

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
	§	
	§	
	§	

**ASARCO LLC'S REPLY BRIEF FOR THE
UNITED STATES INTERNATIONAL BOUNDARY AND WATER COMMISSION
(USIBWC) SITE**

I. INTRODUCTION

On November 29, 2007, the United States International Boundary and Water Commission (“IBWC”) filed its Pre-Trial Brief (the “IBWC’s Brief”) addressing issues likely to arise during the December 7, 2007 hearing to estimate the IBWC’s claims for the IBWC Site (the “Site”). A careful reading of the IBWC’s Brief reveals four important facts. First, the IBWC cannot support its own groundwater pumping estimate of 8,000 gpm or seriously challenge ASARCO’s groundwater model and pumping estimate of 350 gpm. As a result, IBWC’s cost assumptions are exaggerated. Second, the IBWC proposes groundwater and soil remedies that are not consistent with the National Contingency Plan (“NCP”), 40 C.F.R. Part 300, because they are not cost-effective and were not selected after a serious review of alternatives. Third, the IBWC fails to recognize that CERCLA requires that federal agencies that are potentially responsible parties (“PRPs”) be treated just like other PRPs, which means the IBWC is not entitled to joint and several liability or attorneys’ fees. Finally, the IBWC portrays conditions at the Site as worse than they truly are.

II. ARGUMENT

A. The IBWC Offers No Substantive Support For Its Groundwater Claim

The IBWC seeks \$23.9 million for its canal reconstruction project, roughly \$22 million of which is for groundwater treatment. *See* IBWC’s Brief at 8. Despite making such a large claim, the IBWC does not offer any support for why its claim for an 8,000 gallon per minute (“gpm”) treatment system should be given any weight. *See* IBWC’s Brief at 21-22. The IBWC assures the Court that the IBWC’s expert, Dr. Medine, thinks 8,000 gpm is “reasonable” and “conservative.” *Id.* at 21. The IBWC goes on to note that this number is supported by a United States Army Corps of Engineers assessment as well as computations by an IBWC engineer. *Id.* The IBWC fails to provide key details such as admitting to errors made by the

IBWC engineer, or that the Army Corps did not assess the 8,000 gpm number but rather was merely inspecting conditions of the IBWC's dam. The IBWC also fails to note that no one, including the IBWC or Dr. Medine, knows how the IBWC's contractor, Montgomery Watson Harza, generated the 8,000 gpm estimate. This Court should not accept the IBWC's estimate given the IBWC's failure to provide any detail for why such an estimate is credible.

Likewise, the IBWC's claim that ASARCO experts rely "on a set of assumptions which are unverified by any actual site data" is untrue. As ASARCO's hydrogeologist, Brian Hansen, will explain, the model and his work are consistent with years of study results at the Site including the MWH Report, ASARCO's Phase III Remedial Investigation, groundwater slug tests, and measured arsenic loadings in the River. *See* Depo. of Brian Hansen, pp. 86-88 (Exhibit D-173); Direct Proffer of Brian Hansen, ¶22 (Exhibit D-177). Thus, ASARCO's estimate is consistent with and verified by the latest actual site data. Equally important, it is transparent and reasonable. Consequently, this Court should rely on ASARCO's groundwater analysis to estimate the IBWC's claim.

B. IBWC's Presumed Remedies Do Not Comply With the National Contingency Plan and Should Be Rejected

1. The IBWC's groundwater remedy does not comply with the NCP

The IBWC's groundwater remedy does not comply with the NCP in several material respects. First, it does not contain an analysis or consideration of various alternatives. Second, it is not cost effective. Finally, the IBWC's groundwater remedy has not been subjected to public comment. As such, IBWC's treatment choice should not be afforded administrative deference.

a. The IBWC did not consider any alternatives to groundwater pumping at 8,000 gpm

Although the IBWC claims that the Montgomery Watson Harza Report (“MWH Report”) “contained various alternative response actions” for the IBWC’s consideration,” *see* IBWC’s Brief at 6, this is a broad overstatement. The MWH Report sets forth one treatment scenario and notes that multiple other alternatives might exist. MWH Report, 4-8, -9 (Exhibit D-4) (“Consequently, alternative construction dewatering methods should be evaluated during the preliminary design Consequently, alternative methods could be considered in lieu of dewatering wells”) (emphases added). The MWH Report never actually analyzes any of these alternatives. The most that can be said is the MWH Report devoted two pages to assessing which of three different types of water treatment system would be best. *Id.* at 4-19, -20. However, even this cannot be seriously described as thorough given MWH’s description of its recommendation as a “Preliminary Recommendation” that “should be [further] evaluated.” *Id.* at 4-22.

b. The groundwater remedy is not cost effective

The IBWC’s failure to consider alternatives makes it impossible for the IBWC to demonstrate that its remedy is the most cost-effective. After all, the IBWC has no alternatives against which it can compare its 8,000 gpm dewatering. The IBWC attempts to do so by arguing that such a large system is necessary to address “peak” flow rates. *See* Surrebuttal Report of Allen Medine, 10-11 (Exhibit D-184). Putting aside the question of whether such a system is needed, it cannot be the case that a system designed to handle peak flows rates is the most cost effective when MWH itself suggested that an 8,000 gpm system was “cost prohibitive” and suggested various construction alternatives that would reduce the cost of treating water even during peak flows. MWH Report, 4-8, -9 (Exhibit D-4).

c. The groundwater remedy was not subject to public comment

The IBWC's selection of the groundwater remedy without public comment also violates the NCP. *See* IBWC's Brief at 6. The IBWC notes that it "made available the findings" of its groundwater report. *Id.* This is not public participation, it is telling the public what has been decided. The NCP requires that the public be given a meaningful opportunity to participate in the remedy selection process. EPA suggests among other things a community relations plan, public interviews, and a public comment period. *See* EPA's *Community Relations Handbook*, p. 5 (OSWER Dir. 9230.0-03C) (*available at* http://ar.inel.gov/owa/getimage_2?F_PAGE=1&F_DOC=EPA/540/R-92/009&F_REV=00) (last visited December 1, 2007). The IBWC did none of these things and does not seriously argue that it did. Therefore, the IBWC faces a serious, potentially fatal, impediment to recovering for the remedy it proposes to this Court.

2. The IBWC's soil remedy does not satisfy the NCP

The IBWC's soil remedy suffers from many of the same problems as its groundwater remedy. The IBWC can point to no document wherein the IBWC analyzed alternatives to the remedy it proposes to this Court. The IBWC appears never to have seriously analyzed the possibility of alternative remedies such as hot spot removal. Likewise, the IBWC never involved the public in the remedy that is now being proposed. The IBWC makes no serious effort to defend the cost-effectiveness of its soils remedy either.

The IBWC insists that residential standards must be applied because the IBWC does not want a deed restriction on its property. *See* IBWC's Brief at 16. The IBWC is free to clean its property to whatever level it wants. The question for this Court, however, is whether doing so is cost effective and therefore consistent with the NCP. Industrial/commercial

standards would protect the IBWC's industrial workers because that is what the standards are intended for. Cleaning to residential standards for property that will never be put to residential use would require spending more money in exchange for no meaningful increase in protection, and such action cannot be cost effective.

C. The IBWC Is a Potentially Responsible Party (PRP)

The IBWC is a potentially responsible party ("PRP") and therefore is not entitled to joint and several liability or recovery of attorneys' fees. Under CERCLA Section 120(a), a federal entity may be held liable in the same manner as a private party if it acted as an owner, operator, generator, arranger or transporter as defined under Section 107. 42 U.S.C. § 9620(a)(1); *Differential Development-1994, Ltd. v. Harkrider Distributing Co.*, 470 F. Supp. 2d 727 (S.D. Tex. 2007) ("*Differential Development-1994*") (holding that "federal and state governments may sue in their enforcement capacity for response costs against potentially responsible parties, and may be liable for response costs as potentially responsible parties."); *see also U.S. v. City of New Orleans*, 2003 WL 22208578, *2 (E.D. La. 2003) (holding that "a plain reading of the language [of 42 U.S.C. §9620(a)(1)] is that the government is subject to CERCLA liability just like any private party or nongovernmental entity is subject to CERCLA liability.") (emphasis added).

The evidence will show that the IBWC is liable under CERCLA Section 107 as the current owner/operator of the site and an arranger of waste disposal. *See* ASARCO's Brief at 14-16; *see also Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) ("*Tanglewood East*") (CERCLA liability under Section 107(a)(1) "imposes strict liability on the current owners of any facility" and that disposal for the purposes of arranger liability includes parties "that move the waste about the site"). Based on its status as owner of

the property, operator of the property, and an arranger, the IBWC's status as a PRP under CERCLA is quite possibly the most easily resolved issue regarding this Site.¹

1. PRPs are not entitled to joint and several liability.

As a PRP, the IBWC is not entitled to recover jointly and severally from another PRP. The Fifth Circuit has held that “[w]hen one liable party sues another liable party under CERCLA, the action is not a cost recovery action under §107(a), and the imposition of joint and several liability is inappropriate.” *Elementis Chromium L.P. v. Coastal States Petrol Co.*, 450 F.3d 607, 613 (5th Cir. 2006). This holding is further supported by courts of appeals that have consistently held “that a PRP could not bring an action against another PRP for cost recovery, on a theory of joint and several liability, under section 107(a), but was instead limited to an action for contribution under one of the two provisions of section 113(f).” *Differential Development*, 470 F. Supp. 2d at 757 n.12 (collecting cases). Thus, the IBWC is a PRP and has no standing to impose joint and several liability on ASARCO.

2. PRPs cannot recover attorneys' fees.

Finally, although the IBWC makes a claim for attorneys' fees, in part through the expert report of William Kime, attorneys' fees are not a recoverable cost of litigation absent explicit congressional action. *See Key Tronic Corp. v. U.S.*, 511 U.S. 809, 814 (1994) (citing *Runyon v. McCrary*, 427 U.S. 160, 185 (1976)). Neither CERCLA Section 107 nor Section 113 expressly dictate the recovery of attorneys' fees. *Id.* at 815. Accordingly, attorneys' fees related to actions under these sections of CERCLA are not subject to recovery by a PRP. This holding

¹ The United States' reliance on *United States v. Chrysler Corp.*, 158 F. Supp.2d 849 (N.D. Ohio 2001), is misplaced. In that case, the court went to great lengths to explain that the National Park Service (“NPS”) was entitled to joint and several liability because the NPS became a PRP (as an owner) only in order to clean the site, which warranted an exception to the general rule in the Sixth Circuit that PRPs were not entitled to joint and several liability. *Id.* at 859-60. The IBWC, on the other hand, is merely a land-owning PRP that exacerbated conditions on its property that happens to be owned by the government. There is no justification to make an exception to the plain language of Section 120(a) under these circumstances.

was recently applied by the United States District Court for the Eastern District of Texas in a CERCLA case which held that a party “cannot recover its attorneys’ fees as CERCLA response costs.” *Vine Street, LLC v. Keeling*, 460 F. Supp. 2d 728 (E.D. Tex. 2006). Thus, the IBWC’s claim for attorneys’ fees must be denied.

D. The IBWC Exaggerates Environmental Conditions at the Site

IBWC’s Brief incorrectly suggests a threat to drinking water supplies in El Paso. *See* IBWC’s Brief at 11. The IBWC references groundwater samples from the Site, some of which exceeded regulatory criteria for drinking water, and simultaneously raises concern over contamination of the American Canal. Importantly, the IBWC never actually claims that (1) the groundwater in this industrial area is or ever will be used for human consumption; (2) the American Canal or the Rio Grande River exceed regulatory criteria for drinking water; or (3) the groundwater beneath the IBWC Site is having a measurable impact on water quality in either the American Canal or the Rio Grande. *See* IBWC’s Brief at 12-13. The IBWC also claims that contaminated soil poses a threat to groundwater, *see* IBWC’s Brief at 13-14, although a close reading of the expert reporting underlying the IBWC’s claim reveals no evidence that any leaching of metals into groundwater is actually taking place. *See* Rebuttal Report of Allen Medine, p. 4 (Exhibit D-134). Thus, the IBWC’s claims lack a factual basis.

Moreover, the IBWC downplays the fact that environmental regulators are aware of conditions in the area and have already taken steps to address them. ASARCO is in compliance with the 1996 TCEQ Agreed Order. ASARCO has never been cited for failing to meet its obligations to implement source control measures to control groundwater, which it has been doing for several years. *See* Direct Proffer of Thomas Klempel, ¶¶4-7 (Exhibit D-178); Direct Proffer of Jeffrey Zelikson, ¶12 (Exhibit D-179). The IBWC is under no regulatory or

administrative order to address the groundwater under its property. *See* Deposition of Allen Medine, p. 59: 4-15 (Exhibit D-190). Presumably EPA and TCEQ would not stand idly by if contaminated groundwater were seeping through the IBWC's canal and poisoning El Paso's drinking supply.

The IBWC claims about drinking water are also contradicted by the IBWC's own June 2004 report on the Rio Grande River around El Paso, Texas, which concluded in the "Significant Findings" section that "Arsenic levels in water did not exceed the water quality criteria for either the protection of aquatic life or human health." *Third Phase of the Binational Study Regarding the Presence of Toxic Substances in the Upper Portion of the Rio Grande/Rio Bravo Between the United States and Mexico*, p. 85 (Exhibit D-27). That report went on to note that the "water and sediment toxicity tests run on samples collected during the Phase III showed no significant effect on test organisms." *Id.* at 86.

The IBWC also claims that it must provide protective gear to workers that will be handling soils at the Site, IBWC's Brief at 14, even though the IBWC's workers routinely move soil about the Site already and have not been instructed by the IBWC to take any protective measures. *See* Deposition of Gabriel Duran, pp. 93-94, 109-11 (Exhibit D-172). Furthermore, the IBWC fails to concede that its only basis for claiming that protective equipment is necessary is the MWH Report, which said this equipment "may" be necessary – not that it "will" be necessary. *See* Depo. of Dr. Powell, pp. 148-51 (Exhibit D-191). Again, the IBWC overstates conditions at the Site to inflate its claim.

III. CONCLUSION

The IBWC's Brief fails to acknowledge key flaws in the IBWC's groundwater and soil claims. As explained in ASARCO's Brief, the issues before this Court are relatively

narrow and straightforward. The IBWC's failure to address those issues directly and to resort instead to vague claims about environmental threats and ASARCO's past operations is indicative of how weak the IBWC's claim truly is.

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