTRICT OFFICE:
800 Wyoming Ave., Suite A
El Paso, Texas 79902
915/544-1990
Fax: 915/544-1998

EASTSIDE DISTRICT OFFICE:
1801 N. Zaragosa, Suite C
El Paso, Texas 79936
915/857-4800
Fax: 915/857-4854

CAPITOL OFFICE:
P.O. Box 12068
Austin, Texas 78711
512/463-0129
Fax: 512/463-0218
Dial 711 For Relay Calls
e-mail: eliot.shapleigh@senate.state.tx.us

Ms. LaDonna Castañuela
Chief Clerk (MC 105)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

VIA HAND DELIVERY

Re: Public Comment on *Executive Director's Report to the Commission on Renewal of Asarco, Incorporated's Air Quality Permit No. 20345*; TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-0593

Dear Ms. Castañuela:

I write to submit public comment on the Executive Director's (ED) Report to the Texas Environmental Commission on Environmental Quality (TCEQ) regarding renewal of Asarco Incorporated's Air Quality Permit No. 20345. The recommendations of the ED on Asarco's permit application are contrary to established precedent, contrary to the ALJs' recommendations, circumvent full public participation in the permitting process, and fall beyond the scope of his authority to cure Asarco's failure to comply with procedure.

Therefore, I ask the Commissioners to deny Asarco's Air Quality Permit No. 20345 or, in the alternative, order an *objective* investigation into Asarco's permit compliance and call a contested case hearing on the permit.

Summary of comments

- The Executive Director created a conflict of interest when it allowed Asarco to hire and fund an employee to conduct its own air modeling audit on its own air quality permit.
- After a hearing on the merits from July 11-22, 2005, Administrative Law Judges with the State Office of Administrative Hearings recommended denial of the permit renewal. These findings remain in the record and have not been



overruled or otherwise contradicted. The Commissioners should uphold this ruling and deny the air permit renewal.

- **Asarco and TCEQ each failed to meet mandatory deadlines ordered by TCEQ Commissioners in March 10, 2006 Interim Order, Ordering Provisions No. 2 and 3; therefore, Air Quality Permit No. 20345 is effectively denied.**
- **TCEQ is bound by precedent to call a contested a case hearing in the "public interest" on Air Permit No. 20345.**
- **The Executive Director failed to conduct a Constitutional analysis of whether due process demands a public hearing on Air Permit No. 20345.**

Background

For more than a century, Asarco has relentlessly polluted the three-state and two-country region of Texas, New Mexico, and Chihuahua. A 1972 study on epidemic lead absorption near an ore smelter yielded some shocking results for El Paso.¹ Due to the contaminated dust, air, and soil, 53 percent of children living within 1.6 kilometers of the smelter were found to have dangerously high blood lead levels. All had evidence of brain damage and fine motor function impairment, and 100 families were forced to move from the immediate vicinity of the plant. More recently, Asarco was named a Potentially Responsible Party (PRP) by the U.S. Environmental Protection Agency (EPA) for the lead and arsenic contamination in residential areas near the smelter. To date, 833 homes have been remediated using settlement funds Asarco paid to the Environmental Protection Agency. An additional 289 residential properties remain to be cleaned.

My community and the surrounding region have suffered for too long as Asarco's pollutants contaminated our air, our soil, and our children. In the past, TCEQ has done little to provide adequate oversight into the activities of Asarco and its subsidiaries. In a particularly egregious case, Asarco illegally burned 144,000 trainloads of hazardous waste between 1992 and 1997 at their El Paso smelter. Asarco and its Corpus Christi subsidiary, Encycle, had a permit to extract metals from hazardous waste, but instead simply sent it to El Paso to be incinerated in a "sham recycling" scheme to save money.

As a result, more than 5,000 tons of waste was illegally burned in my city, including more than 300 tons of chemical warfare agents from the Rocky Mountain Arsenal outside Denver, Colorado. Consequently, Asarco was fined \$20 million by the EPA in 1999. Enclosed you will find an October 11, 2006 *New York Times* article

¹ Landrigan PJ, Gehlbach SH, Rosenblum BF, et al. *Epidemic lead absorption near an ore smelter, the role of particulate lead.* N Engl J Med 1975; 292:123-129.

detailing the illegal burning of hazardous waste together with an internal EPA memo describing deep concerns about the treatment of the hazardous waste.²

During the over one hundred years that Asarco has been present in my community of El Paso, Asarco has been the worst type of corporate citizen. Asarco declared chapter 11 bankruptcy in August 2005. In the pending federal bankruptcy, over \$24 billion worth of claims have been submitted, many of them associated with the numerous environmental complaints from federal, state, and local agencies involving at least 94 sites across 21 states.³ Recently, the Environmental Protection Agency publicly indicated that it will vigorously pursue \$6.5 billion in claims in order to clean up years of pollution across the country.

Because of this history, El Pasoans deserve to have their voice heard during this permitting process. Despite public outcry and overwhelming support from elected officials, TCEQ has refused to hold in El Paso the public meeting to consider the ED's Report and related comments regarding the Asarco application. Due to Asarco's proximity to the city's university and downtown area, the El Paso community has a large stake in the outcome of these proceedings. Over the last two years, the City of El Paso, the Municipio of Juarez, the City of Sunland, New Mexico, and area legislators have all opposed the reopening of Asarco.⁴

Recently, three regional mayors met to sign a historic resolution against Asarco, and 11 legislators from the three-state region of Texas, New Mexico, and Chihuahua signed a bi-national joint resolution in opposition to the air permit's renewal.⁵

The strong local concern for this issue is also evident by the hundreds of El Paso citizens who traveled over eight hours in order to attend the Commissioners' February 2006 agenda in Austin. Despite this, TCEQ refuses to grant the numerous requests for an El Paso meeting.

² Ralph Blumenthal, "Copper Plant Illegally Burned Hazardous Waste, E.P.A. Says," *The New York Times*, October 11, 2006; "Asarco - El Paso Meeting," e-mail from Mac Vilas to Brad Wilkinson, et al., August 17, 2000.

³ Associated Press, "Feds' cleanup claims against bankrupt Asarco could top \$1 billion," *The Dallas Morning News*, August 2, 2006; Les Blumenthal, "Lawyers dissent Asarco's cleanup obligation in U.S.," *The Herald*, March 20, 2006.

⁴ Tammy Fonce-Olivas, "Mayors urge state to deny Asarco air permit," *El Paso Times*, June 1, 2007.

⁵ Joint Resolution of Border Cities; Bi-national Joint Resolution in Opposition to Renewal of Asarco's Air Permit.

The Executive Director created a conflict of interest when it allowed Asarco to hire and fund an employee to conduct its own air modeling audit on its own air quality permit.

During the ED's recent investigation of Asarco under the Commission's May 10 Interim Order, TCEQ continued its history of negligence. In regard to the investigation, the ED indicated that the required investigation "exceed[ed] the scope of the agency's normal permit renewal process and will require resources beyond those appropriated to the agency for that process."

As a result, the ED stated that he must require additional information from Asarco. In order to obtain that information, the ED required "that Asarco retain one or more qualified ***independent third parties*** to perform" three tasks, including: 1) a modeler to audit all modeling performed by Asarco; 2) a process engineer to determine the condition and effectiveness of all air quality control equipment; and 3) a process engineer to review air quality control equipment in comparison with Asarco's existing air permit. [emphasis added].

Underfunding and/or incompetence is no basis for substituting objective process with an applicant-driven investigation. Yet, the ED provides that argument as the basis for creating a conflict of interest in which Asarco is allowed to hire and fund its own modeling and investigation on its own air quality permit. As I stated in my May 12, 2007 letter to the ED, "[a]llowing Asarco to select the investigating third parties presents a blatant conflict of interest that will only serve to harm El Paso and the surrounding areas."⁶

On Sept. 22, 2006, Asarco hired as an *employee*, not a third-party consultant, Arnold Srackangast ("AS1MET Services") to conduct the "independent modeling audit" for Air Quality Permit No. 20345.⁷ As a result of the ED's fabricated reliance on the applicant for the audit, Mr. Srackangast's employment was required to be approved by the U.S. Bankruptcy Court for the Southern District of Texas in Corpus Christi, where Asarco is currently in bankruptcy.⁸

Despite assurances from Asarco that "Mr. Srackangast will not act as an advocate for ASARCO, but as an independent third-party consultant paid for by ASARCO," the legal relationship established in the agreement between Mr. Srackangast and Asarco is an employer-employee relationship, not the ***independent third-party*** relationship required

⁶ Letter from Sen. Eliot Shapleigh to TCEQ Exec. Dir., Glenn Shankle, dated May 12, 2007.

⁷ Press Release, *Asarco LLC: Wants Srackangast as Special Environmental Auditor*, Sept. 22, 2006, available at http://bankrupt.com/TCR_Public/060922.mbx (last visited June 18, 2007).

⁸ Press Release, *Asarco LLC: Srackangast Approved as Special Environmental Auditor*, Oct. 13, 2006, available at http://bankrupt.com/TCR_Public/061013.mbx (last visited June 18, 2007) ("The Honorable Richard S. Schmidt of the U.S. Bankruptcy Court for the Southern District of Texas in Corpus Christi authorized ASARCO LLC to employ Arnold Srackangast as its special purpose environmental professional.").

under the May 10 Interim Order.⁹ It is well-established that an employer-employee relationship creates a fiduciary relationship in which the employee owes his allegiance to the employer, not a third party.¹⁰

The ED's reliance on an Asarco employee to conduct the air modeling audit therefore 1) violates the Commission's Interim Order by not securing an ***independent third-party*** consultant and 2) creates a conflict of interest, with Mr. Srackangast's legal duty owed to his employer, Asarco.

Moreover, allowing Asarco to hire an employee to conduct its air modeling audit is as absurd a process as having the contesting parties fund and hire their own employee to evaluate Asarco's permit. As the contesting parties had no role, neither should Asarco have had a role in determining who conducted the investigation required by the March 10 Interim Order. By allowing Asarco to influence the investigation into their air permit renewal, TCEQ effectively aligned its interests with the company at the expense of El Paso citizens.

The documents produced as a result of this conflict of interest should be stricken to comport with common sense notions of fairness and justice, if not existing ethical rules, and laws of agency. Asarco's failure to procure a timely ***independent third-party*** audit as ordered by the Commission effectively terminates any right to renew Air Quality Permit No. 20345.

After a hearing on the merits from July 11-22, 2005, Administrative Law Judges with the State Office of Administrative Hearings recommended denial of the permit renewal. These findings remain in the record and have not been overruled or otherwise contradicted. The Commissioners should uphold this ruling and deny the air permit renewal.

On May 14, 2004, the Commission exercised its plenary authority to hold a hearing in the public interest and issued an interim order to the State Office of Administrative Hearings (SOAH).¹¹ On July 11-22, 2005, a contested hearing on the permit was held in El Paso, Texas.¹² The Administrative Law Judges (ALJs) issued their proposal for decision (PFD) on October 27, 2005, recommending denial of the permit renewal. In the PFD, the ALJs held that:

⁹ *Id.*

¹⁰ *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177 (Tex. App. Houston [1st Dist.], 2005, no pet.).

¹¹ March 10, 2006, Interim Order, Finding of Fact No. 4.

¹² Diana Washington Valdez, "Asarco hearing ends, wait begins," *El Paso Times*, July 26, 2005.

1. Asarco had not proven that its emissions would not cause or contribute to air pollution; and
2. Asarco had not proven that its compliance history during the last five years of operation warranted renewal of its permit.

The Commissioners have not overruled or otherwise contradicted the findings of fact and law by the two ALJs who came to El Paso and considered days of testimony by those impacted most by Asarco. The decisions reached in the PFD are not rendered null and void merely by the submission of recommendations by the Executive Director and remain part of the record.

Unless and until successive information specifically negates the findings of the ALJs, the Commissioners should defer to the recommendations issued in the PFD and deny the air permit renewal.

Asarco and TCEQ each failed to meet mandatory deadlines ordered by TCEQ Commissioners in March 10, 2006 Interim Order, Ordering Provisions No. 2 and 3; therefore, Air Quality Permit No. 20345 is effectively denied.

The March 10, 2006 Interim Order explicitly provides a set timeline for the ED to conduct certain evaluations of emissions impacts, air modeling and on-site equipment within a six-month period, ending September 10, 2006.¹³ On November 10, 2006, the ED filed a request for an extension of the deadline.¹⁴

In his March 10 filing, the ED concedes the applicant failed to meet the requirements in accordance with the schedule.¹⁵ The ED may claim no statutory or plenary authority to set its own deadlines or create procedure ad-hoc in contradiction of an explicit Commission order. Therefore, the failure of the ED and applicant to timely submit the March 10 ordered evaluations effectively denies Air Quality Permit No. 20345. Health and Safety Code section 382.055(g) states plainly:

If the applicant meets the commission's requirements in accordance with the schedule, the commission shall renew the permit. ***If 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.***¹⁶ [emphasis added].

¹³ March 10, 2006, Interim Order, Ordering Provisions No. 2 and 3.

¹⁴ Nov. 10, 2006, Executive Director Interim Report and Request for Extension.

¹⁵ *Id.*

¹⁶ Health & Safety Code § 382.055(g) (2006).

As such, TCEQ must call a contested case proceeding on Air Quality Permit No. 20345 where Asarco must show why the permit should not expire immediately.¹⁷

TCEQ is bound by precedent to call a contested case hearing in the "public interest" on Air Permit No. 20345.

TCEQ's mission statement states clearly that it "strives to protect our state's human and natural resources consistent with sustainable economic development. Our goal is clean air, clean water, and the safe management of waste."

Texas Health and Safety Code section 382.011 authorizes TCEQ with its statutory powers and duties, which include: 1) administering the Health and Safety Code; 2) establishing the level of quality to be maintained by the state's air; and 3) controlling the quality of the state's air.¹⁸ Furthermore, the statute states that the Commission "shall seek to accomplish the purposes of this chapter through the control of air contaminants by all practical and economically feasible methods."¹⁹ The purpose of the Health and Safety Code and the policy of the state are to "safeguard the state's air resources from pollution or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility."²⁰

Importantly, the Health and Safety Code further provides the Commission with the "powers necessary or convenient to carry out its responsibilities."²¹ Among those powers includes TCEQ's plenary authority to call a contested case hearing on Air Quality Permit No. 20345 and similarly situated permits *sua sponte* in the "public interest."²²

On May 14, 2004, the Commission exercised its plenary authority to hold a hearing in the public interest and issued an interim order to the State Office of Administrative Hearings (SOAH).²³ On July 11-22, 2005, a contested hearing on the permit was held in

¹⁷ *Id.*

¹⁸ Tex. Health & Safety Code § 382.011(a)(1)-(3).

¹⁹ Tex. Health & Safety Code § 382.011(b).

²⁰ Tex. Health & Safety Code § 382.002(a).

²¹ Tex. Health & Safety Code § 382.011(c).

²² Order on Appeal from Tex. Comm. on Env. Quality's Order Dated May 14, 2004, *Asarco Incorp. v. TCEQ*, No. GN4-01709 (261st Jud. Dist. Travis Cty. Tex., filed Mar. 9, 2005).

²³ March 10, 2006, Interim Order, Finding of Fact No. 4.

El Paso, Texas.²⁴ On March 10, 2006, the Commission determined "on the evidence in the record and the applicable law":

...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 finding of the ALJs with regard to predicted exceedances of the significant level for PM10, PM2.5, and NO2, and 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.²⁵ [emphasis added].

With this second round of procedure on the same permit, the public interest has not diminished or expired. On the contrary, public interest has increased since the May 10 order. As noted above, three regional mayors met to sign a historic resolution against Asarco, and 11 legislators from the three-state region of Texas, New Mexico, and Chihuahua signed a bi-national joint resolution in opposition to the air permit's renewal.²⁶ In addition, multiple editorials from the *El Paso Times*, with headlines such as "Deny Asarco" and "Ugly Asarco," have recently spoken against the re-opening of Asarco.²⁷ The El Paso community, simply put, does not want Asarco to re-open.

Given the problematic history of this air permit application, both procedurally and substantively, renewal of the permit should be no slam dunk. In his May 1, 2007 report to the Commission, the ED proposes to circumscribe and discard the public interest by disallowing a public hearing on the permit. Rather, TCEQ has bound itself by its prior determination that this case merits a contested case hearing in the public interest. This round of process on Air Quality Permit No. 20345 is grounded in the identical fact and law as the prior round, but for the updated modeling submitted by Asarco.

Therefore, the updated modeling must be scrutinized in accordance with the identical process ordered prior—a contested case hearing in the public interest. For the Commission to order process to the contrary, in absence of a contested case hearing, is arbitrary and capricious, without basis in fact, law or, most on point, direct precedent.

²⁴ Diana Washington Valdez, "Asarco hearing ends, wait begins," *El Paso Times*, July 26, 2005.

²⁵ March 10, 2006, Interim Order at 1.

²⁶ Joint Resolution of Border Cities; Bi-national Joint Resolution in Opposition to Renewal of Asarco's Air Permit.

²⁷ "Deny Asarco: We're better than a smokestack," *El Paso Times*, June 2, 2007; Charlie Edgren, "Asarco's mirrors and lots of smoke," *El Paso Times*, June 1, 2007; "Ugly Asarco," *El Paso Times*, May 2, 2007.

The Executive Director failed to conduct a Constitutional analysis of whether due process demands a public hearing on Air Permit No. 20345.

The ED may not write out U.S. Constitutional due process from his proposed procedure. It is well-established that due process requires an agency administering an adjudicative function, such as a permitting, to provide citizens an opportunity to be heard, particularly when the government wishes to violate a citizen's life, liberty, or property.²⁸ It is also established that "resolution of the issue whether administrative procedures provided...are constitutionally sufficient requires analysis of the governmental and private interests that are affected."²⁹

More precisely, the agency must weigh three factors in determining the sufficiency of the process it affords affected parties:

1. the private interest that will be affected by the official action;
2. the risk of an erroneous deprivation of such interest through the procedures used, and
3. the probable value, if any, of additional or substitute procedural safeguards.³⁰

The ED states in his May 1, 2007 report to the Commission that "the ED concludes ASARCO will not meet the requirements for renewing its permit and does not recommend issuance," then in apparent contradiction, outlines a process for *granting the permit*, without a public hearing.³¹

Notice and comment are not enough in this case. Neither sufficient is a conclusory statement from the Commission that a public hearing is not merited or required by law. Given the great risk to the public health already documented, Asarco's miserable record of environmental safety, and the clear value of a public hearing on this permit—as evidenced by the value of the past hearing denying the permit—the ED failed by not conducting a Constitutional due process analysis and recommending to the Commission a public hearing on Air Permit No. 20345.

²⁸ *Londoner v. City and County of Denver*, 210 U.S. 373 (1908).

²⁹ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

³⁰ *Id.*

³¹ May 1, 2006, Executive Director's Report at 24.

Ms. LaDonna Castañuela

June 18, 2007

Page 10

Again, I ask that the Commissioners deny Asarco's Air Quality Permit No. 20345 or, in the alternative, order an *objective* investigation into Asarco's permit compliance and call a contested case hearing on the permit.

Very truly yours,



Eliot Shapleigh

Encl.:

1. Tammy Fonce-Olivas, "3 Cities, 1 Message: Don't Reopen Asarco," *El Paso Times*, June 1, 2007.
2. Binational Joint Resolution in Opposition to Renewal of ASARCO's Air Permit.
3. Ralph Blumenthal, "Copper Plant Illegally Burned Hazardous Waste, E.P.A. Says," *New York Times*, October 11, 2006.
4. "Fed's cleanup claims against bankrupt Asarco could top \$1 billion," *Dallas Morning News (AP)*, August 2, 2006.
5. Les Blumenthal, "Lawyers dissect Asarco's cleanup obligation in U.S.," *The (Tacoma) News Service*, March 20, 2006.
6. Robert McClure, "Extensive arsenic and lead pollution revealed," *Seattle Post-Intelligencer*, April 4, 2002.
7. Memo from Mac Vila re: ASARCO – El Paso Meeting, August, 17, 2000.

ES/de

State Government\Environmental Quality, Texas Commission on\CastanuelaL ED public comment.doc

Area Bible schools

Soccer tournament



POWER JAM



El Paso Times

elpasotimes.com

78711-2028

to the Times
 participated in
 Spelling Washing-

music'
 P
 it of
 ion

reviewed
 spelling
 the 2007
 spelling Bee,
 tried that
 could not
 much
 or than he
 when he
 participated
 a competi-

by
 sday af-
 on, the
 element's
 scop al
 h School
 enth-
 ar, who
 esented
 aso and
 El Paso
 / compe-
 n, D.C.,
 odest ex-

second
 als at the
 for 16th
 g against
 out the
 restimat-
 I also got
 ause the
 e kind of
 re worse
 "paseo,"
 wa" was
 a — who
 the high
 titors af-
 st word.
 oved to
 of, like
 tanning

3 CITIES, 1 MESSAGE: DON'T REOPEN ASARCO



Mark Lambie / El Paso Times

Juárez Mayor Hector Murguía, left, Sunland Park Mayor Ruben Segura and El Paso Mayor John Cook signed a resolution Thursday opposing the renewal of Asarco's air permit.

Mayors urge state to deny smelter air permit

By Tammy Fonce-Olivas
 El Paso Times

El Paso Mayor John Cook, Juárez Mayor Héctor Murguía and Sunland Park Mayor Ruben Segura, along with their councils, met Thursday on the banks of the Rio Grande to sign a resolution opposing the reopening of Asarco's copper smelter in West

El Paso. The historic meeting was the first session of its kind to take place near Monument 1 on the riverbed where the states of Texas, New Mexico and Chihuahua come together. Elected officials said the site was selected as a show of unity against Asarco. For the past few years, Asarco

has been seeking to have the Texas Commission on Environmental Quality renew its air permit from 1992. The smelter, at 2301 W. Paisano, has been idle since 1999. The decision on whether to renew the air-quality permit is still months away, but the three mayors hope their resolution will help persuade the Texas com-

mission to deny Asarco's request. The mayors signed the resolution opposing the renewal of Asarco's air-quality permit after their councils approved it. "I'm very hopeful that we are going to be able to convince them (TCEQ officials) that this entire region is opposed to Asarco reopening," Cook said. "There

is no obligation by the state of Texas to issue an air-pollution permit, and that's what Asarco is requesting. They are requesting a permit to pollute our air, and we are saying no — we don't want it. We appreciate everything Asarco has done for this community in the past, but their

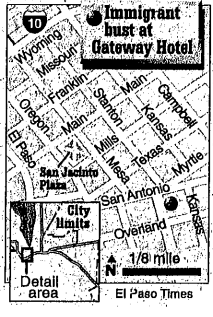
Please see Asarco 2A

Raid of Downtown hotel nets 68 in U.S. illegally

By Adriana M. Chávez
 El Paso Times

Sixty-eight undocumented immigrants were found in a Downtown hotel where a similar bust occurred last year. Immigration and Customs Enforcement agents working with the Border Enforcement Security Team, or BEST, received a tip Thursday morning about a

viadually and that some were interviewed more than once. She said the Mexican immigrants found would be returned to Mexico within 24 hours of the bust. "With Mexican illegal aliens,



Principal facing grievance takes similar job in Austin

By Gustavo Reveles Acosta
 El Paso Times

Daniel Girard — the Bel Air High School principal named in a grievance by 12 teachers who claimed they were harassed and forced to work during duty-free hours — will leave El Paso and take a principal position in Austin. Officials of the Austin Inde-

have embraced and welcomed both me and my family," Girard said in a written statement released by the Ysleta Independent School District. "I am confident that Bel Air and the students will continue to

Friday, Jun. 1, 2007
 El Paso Times



Mark Lambie / El Paso Times

Aurelia Roque, left, of El Paso and Natalia Francis, right, of Sunland Park held signs opposing Asarco on Thursday during a meeting of the mayors of Juárez, Sunland Park and El Paso. The mayors signed

a resolution opposing the renewal of the copper smelter's air-quality permit. The meeting took place at Monument 1 on the riverbed where the states of Texas, New Mexico and Chihuahua come together.

Asarco

Continued from 1A

time has come to an end."

Lairy Johnson, Asarco's environmental manager in El Paso, said air emissions from the copper smelter, if reopened, would not cause or contribute to air pollution or cause health risks. Johnson based his comments on independent studies he said were conducted by local, state and federal environmental departments.

Johnson said the reasoning for the municipalities' opposition to the air-quality permit was based on outdated scientific data.

"Looking at their resolution, again a lot of it is dated material. A lot of it is they are referencing to a copper smelter that doesn't exist anymore or a situation that doesn't exist," he said.

Johnson said that the smelter was modernized in the early '90s

and that on May 1, 2007, the TCEQ executive director issued a favorable recommendation in support of the restart of the smelter. The recommendation, he said, states that the air emissions meet all the air-quality standards.

El Pasoan Laura Najera said she didn't want the smelter to reopen because of the potential health risks to El Paso and neighboring communities.

"We are hoping for their (TCEQ) support, because our health and our future is at risk," she said.

This week, a study released by UTEP's Institute for Policy and Economic Development — and commissioned by Asarco — indicated that the reopening of Asarco would bring hundreds of jobs to El Paso and a \$1.16 billion in regional economic output each year.



Johnson

Frank Gallardo said that he worked for Asarco for nearly 30 years and that he would gladly return to work there. He said the smelter meets the standards on air emissions and, equally important, Asarco pays livable wages. "We need to get back to work," he said.

Cook said Asarco's potential economic impact is not worth the possible health risks, which were outlined in the resolution.

"As I mentioned before, prostitution would also bring jobs, and it would bring money to our economy, and we could attract people from all over the United States and world for that, but there are some things you don't want to do for money," Cook said. "Having Asarco polluting our air is one of them."

Segura said he hoped the Texas commission recognized that renewing Asarco's air-quality permit would affect more than one Texas community.

"It's not just a local issue. But it is a regional issue that has far-reaching ramifications and im-

pact. It is impacting another state, and it's impacting another nation," Segura said. "This gesture has to speak volumes to the state of Texas."

Murguía said the solidarity displayed by the municipalities on Thursday show that the more than 2 million residents of the three sister cities are speaking as one against the air-quality permit for Asarco. He said that one voice shouldn't be ignored.

Elected officials for the three cities also signed a resolution asking the federal governments from the United States and Mexico to provide adequate money to maintain and repair the Rio Grande.

The three government bodies also voted in favor of creating committees for border relations to improve communication among El Paso, Juárez and Sunland Park.

Tammy Fonce-Olivas may be reached at tfonce@elpasotimes.com; 546-6362.

Bi-national Joint Resolution in Opposition to Renewal of ASARCO's Air Permit

Whereas, lead in children's blood is a serious health hazard; as children with blood lead levels above 10 micrograms per deciliter have demonstrated severe and permanent injury to brain and neurological functions that include learning disabilities, decreased growth, hyperactivity, and impaired hearing; and

Whereas, continued exposure to arsenic creates a life-time cancer risk; and

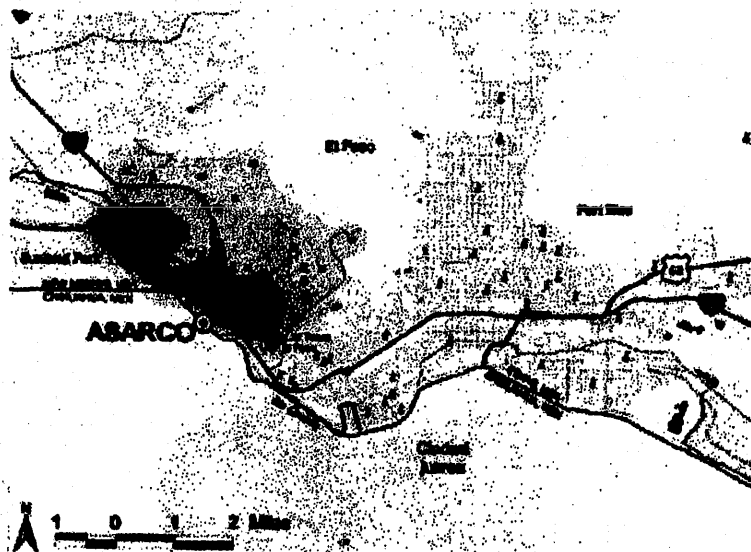
Whereas, in 1973, as a result of serious health complaints, Centers for Disease Control and Prevention (CDC) and others did health tests in the Smeltertown area, in Southern New Mexico and in the Anapra, Cd. Juarez area, finding that over 53% of the children had harmful levels of blood lead, resulting in the evacuation of all families in the Smeltertown area; and

Whereas, a 1996 study of children's blood lead levels in Anapra, Cd. Juarez concluded there is an ongoing threat to children's health from exposure to lead in contaminated soil; and

Whereas, thousands of children on both sides of the International Border have been exposed to ASARCO's emissions; and hundreds of thousands border residents have lived in the shadow of the smelter; and

Whereas, in 2001, after property at the University at Texas at El Paso was found to have lead levels of over 2,200 parts per million (ppm), a request was made by State Senator Eliot Shapleigh to the Texas Department of Health, the Texas Commission on Environmental Quality (TCEQ) and the EPA to investigate lead and arsenic deposits our area; and

Whereas, the EPA and others completed testing in El Paso Texas and of the 3,638 properties 1,097 had toxic levels of lead and arsenic, with the borders of contamination demonstrated in the map below, which must be removed at an estimated total cost of \$80 million; and



Whereas, on April 28, 2004, ASARCO appeared before the state to renew its Air Quality Permit No. 20345, which would allow ASARCO to operate and emit over 7900 tons of contaminants into the region, as shown in the chart below;

Pollutants (tons per year)	Allowables
Lead	7.69
Oxides of Nitrogen	230.04
Carbon Monoxide	287.68
Volatile Organic Compounds	7.66
Sulfur Dioxide	6,673.15
Particulate Matter	352.6
Particulate Matter (equal to or less than 10)	349.64
Sulfuric Acid	16.21

Whereas, pursuant to the TCEQ order that the application be referred to the State Office of Administrative Hearings for a hearing in the public interest; and

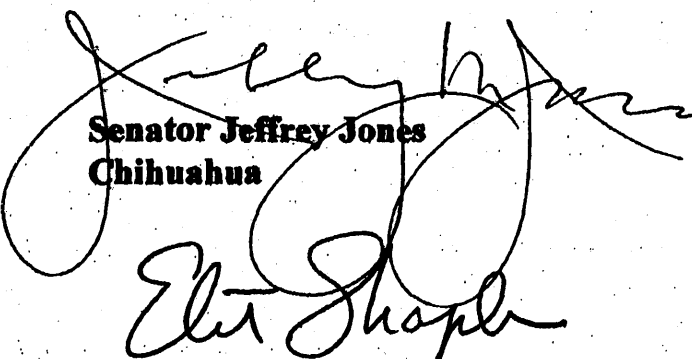
Whereas, on October 27, 2005, the Administrative Law Judge's (ALJ's) recommendation to the TCEQ concluded that ASARCO failed to prove that its operation under Permit 20345, warranted renewal; and

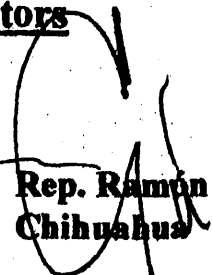
Whereas, considering that the Chihuahua State Commission on Human Rights in Cd. Juarez, Chihuahua has stated that the responsibility to prove that the quality of the environment will not be affected by the renewal of the permit lies on ASARCO and ASARCO has not proved it, and that sufficient evidence exists to deny Permit No. 20345.

Now therefore, be it resolved, the legislators that sign below representing Cd. Juarez, Chihuahua, MX, El Paso, Texas and Southern New Mexico and her citizens oppose the reopening of Asarco, oppose any new air permit that would allow contaminants into the air and into the soil, and stand strongly to vigorously contest the company's air permit application; and

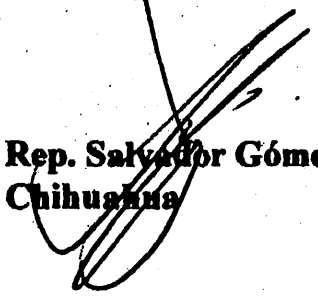
Be it further resolved, that Cd. Juarez, Chihuahua, MX, El Paso, Texas and Southern New Mexico and her citizens hereby request that the Texas Commission on Environmental Quality deny the renewal of Permit No. 20345, consistent with the opinion of the ALJ's.

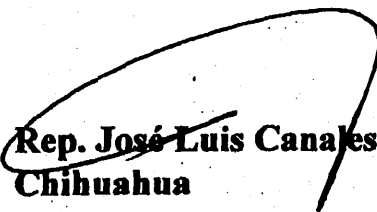
Legislators


Senator Jeffrey Jones
Chihuahua

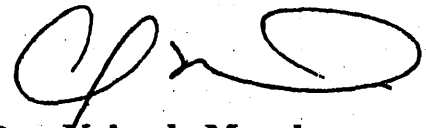

Rep. Ramón Galindo
Chihuahua


State Senator Eliot Shapleigh
Texas


Rep. Salvador Gómez
Chihuahua



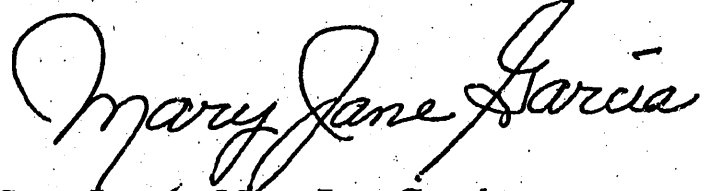
Rep. José Luis Canales
Chihuahua



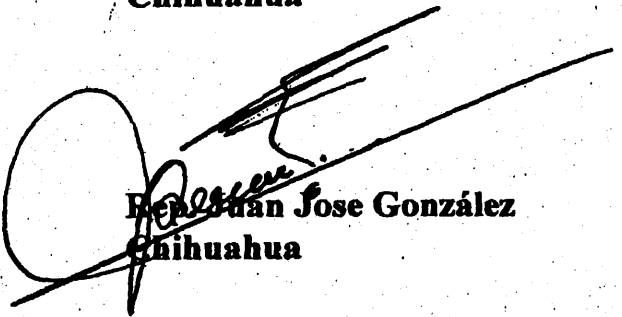
Rep. Yolanda Morales
Chihuahua



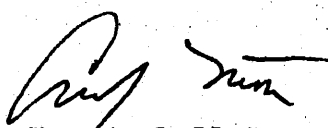
Rep. Rubén Aguilar
Chihuahua



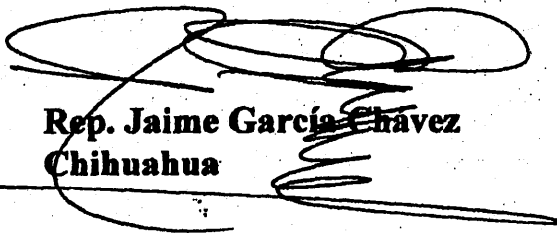
State Senator Mary Jane García
Nuevo México



Rep. Juan Jose González
Chihuahua



Rep. Andy Nuñez
New Mexico



Rep. Jaime García Chávez
Chihuahua

October 11, 2006

Copper Plant Illegally Burned Hazardous Waste, E.P.A. Says

By **RALPH BLUMENTHAL**

HOUSTON, Oct. 10 — A bankrupt copper giant facing billions of dollars in pollution claims across the nation pretended for years to recycle metals while illegally burning hazardous waste in a notorious El Paso smelter, according to a newly released Environmental Protection Agency document.

The agency, in a 1998 internal memorandum, said the company, Asarco, and its Corpus Christi subsidiary, Encycle, had a permit to extract metals from hazardous waste products but used that as a cover to burn the waste until the late 1990's, saving the high costs of proper disposal.

Among the more than 5,000 tons the company was accused of misrepresenting as containing metals for reclamation were more than 300 tons of nonmetallic residues from the former Army chemical warfare depot at the Rocky Mountain Arsenal outside Denver. (It is not clear what the arsenal's material contained.)

"This activity, plain and simple, was illegal treatment and disposal of hazardous waste," the environmental agency said in the memorandum, long held confidential but recently obtained by two El Paso environmental groups opposed to the smelter. "Encycle's own business records provide compelling evidence of sham recycling."

There was no response to messages left for an Asarco spokeswoman at corporate offices in Tucson and for the El Paso plant manager. But a company history states, "Asarco is committed to responsible management of our natural resources."

Asarco was founded as the American Smelting and Refining Company in 1899 and was bought by Mexican interests in 1999. It has long faced complaints of contaminating broad swaths of downtown El Paso and borderland areas of Mexico with lead and other dangerous metals, and it has been the target of federal, state and local complaints involving at least 94 sites in 21 states.

But although the environmental agency reached a landmark national \$20 million cleanup and penalty settlement with Asarco in 1999, the details of the violations had never been disclosed. The El Paso plant was shut down in 1999, but the company is now seeking permission to reopen it.

The long-confidential records were obtained from the Texas Commission on Environmental Quality through public information requests by the two citizens groups, the Get the Lead Out Coalition and the Sunland Park Grassroots Environmental Group, which provided copies to The New York Times.

"They were supposed to recycle reusable residues," said Heather McMurray, a teacher who requested the records. "They just burned them."

Ms. McMurray said the disclosure came as news to her and other activists who had been opposing Asarco for years with claims that pollutants released by the plant caused untold sickness.

"How could this not have been made public before?" said State Senator Eliot Shapleigh, Democrat of El Paso, who has long campaigned against the company and tracks developments on his Web site. "I was not aware of it."

Mr. Shapleigh added: "In the American West, the modern trail of tears is the lead and arsenic left behind from Asarco."

Michael D. Goodstein, who as a Justice Department environmental lawyer helped negotiate the 1999 settlement with Asarco, said the E.P.A. memorandum detailing Asarco's violations was for internal use and was not meant to become public.

"This was the E.P.A. position, and it was addressed in the enforcement actions and the settlement approved by the judge," Mr. Goodstein, who is out of the government, said in an interview. Although the 122-page settlement does not spell out misdeeds, it commits Asarco to lengthy remedies, including the proper recycling of hazardous waste.

Terry Clawson, a spokesman for the Texas Commission on Environmental Quality, also said, "You can't say this was unknown."

Mr. Clawson pointed to an E.P.A. news release in 1999 that announced the settlement of federal and state claims against Asarco. But the release, while citing the company for "failing to properly manage hazardous waste and otherwise engaging in unlawful recycling practices" and accepting "shipments of unmanifested hazardous waste," does not say specifically that the company burned the waste under a subterfuge.

Although the company has filed for Chapter 11 bankruptcy protection, it is also awaiting action from the Texas commission on an application to renew smelting in El Paso, and it still faces a mountain of litigation and enforcement actions. As recently as August, the Justice Department filed a claim under the bankruptcy proceedings to assure Asarco's compliance with terms of the agreed-upon cleanup at Encycle.

At the same time, Mr. Shapleigh said a tabulation showed that legal claims filed against Asarco amounted to more than \$21 billion.

Copyright 2006 The New York Times Company

[Privacy Policy](#) | [Search](#) | [Corrections](#) | [RSS](#) | [First Look](#) | [Help](#) | [Contact Us](#) | [Work for Us](#) | [Site Map](#)

**NEWS**

Texas/Southwest

Feds' cleanup claims against bankrupt Asarco could top \$1 billion

08/02/2006

Associated Press

Federal officials have lodged claims that could easily top \$1 billion against Asarco LLC for environmental damage left at 31 sites operated by the bankrupt mining and smelting company.

The claims are based on Asarco cleaning up the sites, and it could rise significantly if the Environmental Protection Agency is required to do the work, government lawyers say.

The Department of Justice filed the claim before a deadline Tuesday for submitting claims to an administrator appointed by a federal bankruptcy judge in Corpus Christi.

States are seeking additional cleanup money. Last week, Washington state filed a claim for up to \$600 million.

The company also faces asbestos-exposure claims from individuals that could run into the hundreds of millions. Those claimants have until Sept. 30 to file.

A lawyer for Asarco said the company, a Tucson, Ariz.-based subsidiary of Grupo Mexico SA, was not surprised by the size of the government's claim, and said it wouldn't prevent the company from eventually emerging from bankruptcy.

"We expected the government to file a big number," said the lawyer, Jack L. Kinzie. "The government asserted everything it possibly could recover if it had the best day possible in the courtroom."

Kinzie, who also worked on Halliburton Co.'s effort to limit asbestos claims through the bankruptcy of a subsidiary, said even if the government won all the claims, Asarco could recover from bankruptcy because of the strength of its mining business and the high price of copper and other metals.

The federal claim against the company centers on sites in 14 states, including some on the Superfund list of contaminated areas. Justice Department lawyers said hazardous substances had been released, or threatened to be released, at each site.

The claims vary in precision. Some are for work that EPA has already done and were calculated to the last dollar. Others — totaling in the hundreds of millions — are estimates of future costs.

Asarco has several facilities in Texas, including smelters in Amarillo and El Paso and a recycling center in Corpus Christi.

Federal officials say the El Paso smelter, which is now closed, caused unacceptable levels of lead and arsenic in soil and groundwater along the Rio Grande. They are seeking \$26.4 million in claims to clean up residential yards.

The government is seeking a penalty of more than \$2 million because the Corpus Christi center failed to live up to an agreement to recycle about 260 tons of nickel, copper and chrome per year.

The federal lawyers said they couldn't estimate future cleanup costs at Houston's Federated Metals site, which was used to dump ship channel dredgings and other waste, some of it radioactive. State officials have indicated they plan to seek a cleanup.

The Justice Department filed the new claim on behalf of several federal agencies, including the EPA and the Interior Department. It updates previous government filings, and in many cases increases the amount of money for cleanup projects.

Government lawyers said the cost of some renovation projects isn't known, and the claims against Asarco could grow. They also indicated that others might also be held responsible for the contamination.

Asarco filed for bankruptcy protection in August 2005. Even rising copper prices failed to restore the company to profitability.

In 2003, the Justice Department agreed to let debt-laden Asarco sell one of its most valuable assets, a controlling stake in a Peruvian copper-mining company, to Grupo Mexico.

The company has spent millions to clean up some of the sites. Last week, federal officials announced an agreement that would let Asarco sell contaminated shoreline land near Tacoma, Wash., to a developer to speed cleanup work at the site of a former copper smelter.

The Herald - Everett, Wash. - www.HeraldNet.com

Lawyers dissect Asarco's cleanup obligation in U.S.

TODAY: Lawyers with claims against Asarco say its parent corporation, Grupo Mexico, "cannibalized" the company and abandoned its obligations. The case exposes weaknesses in the Superfund law.

Now, Grupo Mexico S.A. de C.V. could find itself on the hook for Asarco's bankruptcy and for paying off creditors of the century-old American mining and smelting company.

Asarco owes more than \$1 billion to clean up environmental contamination at 94 sites in 21 states, including the company's former copper smelter in Ruston, according to court filings.

Over the coming months, lawyers will try to convince a federal bankruptcy judge in Texas that Grupo Mexico "systematically cannibalized" Asarco since buying it six years ago, and should be ordered to help cover its debts.

The Asarco saga, however, is about more than just the financial collapse of a once profitable company following its unexpected takeover. It is also about more than corporate maneuvering to gain control of some of the world's most valuable copper mines high in the Andes of Peru.

The fund was created in 1980 to clean up the nation's legacy of toxic pollution. It was financed with a special corporate tax that expired in 1995.

Some regulators fear that other companies with major environmental liabilities will follow Asarco's lead and seek bankruptcy protection. A report last year from the Government Accountability Office said officials in eight of EPA's 10 regions expect more such bankruptcies.

EPA and Justice Department officials say they aren't worried. They have adequate staff to deal with additional bankruptcies,

they say, and the law is on their side.

"The EPA and the Justice Department generally find that bankruptcy filings are rarely due to environmental liabilities," EPA spokesman Dave Ryan said in an e-mail, which was the only way he would respond to questions.

'Self-assurance' OK'd

Companies with Superfund responsibilities are supposed to offer financial assurances that they will clean up their sites. But the GAO, the investigative arm of Congress, found they don't always follow up.

Asarco promised it would clean up the Ruston smelter site, offering a "self-assurance" to the EPA. Self-assurances are allowed if a company passes a complicated financial test that hasn't been adjusted for inflation since 1982.

The EPA's inspector general reported that one of the agency's regional offices found that almost a third of the companies with Superfund obligations were out of compliance with their financial assurances.

The 1980 Superfund law required EPA to issue a comprehensive regulation covering financial assurances. The regulation has never been written.

The GAO, the EPA inspector general, the EPA Environmental Financial Assurance Board and a team of senior EPA managers have criticized EPA for not acting in 25 years. Several EPA officials said privately it is all but impossible to write a one-size-fits-all regulation that would cover every industry, and the political pressures would be enormous if they tried.

"EPA is at a disadvantage when it comes to these corporate maneuvers," said Christine Fishkin, who wrote the GAO report. "It's not a level playing field, and the solution is tougher financial assurances."

Takeover red flags

Grupo Mexico's takeover of Asarco in 1999 touched off warning bells in the EPA and the Justice Department.

Asarco was considered an attractive takeover target because of its 54 percent interest in the Southern Peru Copper Co. The Peruvian company owns two mines in South America's rich copper belt, and in 1999 had announced the discovery of major new reserves.

Federal regulators were concerned about Asarco's mounting environmental liabilities and a balance sheet that was steadily tipping toward insolvency. But they were powerless to stop the takeover.

Founded in the 1950s by Jorge Larrea Ortega, Grupo Mexico has a reputation as an exceedingly private company. It's the third largest copper producer in the world, controls Mexico's largest and most profitable railroad, and is reportedly interested in buying Aeromexico, one of Mexico's major airlines.

Larrea died in 1999 at age 87, and the company is now run by his son, German Larrea Mota-Velasco. As major players in the international mining market, the family is considered sophisticated and shrewd. But it is a cutthroat industry.

Peru mines key

In filings in the Texas bankruptcy court and in a New York case, lawyers for the asbestos claimants allege that Grupo Mexico's "bust-up" acquisition of Asarco was aimed squarely at acquiring control of the Peruvian mines.

"After less than six years of pillage by Grupo Mexico, Asarco today is a depleted, denuded vestige of a once vibrant, century-old mining enterprise," one brief said.

Within days of the takeover in November 1999, Grupo Mexico named some of its corporate officers, including Larrea, to top positions at Asarco. Grupo moved Asarco's corporate offices from New York to Phoenix, where it shared office space with another Grupo mining subsidiary, Americas Mining Corp.

Less than a month later, Asarco began selling its nonmining assets to pay for its own takeover, the asbestos lawyers claim. Asarco sold its specialty chemicals division, Enthone, for \$503 million and its aggregates division, American Limestone, for \$211 million. The proceeds from both sales were used to pay for Grupo Mexico's buyout of Asarco.

The asbestos lawyers say the "fire sales" of Enthone and American Limestone exacerbated Asarco's financial problems and served as a prelude to Grupo Mexico's plan to acquire control of Asarco's "crown jewel" - Southern Peruvian Copper Co.

Takeovers are often financed by selling a company's assets. But it could be illegal, under certain circumstances, if it is part of a deliberate scheme to force a company into bankruptcy or limit its financial liabilities. It's known as "fraudulent transfer" under the bankruptcy code, but it can be difficult to prove.

"It was a classic leveraged buyout carried out by the fraudulent conveyance of Asarco's assets, and they got SPCC almost for free," said Alan Rich, a Dallas lawyer representing asbestos claimants.

Grupo Mexico initially sought to purchase the Peruvian mines for \$640 million in summer 2002, a price tag the asbestos lawyers insist was outrageously low. EPA and Justice Department lawyers, in a step believed unprecedented, secured a temporary restraining order in federal court to block the sale.

"It was a Texas Hold 'Em move," said an EPA regulator who would speak only on the condition of anonymity. "We knew we could make it difficult for them, but it was a bluff. There really wasn't much we could do."

Concerns grow

Though no two cases are exactly alike, EPA is no stranger to bankruptcies involving companies with major Superfund obligations.

In one case, MagCorp filed for bankruptcy protection in 2001 seven months after the Justice Department filed a lawsuit seeking \$900 million in fines for toxic waste violations, according to the GAO. The bankruptcy court allowed MagCorp to sell its assets to a new company, US Magnesium, which was controlled by the same owner as MagCorp.

In another case, Gulf Resources and Chemical Corp., which faced potentially massive cleanup costs resulting from its northern Idaho mining interests, sought bankruptcy protection in the mid-1990s after a succession of buyouts.

In Asarco's case, the EPA grew increasingly anxious about whether Asarco would be able to fulfill its written assurances to clean up the Ruston smelter and other sites after the company sold its chemicals and aggregate divisions.

Asarco had approached EPA about a "global settlement" covering its environmental liabilities. With the temporary restraining order in place, government and Asarco lawyers intensified settlement negotiations.

In early 2003, they reached an agreement allowing Grupo Mexico to take control of the Peruvian mines for \$765 million, which was \$125 million more than the original purchase price. Grupo Mexico also agreed to fund a \$100 million trust dedicated to cleanups at Asarco's mining and smelting sites. EPA and the Justice Department agreed not to pursue any enforcement actions against Asarco for three years.

"EPA and the Justice Department took a pittance to roll over and go away," said Tate, the San Antonio asbestos-claims lawyer. "We would like to undo the entire transaction or have them pay a reasonable amount for SPCC."

With the price of copper currently at record levels, the Peruvian mines could be worth three or four times as much as they were in 2003.

In agreeing to the settlement, EPA officials said the \$100 million trust was better than nothing, considering Asarco was on the edge of bankruptcy.

"The United States believed at the time and continues to believe that the settlement was in the best interest of maximizing environmental cleanups," said Cynthia Magnuson, a Justice Department spokeswoman.

Trust fund targeted

The environmental trust fund could become part of the bankruptcy proceedings.

Asbestos lawyers won't reveal their legal plans, but EPA managers around the country said they worry the asbestos-claimants might try to tap the trust fund as part of any Asarco reorganization to pay off creditors. The next annual distribution - the first since the bankruptcy filing - is due in June.

Since the bankruptcy filing in August, the asbestos lawyers say Grupo Mexico has taken steps to force Asarco to halt operations and liquidate its remaining assets rather than reorganize.

Almost immediately after Asarco sought bankruptcy, its board of directors resigned. Two new board members were named, but one resigned a month later, leaving Carlos Ruiz Sacristan running the company.

Ruiz also is on the board of directors of Southern Peru Copper Co. and was Mexico's minister of communications and transportation in the late 1990s when Grupo Mexico purchased its first railroad from the Mexican government.

The asbestos lawyers claim Ruiz prolonged a labor strike last year at the Asarco mines in Arizona, allowing Southern Peru Copper to maximize its profits and steal customers from Asarco. They say the four-month strike cost Asarco up to \$50 million.

They also believe that Ruiz might resist any decision by Asarco to pursue action against Grupo Mexico.

"By reducing copper production at a 'deliberately failed' Asarco reorganization, Grupo Mexico will benefit from increased copper prices as well as increased copper profits from its other mining operations," the lawyers said in one court filing.

"We have stabilized"

In late December, the bankruptcy judge agreed to appoint two U.S. businessmen without ties to Grupo Mexico to the Asarco board of directors.

Grupo referred questions about the bankruptcy to Asarco. Lawyers for Americas Mining Corp., Grupo Mexico's mining subsidiary that Asarco is now part of, failed to return repeated phone calls seeking comment.

But in court filings, Americas Mining dismissed the asbestos lawyers' allegations as "innuendo and speculation."

For its part, Asarco could be forced to turn on its corporate parent and join the asbestos lawyers in trying to recover money from Grupo Mexico. Under the federal bankruptcy code, Asarco's fiduciary responsibilities are now to its creditors rather than its stockholders. The company may have no choice but to go after Grupo Mexico, said Jack Kinzie, an Asarco lawyer.

While Kinzie said the company is investigating that possibility, the federal bankruptcy judge hearing the case, Richard Schmidt, hinted during a December hearing that Asarco may be required to take such a step.

The federal government, through the Justice Department, and more than a dozen states, including Washington, could face similar decisions.

Kinzie said the decision by Asarco to seek bankruptcy protection came so "precipitously" that the company hadn't even hired a financial adviser to help guide it. Since then, a financial adviser has been hired, a legal team assembled and \$75 million in debt financing secured to keep the company operating.

"We have stabilized the company," Kinzie said. "We now need to start dealing with the creditors."

Trying to prove that Grupo Mexico was at the heart of the Asarco bankruptcy won't be easy. Bankruptcy experts say such cases are always difficult to prove, and the task is even harder because of Grupo Mexico's involvement.

"It's not easy to bring a foreign company into a bankruptcy case," said Leif Clark, a bankruptcy judge who also teaches at the University of Texas law school. "It's not impossible, but it is difficult."

Even serving court papers to foreign parties in a bankruptcy case requires a complicated process spelled out in a 1910 international treaty. And if a judgment against Grupo Mexico is ever ordered, it might be difficult to collect and may require going into a Mexican court.

The asbestos lawyers aren't deterred.

"Grupo Mexico has been pretty brazen," said Alan Rich, the Dallas asbestos lawyer. "They aren't afraid to play hardball, and neither are we."

Les Blumenthal: 202-383-0008; lblumenthal@mcclatchydc.com.

Copyright ©1996-2007.
The Daily Herald Co.
ALL RIGHTS RESERVED.

Extensive arsenic and lead pollution revealed

By Robert McClure, Seattle PI

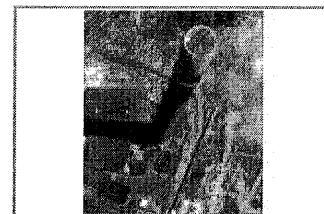
Then Wade, a Normandy Park resident, heard about people from nearby Vashon and Maury islands being warned about lead and arsenic contamination carried by the wind from Asarco's copper smelter near Tacoma before it closed in 1985.

Posted on May 25, 2004

Report finds smelter fallout at many sites in King County

This article originally appeared in the Seattle Post-Intelligencer on Thursday, April 4, 2002.

NORMANDY PARK -- In her sickbed, weak after chemotherapy knocked her white blood cell count way low, Arlene Wade wondered why she would have lymphatic cancer when there was no history of cancer in her family. Her gardener had died of cancer. Her dog and cat, too.



Then Wade, a Normandy Park resident, heard about people from nearby Vashon and Maury islands being warned about lead and arsenic contamination carried by the wind from Asarco's copper smelter near Tacoma before it closed in 1985.



Arlene Wade holds a map of the wind patterns that carried arsenic from the ASARCO smelter to her Normandy Park neighborhood.

Grant M. Haller/Seattle Post-Intelligencer

Wade repeatedly called City Hall, the local water department and county officials trying to find out if the contamination had spread to her town.

"You can't believe how many people I had to call to get this information," she recalled. "They pass you off like a hot potato."

When she called the local water department in spring 2000 saying she had developed cancer and had some questions, the man on the other end of the line responded: "What do we have here, an Erin Brockovich?"

A few months later, Wade finally got results of tests on soil in her neighborhood -- tests showing potentially harmful readings of arsenic and lead. Arsenic at one place near her house was 13 times higher than the level that warrants a cleanup according to state law. Wade, 59, wonders why residents were not warned.

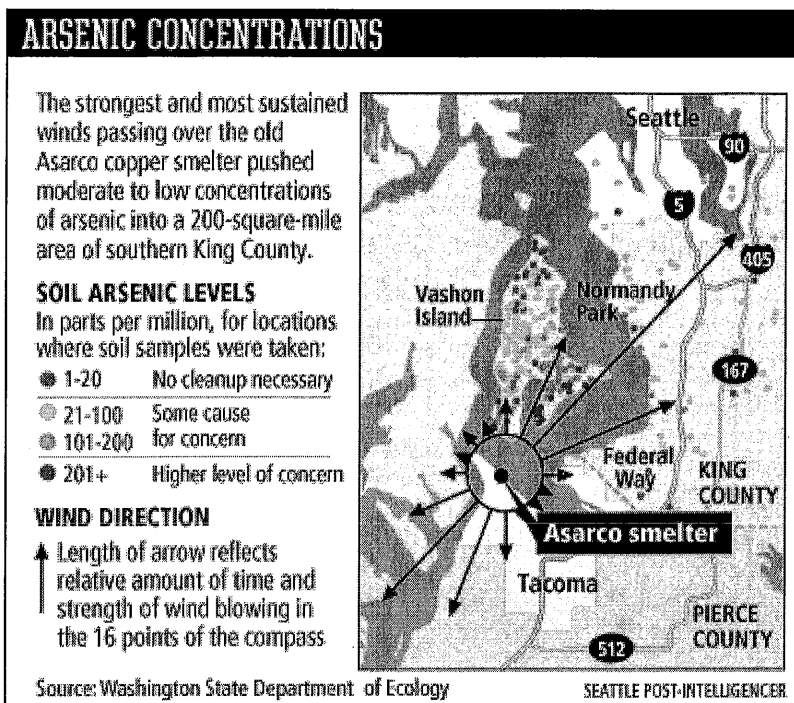
Today, that's supposed to change. The state Department of Ecology made public how much lead and arsenic was detected at 75 locations across a 200-square-mile swath of King County -- from Bellevue to West Seattle to Federal Way to Kent.

In the initial round of samples taken in the fall of 1999 in eight areas in Des Moines, Burien, Normandy Park and Federal Way, all but five of 45 samples came up above the level of arsenic that warrants a cleanup under state law.

Of the 75 places studied between 1999 and 2001, 62 showed arsenic readings above the state cleanup standard, while 13 had lead above the standard.

Contamination is highest in the Normandy Park and Burien areas, lower in West Seattle and Federal Way, even lower farther inland.

With enough exposure, arsenic can cause cancer. Lead can depress children's learning abilities.



Wind-direction maps distributed recently by the Department of Ecology show that the strongest and most sustained winds carried pollution from the smelter directly over Normandy Park, a well-heeled, tree-shaded town at the edge of Puget Sound where Asarco's old smelter seemed far away.

Southern Vashon and Maury islands, where contamination was higher and residents clamored for soil testing, are closer to the old smelter site but not in line for such strong, sustained winds.

Vashon and Maury residents, including some in neighborhoods with readings comparable to those of Normandy Park and environs, were warned in an April 2000 letter from King County Executive Ron Sims to minimize exposure to contaminants.

Why didn't residents of the mainland get the same health warnings?

Dr. Alonzo Plough, health director for Seattle and King County, said issuing a warning based on the initial samples along the coast would have raised more questions from neighboring cities -- questions authorities were in no position to answer without further tests.

"We're not talking about an imminent health hazard," Plough said. "There are stages of appropriate risk communication as to the definitiveness of the science. It would not have been prudent ... to have communicated a characterization of mainland lead and arsenic in soil until we had 75 sites instead of eight."

Elaine Kraft, a spokeswoman for Sims, said he and Plough notified physicians and day care centers in South King County and told newspapers about the situation.

"The executive said the initial sampling on the mainland wasn't sufficient enough to get hysterical or warrant a huge public thing, but it was enough to do further sampling," Kraft said.

The Department of Ecology plans to take more samples in summer 2003 at day care centers, parks and other places where children are likely to come in contact with soil.

Officials say no one should panic.

"This is not a health emergency; it is a health concern," said Marian Abbett, manager of the department's response to the contamination.

It poses little if any danger to drinking water, authorities say, because it is mostly in the top few inches of soil. Drinking-water wells are much deeper.

Department of Ecology spokesman Larry Altose said the yards of many older homes that have not been disturbed since the smelter went off-line in 1985 are likely to be the most contaminated.

That's exactly the kind of place where Arlene Wade, a retired psychotherapist who lives with her husband and son, spent many days doing intense yardwork during the 1980s. She labored alongside her gardener, accompanied by her dog and cat.

Besides gardeners, health officials are most concerned about infants and young children. Their total dose is larger relative to an adult's because of their size, and kids are much more likely to put something contaminated -- fingers, a stick, whatever -- into their mouths.

Wade, a determined, quick-witted woman who was active in civic affairs for years before she contracted cancer, said she was surprised King County officials were not more forthcoming, because she previously found them supportive when cooperating with her on unrelated matters.

She knows that her cancer -- non-Hodgkins lymphoma -- has not been definitively tied to arsenic or lead exposure.

Still, Wade -- whose cancer is in remission -- thinks there may be an unusual number of illnesses in Normandy Park, a town of 6,500. Some neighbors contacted this week agreed, saying at least three residents of a neighborhood near where the highest contamination levels were found had cancer, and three also had Alzheimer's disease.

Residents said they would have preferred to get a letter, like Vashon residents did.

"I think it's something that it's good to advise people about," said resident Sandy Schlyer.

"What I remember was something about Vashon," said neighbor Julie Clearwater, whose brother contracted cancer at age 30 after growing up in the neighborhood, and whose mother died of cancer. "Nothing was said about don't put your hand in the dirt" in Normandy Park.

Mayor John Wiltse and other council members were paid a visit by county health officials about a year ago, he said.

"Our meetings are announced. The subjects are announced. If people are interested in coming to the meeting, they could find out," Wiltse said. "Do I think we've done enough? No, and we're going to rectify that. The thing we've been waiting for is to get meaningful data."

Wiltse said he was unaware of the letter sent to Vashon and Maury residents, and doesn't know why those warnings could not have also been sent to his constituents.

"That's a good question," he said.

Officials said they have no plans to study southern King County to determine if contamination has increased cancer rates. A similar study on Vashon and Maury islands, where contamination levels are similar or higher than those on the mainland, was unable to establish a link between arsenic exposure and increased rates of cancer.

There is strong evidence that arsenic exposure, in sufficient doses, causes cancers of the bladder, skin and lung. Statistics suggest arsenic may also be linked to cancers of the liver, kidney and prostate, but it's never been proven to cause those.

There is also no indication arsenic causes Alzheimer's, said University of Washington toxicologist David Eaton, who served on a National Academy of Sciences panel that studied arsenic in drinking water.

While some scientists are concerned about low levels of arsenic in soil, Eaton says he does not believe residents need to worry much unless the level of arsenic in the soil around their home exceeds 200 parts of arsenic for every million parts of soil. Only one of the 75 mainland locations tested that high, and then only on one sample. It was at a park near Wade's house.

"It's not that any exposure to arsenic will give you these kinds of cancer," Eaton said. "It depends on how much and how long. ... It's kind of like playing the lottery. If you buy one ticket, you're less likely to win than if you buy 100,000."

"Most of the population is not at obvious acute risk" at the levels being unveiled on the mainland, said UW

environmental engineer John Kissel, president-elect of the International Society of Exposure Analysis. On the other hand, he said, "We can't be absolutely certain that someone is not at risk if they're exposed to that for a long time. ... If we had our choice, we wouldn't have anybody living in soils with those kinds of dangers."

There are a number of ways people can ingest or inhale dirt, researchers say. Dust is stirred up by the wind or cars. Someone working in the yard might smoke, eat or pop a stick of gum into his or her mouth. Or people may track dirt into the house on their shoes, and then inhale it when it is stirred up.

Cities can apply for state reimbursement for up to one-half of their cleanup costs, but private landowners are on their own.

The Department of Ecology plans to seek reimbursement from Asarco for costs of testing and helping cities clean up. But that may be difficult, because Asarco, with \$1 billion-plus in cleanup obligations around the country already, faces \$450 million in outstanding loans and is \$86 million short of collateral needed to cover them.

The company has bitterly opposed state requirements to clean up the soil around an old Asarco smelter in Everett, saying the 20 parts per million in the state standard for arsenic is too stringent. That translates into a risk of 30 people getting cancer for every 1 million people who are exposed over the course of a lifetime.

At Asarco's smelter site near Tacoma, where the U.S. Environmental Protection Agency is in charge, Asarco must clean up all soil measuring 230 parts per million or greater -- which was identified in a science journal article several years ago as the laxest residential standard for arsenic cleanups anywhere in the country. The 230 parts per million translates to one cancer case for every 2,000 people exposed.

The southern King County situation illustrates how the state and federal toxic-cleanup laws are ill-suited to dealing with moderate levels of contamination spread across large areas. The laws were targeted at relatively small areas with egregious contamination, such as the land immediately around the old smelter.

Still, Wade thinks authorities had enough information to at least warn the shoreside communities based on the samples taken in 1999.

"If they're going to be intimidated and controlled by the corporations that are polluting our country," Wade said, "the least the government can do is get the information to us."

PROTECT YOURSELF

To minimize harmful exposure to arsenic and lead:

- Frequently wash hands, pets and anything that children put in their mouths, such as toys and pacifiers.
- Remove shoes outside the home. Keep dirt out of the house.
- Damp-mop and dust frequently.
- Wash hands before preparing food, eating or smoking.
- Keep children and pets away from exposed soil. Cover soil with grass, wood chips or gravel.
- Wear a mask in dusty areas.
- Wash vegetables grown in gardens carefully before eating. Peel root vegetables.
- Wear gloves and shoes while gardening.
- Dampen soils before digging to reduce dust.
- Add clean soils such as compost and mulch to your garden, and consider using a raised bed.

For more information: call King County health officials at 206-296-4692, or use the Web:

www.metrokc.gov/health/tsp/arseniclead.htm.

Source: Public Health-Seattle & King County

* * *

Friday, January 16, 2004

Boundary is expanded in search for arsenic and lead pollution

Seattle Post-Intelligencer Staff and News Services

OLYMPIA -- The search for arsenic and lead pollution from an old Tacoma-area copper smelter is expanding into Thurston and Kitsap counties, Seattle, parts of northern King County, the Gig Harbor Peninsula and south Pierce County, the state Department of Ecology said Wednesday.

"We expect to find fairly low concentrations of arsenic and lead because the boundary of contamination will be some distance from the original smelter stack in Ruston," said Marian Abbett, the department's project manager for soil studies in the smelter area.

Asarco, the last company that owned the smelter, also produced arsenic before shutting down in 1985. The two main contaminants at the site are arsenic, a cancer-causing byproduct of copper smelting, and lead, which can slow brain development in children.

A one-mile radius surrounding the smelter was declared a federal Superfund site in 1983. The U.S. Environmental Protection Agency is overseeing the cleanup, which officials say could cost as much as \$200 million by the time it's complete.

Ecology and local health departments will ask property owners for permission to sample soil on sites that have not been disturbed since the smelter began operating in the 1890s, including forested areas and some residential lots.

From: Mac Vilas
To: Brad Wilkinson; David Hastings; David Murry; Da...
Date: 8/17/00 4:56pm
Subject: ASARCO - El Paso Meeting

Confidential Information

Re: issues of haz. waste from Encycle Corpus Christi to ASARCO El Paso and the implications to calling the facility or some subset of the facility an AOC assuming only preRCRA and non haz. or bevell exempt RCRA waste to exempt it from PC care Permit and CP.

First of all, **there is no question that the facility did receive hazardous waste from Encycle as evidenced by the following:** It also appears that ASARCO Amarillo Plant stored, treated and disposed of spent haz. waste refractory bricks.

I do not see how we are bound or tied to call the ASARCO El Paso Plant a nonhaz. waste facility based on the 1996 order. I think the Consent Decree and the Encycle investigation completed after the 1996 order prove that haz. waste was managed the El Paso plant.

1. Records from the Encycle investigation show that Encycle shipped **46,770.1 tons of listed haz. waste to ASARCO El Paso** from 1992-1997 in the following amounts:

1992 - 5,031.43 tons;
1993 - 7,702.98 tons;
1994 - 13,598.32 tons;
1995 - 9,290.68 tons;
1996 - 6,434.87 tons;
1997 - 4,711.82 tons;

2. Page 13 (para. 60-64) of the Complaint filed by the EPA (U.S) and TNRCC (State of Texas) on April 15, 1999 in the Southern District of Texas by the DOJ and AG indicates that **"from at least 1991 to present, ASARCO has received, stored, treated, and disposed of various Encycle Wastes at the Texas Smelter (El Paso). "At least some of the Encycle wastes were and are hazardous under 30 Tex. Admin. Code 335.1. "There has been a release of hazardous waste into the environment at the Texas Smelter. It also indicates that ASARCO has generated, and stored hazardous spent refractory brick from 1975 to the present. Pages 32-34 (para. 197-21-) of the Complaint lists the violations for the ASARCO El Paso plant including storing and disposing of "restricted hazardous waste, including Encycle waste, without meeting storage and treatment requirements."**

The Complaint also indicates that ASARCO Amarillo Plant stored spent hazardous refractory brick.

Penalties were calculated for all 38 claims in the Complaint. The State of Texas claims relating to the Encycle violations are listed on pages 41-47 para 251-274 (relating to the case started by the TNRCC in a 1994 inspection).

Agreed Consent Decree entered on 10/7/99 by the US District Court for the US and State of Texas vs. Encycle and ASARCO requires corrective action pursuant to the TNRCC 1996 Order for the El Paso facility.

2. In my opinion the only thing to prove in order to require a post closure care permit and