

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

**PRE-TRIAL BRIEF OF ASARCO INCORPORATED IN ENVIRONMENTAL  
ESTIMATION PROCEEDINGS FOR UNITED STATES INTERNATIONAL  
BOUNDARY AND WATER COMMISSION CLAIM, EL PASO, TEXAS**

TO THE HONORABLE RICHARD S. SCHMIDT,  
UNITED STATES BANKRUPTCY JUDGE:

ASARCO Incorporated (“Parent”), parent corporation to and sole shareholder of ASARCO LLC (“Debtor”), respectfully submits its Pre-Trial Brief in the Environmental Estimation Proceedings relating to the Claim submitted by the United States International Boundary and Water Commissions:

## I. INTRODUCTION

This environmental estimation trial concerns claims asserted by the United States International Boundary and Water Commission (“USIBWC”) against ASARCO LLC (“Debtor”) related to 5.6 acres of land located to the west of Debtor’s smelter facility in El Paso, Texas (the “USIBWC Site” or the “Site”).<sup>1</sup> In all, USIBWC asserts a claim for nearly \$29 million in past and future remedial response costs. Following the presentation of all evidence from all sides, the Court will be convinced that the USIBWC claim should be reduced by at least 90 percent. The claim itself is straightforward. The genesis of the claim is environmental remedial costs that USIBWC alleges it will incur associated with the planned reconstruction of what is known as the American Canal. It has two basic elements – one for groundwater treatment and “dewatering” during construction, and the other for cleanup and disposal of soils along the Canal as it is being excavated, and in areas adjacent to the Canal.

USIBWC’s request is both proper and improper. It is proper because the property should be cleaned; we do not and will not argue otherwise. The claim is improper and inflated, in large part, because it has been revised to include a “gold plated” remedy which, by USIBWC’s own expert’s account, is too costly and not needed to complete the work. Indeed, long before this litigation began, USIBWC’s own consultant recommended that USIBWC consider other more cost-effective alternatives for the water treatment and dewatering. Yet, after this case was initiated, USIBWC retained new experts who disregarded such recommendations, and instead assessed remedial costs based on the most expensive alternative – without providing a viable basis for needing this alternative, particularly in the face of other available cost-effective methods that would be equally effective. As the Parent’s expert will testify, using a more traditional and cost-effective dewatering method would dramatically reduce the estimated costs.

USIBWC’s claim is further inflated because it indiscriminately includes costs for reconstruction projects that will be needed *regardless of contamination*. In addition, USIBWC relies on improper remediation standards and several unrealistic assumptions to further boost its claim. For example, USIBWC seeks to have the Site cleaned up to *residential* land use standards even though this property is an industrial site and sits on a

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<sup>1</sup> The Site also includes the American Dam Field Office and the American Canal, owned and operated by USIBWC.

flood plain that will never realistically be used for residential purposes. Lastly, USIBWC trumps up its claim by insisting the Debtor shoulder 100% of the liability, while ignoring established law and existing data that would require allocation among all potentially responsible parties for the Site, of which there are many, including USIBWC itself.

When all of these factors are properly considered, and proper allocation principles are applied, the Parent's environmental engineering experts conclude that the Debtor's proper allocable share of past and future response costs is only about \$0.85 million – a far cry from the \$28 million that is unrealistically sought.

**II. USIBWC'S REMEDIATION CLAIM IS INFLATED.**

USIBWC's claim seeks past remediation costs of approximately \$0.29 million and future costs of approximately \$28 million. The Parent's environmental engineer, Dr. Robert Powell, concludes that this claim is significantly overstated as follows:

**A. USIBWC's Claim Is Not Reasonable Or Cost-Effective and Includes Needed Repair Costs Regardless of Contamination.**

The first aspect of the claim that is overstated pertains to USIBWC's suggested cost of repair for the American Canal – which was constructed nearly 70 years ago and, over time, has undergone differential settlement and cracking that is causing seepage into underlying soils at an estimated rate of 80-120 million gallons per day. While the Parent does not dispute that the Canal has deteriorated to the point of requiring repair, this does not entitle USIBWC to recover costs for the most expensive repair method when other more cost-effective alternatives are available (and recommended by USIBWC's own consultants), or to recover costs for repairs that are needed regardless of contamination.

Long before this litigation, USIBWC retained Montgomery Watson Harza ("MWH") for the distinct purpose of developing a recommended plan for reconstructing the Canal with a larger capacity, as USIBWC desired. The proposed canal reconstruction will require dewatering during construction activities. After evaluating alternatives for handling and discharging the large volume of contaminated groundwater using traditional dewatering methods, MWH concluded that, in an ideal world where cost is no object, the best option would be to construct a water treatment plant to treat contaminated groundwater before discharging it into the Rio Grande. However, the costs for this alternative were estimated at \$18.7 million, or 57% of the total estimated reconstruction

project cost, and therefore *MWH did not consider it a viable alternative*. Instead, MWH recommended evaluating alternative viable low-water production dewatering methods.

Yet, when formulating this claim, the expert retained by USIBWC for this litigation conveniently ignored these opinions and recommendations of USIBWC's consultant for the project, and instead created a new estimate for the construction work based only on the most expensive alternative – the very same option that MWH concluded was not viable. USIBWC's expert now claims that this approach is essential to achieve the desired rate of dewatering during construction. But, as Dr. Powell will testify, the dewatering rate sought by USIBWC is highly excessive and unnecessary here and, as MWH previously advised, there are other significantly more cost-effective alternatives to achieve adequate dewatering rates. Moreover, the most costly alternative would entail a much longer construction period, which further increases overall costs. Indeed, MWH concluded in its report that construction period increases arising from this approach might disturb ongoing groundwater remediation efforts at the entire Site.

This claim is additionally inflated because USIBWC improperly tries to include *all* Canal repair costs in its claim without fairly delineating between (a) non-recoverable costs that will be needed, regardless of contamination, to repair aspects of the Canal due to natural aging and deterioration; and (b) costs that are truly necessary for repairs aimed at addressing environmental harms that are directly attributable to the Debtor.

**B. USIBWC's Estimates for Water Cleanup and Soil Disposal are Based On Unrealistic and Overly Conservative Assumptions.**

USIBWC relies on unrealistic and overly conservative assumptions when estimating costs for water cleanup and soil disposal in relation to the Canal. First, in calculating *water cleanup* costs, USIBWC's experts rely on MWH's dewatering calculation as the basis for evaluating the suitability of the proposed water treatment plant. There are several problems with this. Preliminarily, it strains credibility when USIBWC's expert selectively relies on MWH's work only when it helps to boost USIBWC's claim, but disregards MWH's work when it reduces the claim (*i.e.*, MWH's recommendation to consider lower cost alternatives). More importantly, according to Dr. Powell, MWH's estimate is simply unreasonable as a basis for any evaluation because it is based on an incorrect interpretation of the data. This incorrect interpretation leads to overly conservative and excessive assumptions concerning the volume of water that will

be generated during construction dewatering. This, in turn, led to USIBWC's demand for an unnecessarily expensive water treatment plant that can handle an unrealistically high dewatering rate that in reality will never be generated during Canal reconstruction. If traditional and commonly employed dewatering techniques are used during Canal reconstruction, the quantity of contaminated groundwater generated will be nowhere near the preliminary estimates by MWH. Even in its own report, MWH recommended additional study to develop more realistic volume estimates – but, of course, following such advice would lower USIBWC's claim, and therefore USIBWC's expert ignored this recommendation and instead relied on MWH's preliminary and incomplete estimates.

Similarly, when estimating *soil disposal costs* for the construction project, USIBWC's expert again relied on overly conservative and unrealistic estimates from MWH that are not supported by actual Site conditions. Apparently, USIBWC's expert overlooked that the quantities used by MWH for estimating soil disposal costs for the Canal relining project were “worst case scenario” quantities rather than the realistically expected quantities. Dr. Powell concludes that the quantity of soil excavation and removal will likely be no more than 1/3 of the current estimated amount.

**C. USIBWC's Claim Includes Inflated Worker Safety Costs.**

In its claim, USIBWC also includes inflated worker safety costs that will not be incurred if routine safety procedures and OSHA requirements are followed during canal construction. MWH's report properly notes that due to elevated concentrations of lead and arsenic, the OSHA Lead in Construction rule will apply during reconstruction for at least the *upper and middle sections* of the Canal alignment. USIBWC includes in its claim nearly \$1.2 million in costs to comply with this OSHA rule, based on an assumption that 10 workers will be required to wear “Level C” protection during the construction of *all sections* of the Canal. At any major construction project, worker safety costs are typically the cost and obligation of the construction contractor.

**D. USIBWC Applies Wrong Standard to the “Field Office.”**

USIBWC's expert also includes costs for three specified areas of the Field Office portion of the Site location which contain elevated metal levels. Soil samples revealed elevated concentrations of heavy metals in those areas; however, concentrations are still below acceptable levels for industrial sites at most sampling locations in these areas.

Nevertheless, to support its conclusion that remediation is necessary throughout these areas of the Site, USIBWC contends that this *industrial* Site should be cleaned up to levels that are fit for *residential* use, and USIBWC's expert therefore misleadingly references soil action levels associated with residential sites in nearby El Paso. USIBWC's claim is thus based on the speculative notion that this historically *industrial* site should be cleaned up to levels well beyond those that are acceptable for its historical use in order to allow unrestricted use, including *residential* use, in the future – but there are no such plans, now or in the future, to use the Site for residential purposes. Indeed, the Site exists on a flood plain, which would for all intents and purposes preclude future residential development.

The claim that *all* soils in these areas must be remediated is further speculative because ground surface soils contain higher metals concentrations than subsurface soil samples. While it is conceivable that soils in the top inch exceed acceptable standards, there is nothing to support USIBWC's conclusion – nor the associated remediation costs – that *all* soils within the identified Site areas must be excavated to a depth of two feet.<sup>2</sup>

#### **E. USIBWC Fails to Allocate Costs Among All PRPs.**

Finally, where, as here, there is historical data showing a number of entities operating on or around the Site over various periods, many of which released the hazardous heavy metals into the environment, there is a reasonable basis for apportioning liability among all PRPs. *In re Bell Petroleum Servs.*, 3 F.3d 889, 895 (5th Cir. 1993). . . Indeed, as owner of the site, USIBWC is itself liable for its share of remediation costs as owner. Even if joint and several liability were to be imposed under § 107 of CERCLA, liability should still be equitably allocated under § 113(f) of CERCLA. 42 U.S.C. § 9613(f); *United States v. Hercules, Inc.*, 247 F.3d 706, 718 (8th Cir. Ark. 2001).

### **III. CONCLUSION**

USIBWC has significantly overstated cleanup costs at the Site. It seeks to recover costs for remedial activities that are unrelated to contamination, unnecessary and based on unrealistic and unfounded assumptions, inappropriate soil standards, and an improper attempt to charge the Debtor with liability for which it is not responsible.

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<sup>2</sup> USIBWC's expert fails to consider other approaches such as "hot spot" removal, removal of the soils at the surface, or "capping" that are far less costly than the suggested approaches, and equally protective of human health and the environment.

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