

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

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

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**UNITED STATES’ REPLY BRIEF  
TO ASARCO LLC’S PREHEARING BRIEF ON  
UNITED STATES SECTION, INTERNATIONAL BOUNDARY AND WATER  
COMMISSION, UNITED STATES AND MEXICO SITE**

**I. INTRODUCTION**

The United States submits this Reply Brief in opposition to Asarco LLC’s Prehearing Brief on the United States International Boundary and Water Commission (USIBWC) Site.

Asarco LLC (“Debtor”) argues that USIBWC’s claim, consisting of soil and groundwater components, is excessive. While the Debtor agrees that the groundwater is currently contaminated, it alleges that the cost associated with the groundwater treatment system is overestimated. Debtor’s position concerning the cost of the treatment system is based on estimates provided by Debtor’s groundwater modeling efforts.

USIBWC’s Response Action seeks to address the potential threat to the Rio Grande, groundwater, and to USIBWC construction workers. The Response Action includes both a groundwater and soils component. The proposed American Canal project addresses the potential threat to the Rio Grande by precluding the migration of contaminated water and fines through the currently deteriorated American Canal concrete lining. The proposed soil excavation along the canal during the project construction and the excavation and replacement of soils in the

Office and Island areas address potential threats to the groundwater and to current USIBWC employees and construction workers in the area.

USIBWC is not seeking construction costs relating to the American Canal project or costs relating to the removal of soils in the Office and Island areas. Significantly, USIBWC is also not seeking the cost of dewatering soil during the construction of the American Canal project. USIBWC is solely seeking the additional costs associated with contamination of soils and groundwater with lead, arsenic, cadmium, and hydrocarbons it will be forced to incur during the construction of the Canal project and during the removal and replacement of soils in the Office and Island areas (including the cost of decontaminating water produced during the dewatering to be done for the Canal construction project).

The record demonstrates that USIBWC's selected remedy is consistent with the National Consistency Plan ("NCP") and Debtor's argument must fail.

## II. ARGUMENT

### A. DEBTOR CANNOT SHOW THAT UCIBWC ACTED INCONSISTENTLY WITH THE NCP AT THE UCIBWC SITE, AND CANNOT REDUCE COSTS THROUGH A "DECISION TREE" ANALYSIS

USIBWC followed a process consistent with the NCP resulting in the selected Response Action that seeks to address the risks associated with contaminants entering the Rio Grande, to remove lead- and arsenic-contaminated soils, and to treat the contaminated water during repair of the American Canal. USIBWC: 1) assessed the harm in its Environmental Assessment ("EA") and Conceptual Design Study of Replacement Canal Lining ("MWH Study"); 2) identified alternatives; 3) invited public participation; and 4) selected an appropriate response.

By law, the United States' selection of CERCLA response actions is reviewed deferentially. A challenge to USIBWC's actions must be limited to the administrative record under an arbitrary and capricious standard of review. 42 U.S.C. § 9613(j); In the Matter of Bell Petroleum Services, Inc., 3 F.3d 889, 904-5 (5th Cir. 1993). Debtor must affirmatively establish that the response actions giving rise to the challenged costs are inconsistent with the NCP. United States v. Hardage, 982 F.2d 1436, 1442, 1444-45 (10th Cir. 1992); United States v. Ne. Pharm. and Chem. Co., 579 F. Supp. 823, 852 (W.D. Mo. 1984). To carry its burden, Debtor must show that the inconsistency was so grave and of such central importance to the response action that the response action itself would have been significantly different absent the inconsistency. 42 U.S.C. § 9613(j)(4). Further, the focus of the NCP is not on "cost," but on the procedures for the selection of the response action:

The NCP regulates choice of response action, not costs. Costs, by themselves, cannot be inconsistent with the NCP. Only response actions--i.e., removal or remedial actions--can be inconsistent with the NCP, which can be demonstrated by a showing that the government's choice of response action was arbitrary and capricious. As long as the government's choice of response action is not inconsistent with the NCP, its costs are presumed to be reasonable and therefore recoverable.

See Hardage, 982 F.2d at 1443 (emphasis in the original). Even then, because Section 107(A)(4) speaks in terms of "costs" inconsistent with the NCP, the defendant will only succeed if it shows that the deviation from the NCP resulted in costs "demonstrabl[y] [in] excess" of what would have been incurred absent the deviation. O'Neil v. Picillo, 682 F. Supp. 706 (D.R.I. 1988), aff'd 883 F.2d 176 (1st Cir. 1989).

**1. USIBWC'S RESPONSE ACTION IS NOT ARBITRARY AND CAPRICIOUS**

The steps taken by the USIBWC in responding to the risk posed by Asarco's contamination are consistent with the NCP criteria. 40 C.F.R. § 300.415. The NCP requires that when a federal agency undertakes a removal action, it conduct an engineering evaluation/cost analysis, or its equivalent. 40 C.F.R. § 300.415(b)(4). USIBWC did conduct the equivalent to an EE/CA; it completed an EA and contracted for the MWH Study to focus on environmental concerns and to collect samples. USIBWC invited public comments, and specifically invited Asarco to participate in its decision-making as required by 40 C.F.R. § 300.415(n).

USIBWC also considered a number of alternatives when deciding the proper course, and selected the appropriate response action. The selection of response actions is within the technical and scientific expertise of the agency, and judicial review requires deference to an agency's decisions. See United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 748 (8th Cir. 1986). At virtually every site in the Superfund program alternative approaches exist. In fact, CERCLA requires federal agencies to evaluate alternative remedial approaches at every site, a process USIBWC has engaged in, and continues to engage in relating to this Site. The argument of Debtor's expert that he believes there are clean-up alternatives that might be cheaper than the response actions selected by USIBWC is irrelevant to any question of NCP consistency. The record supports USIBWC's selected response action and confirms its consistency with the NCP. The law is clear that this Court should not substitute its judgment, or that of Asarco's witness, for that of USIBWC.

Asarco's particular NCP challenges will be addressed at the hearing, but the administrative record is clear that the actions taken by USIBWC to date result from extensive and careful consideration of the many issues USIBWC is required to consider when exercising

its statutory authority to protect the public health from a recognized danger. Asarco cannot meet the burden that inconsistencies with the NCP caused grave results, or excessive costs.

a. **USIBWC's Proposed Removal Action Regarding the American Canal Project and Office and Island Soil Removal Was Not Inconsistent with the NCP**

A federal agency can undertake removal actions without referring to the NCP, and its actions can still satisfy the NCP if the NCP requirements are met. United States v. E.I. du Pont de Nemours & Co., 341 F. Supp. 2d 215 (W.D.N.Y. 2004) (EPA conducted a removal action under RCRA, and brought a cost recovery action under CERCLA, its costs were recoverable and not inconsistent with the NCP). Regardless of the label applied to the response selection procedures, the challenging party must demonstrate based on the administrative record that the procedures followed were inconsistent with the NCP requirements.

While not specifically characterizing its actions as CERCLA response actions, USIBWC followed a process that mirrored the requirements of the NCP. When USIBWC developed the need to reconstruct the two mile segment of the American Canal it commissioned MWH Study. The MWH Study identified additional costs associated with contamination of soils and groundwater with lead, arsenic, cadmium and hydrocarbons which had migrated from the Asarco Asarco Smelter. Similar to a CERCLA response action under the NCP, the Design Report considered various alternatives for addressing the contamination.

USIBWC's chosen response actions for the remediation of soils at the Office Compound and the Island were not inconsistent with the NCP. Asarco cannot meet its burden of proving that the USIBWC's actions were inconsistent with the NCP simply by pointing out that USIBWC did not refer to CERCLA by name. Further, USIBWC collected samples of sufficient

quality and quantity to determine the high levels of contamination were affecting the soil over the entire property.<sup>1/</sup> Nothing in the record seriously disputes this. The sampling data demonstrates that it was necessary to take action to “abate, prevent, minimize, stabilize, mitigate, or eliminate the release or threat of release” to the public health and welfare of the United States and the environment. 40 C.F.R § 300.415(b). Debtor will be unable to prove that the costs incurred to address the soil contamination are in excess of what would have occurred had USIBWC followed the eight step procedure detailed on 40 C.F.R. § 300.415(b).

**B. THE BASIS OF ASARCO’S DEWATERING ESTIMATE IS TECHNICALLY DEFICIENT**

ASARCO states that its own dewatering estimate of 350 GPM is primarily based on its groundwater modeling efforts. Debtor Brief at 4. Leaving aside the fact that ASARCO is offering evidence that is not in the administrative record, the evidence does not prove anything relevant.

The purpose of the ASARCO model was to simulate conditions USIBWC would face when constructing the canal project. A vital goal of the model was to assess the pumping rate required to result in a 10-foot depression of water level to allow the American Canal work to proceed. Debtor’s brief does not mention that the ASARCO model failed to achieve this 10-foot depression, thus significantly underestimating the GPM rate (and associated cost) and rendering the data irrelevant. Dr. Allan Medine’s Surebuttal Report includes the results of modeling

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<sup>1/</sup> Allen J. Medine, Rebuttal Expert Report, Analysis of Contamination on the United States Section International Boundary and Water Commission (USIBWC) Property in Relation to the ASARCO El Paso Smelter, Sept. 15, 2007, p. 3-7 (IBWC011714-18) Exhibit No. USIBWC046; Allen J. Medine, Analysis of Contamination on the United States Section International Boundary and Water Commission (USIBWC) Property in Relation to the ASARCO El Paso Smelter, July 27, 2007, p. 9-11 (USIBWC004059-61) Exhibit No. USIBWC032.

simulations that demonstrate the 350 GPM dewatering rate used by Mr. Brian Hansen and Arcadis is underestimated because it failed to meet the required 10 foot depression.<sup>2</sup>

The Debtor also erroneously states that Mr. Brian Hansen independently confirmed that the Arcadis model was appropriately constructed and its 350 GPM estimate is reliable. Debtor Brief at 5. Mr. Hansen, however, testified that he did not independently confirm the model.<sup>3</sup> He did not prepare independent model runs or calculations. Instead, Mr. Hansen's "confirmation" was based on two telephone conversations with the computer model preparer.<sup>4</sup> Mr. Hansen admitted that he had never used, nor was an expert on, the computer model in question.<sup>5</sup>

Mr. Jeffrey Zelikson, in his November 5, 2007, expert report, relied on Mr. Hansen's opinion that the 350 GPM was the appropriate basis to estimate costs without any confirming independent analysis.<sup>6</sup> Mr. Zelikson's first expert report, dated July 27, 2007, used a 400 GPM rate that was solely based on conversations with an Asarco employee.<sup>7</sup>

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<sup>2</sup>Allen J. Medine, Surrebuttal Expert Report, Analysis of Contamination on the United States Section International Boundary and Water Commission (USIBWC) Property in Relation to the ASARCO El Paso Smelter, November 25, 2007, p. 9 (IBWC018814) Exhibit No. USIBWC101.

<sup>3</sup> Brian G. Hansen Deposition, November 12, 2007, p. 85-86 Exhibit No. USIBWC089.

<sup>4</sup> Id. at 76-79.

<sup>5</sup> Id. at 82-83, 115.

<sup>6</sup> Jeffrey Zelikson Deposition, November 14, 2007, p. 53-54 Exhibit No. USIBWC087.

<sup>7</sup> Id. at 72-74.

In sum, the record clearly does not support the Debtor's claim that the 350 GPM rate, an estimate much of their case depends upon, is reliable due to its reliance on a modeling estimate that was technically deficient and conversations with Asarco employees.

**C. THE USIBWC IS NOT LIABLE UNDER CERCLA**

**1. USIBWC Is Not an Arranger under Cercla**

Debtor, which polluted USIBWC's property, wrongly seeks to attribute 10% liability to the United States. Debtor argues that USIBWC is liable as an arranger, under 42 U.S.C § 9607(a)(3), because it might have moved soils on USIBWC property that were contaminated by Asarco's smelter.

Under CERCLA, arranger liability attaches when an entity "arranged for" disposal of hazardous substances. 42 U.S.C. § 9607(a)(3).<sup>87</sup> Debtor presents no evidence that any soils that USIBWC personnel moved contained hazardous substances. As such, Debtor fails to carry its burden of proving that USIBWC is liable under CERCLA. Debtor's own expert, Mr. White, concluded that if the particular soils moved were not contaminated, then the USIBWC should not be allocated a 10% share of liability.<sup>88</sup>

To support its claim for USIBWC liability, the Debtor has attempted to apply the Fifth Circuit analysis in Tanglewood-East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988). In Tanglewood, homeowners brought a CERCLA cost recovery action under 42 U.S.C. § 9607(a) against a property development company for contamination on the Site

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<sup>87</sup>Debtor also points this out in the Asarco, LLC Trial Brief, page 15.

<sup>88</sup>Deposition of Richard Lane White, November 14, 2007, P. 33, line 17-19. Exhibit No. USIBWC088.

caused by a wood treatment facility. The wood treatment facility owners sold the Site to the property development company. The developer filled and graded areas of contamination and built homes, which it later sold. The developer filed a motion to dismiss the homeowner's suit on several bases, including that it was not liable as an "arranger." While the Court denied the motion to dismiss to allow more evidence to be evaluated, the Court did state that there may a disposal when hazardous materials are moved, dispersed, or released during landfill excavations and fillings. *Id.* at 1573. This rationale does not avail ASARCO here because ASARCO has offered no evidence that USIBWC moved any soil that contained hazardous substances.

Moreover, whether USIBWC might be viewed as an "arranger" is irrelevant in this case because ASARCO's argument that USIBWC should be liable for 10% of the costs is essentially a counterclaim for contribution under 42 U.S.C. § 9613(f). As such, ASARCO must satisfy the burden of proving under "such equitable factors as the court determines are appropriate," that USIBWC should bear some portion of the costs of cleanup.

Since ASARCO polluted the USIBWC's property, the equities here require ASARCO to pay 100% of the cleanup costs even if the victim of ASARCO's pollution, USIBWC, could be viewed as an arranger under CERCLA. ASARCO must carry the burden of proving why it is appropriate to require the victim of ASARCO's pollution, rather than ASARCO, to pay any part of the cleanup costs. ASARCO claims that USIBWC should pay 10% because in the course of making use of its property in carrying out its mission USIBWC might have moved some contaminated soils. However, as noted above, ASARCO must (and has filed to) prove that USIBWC actually did move contaminated soil. Moreover, even if USIBWC moved

contaminated soil, the Debtor must (and has not) proved that moving the soil caused the remediation costs to increase.

Moreover, the USIBWC Site has been subjected to the release of contamination from the Asarco Smelter property for the approximate 70 years that the agency and the Asarco Smelter have been operating adjacent to one another. It would not be reasonable to demand that USIBWC abandon its mandate and discontinue operations rather than take the risk that its activities might have some impact on a polluter's liability to clean up its pollution.

For these reasons, it is vital that the Asarco be held responsible for the lead and arsenic soil contamination at the USIBWC Site so that the Agency can implement its selected remedy and effectively carry out its mission without always contending with the underlying harm.

## **VI. CONCLUSION**

Asarco contaminated the USIBWC's property over the course of its operations and hazardous substances continue to migrate on the Site. Asarco admits it caused 90% of the environmental harm. A environmental response action is necessary for the protection of human health, by treating the contaminated water and disposing of contaminated soils while addressing exposure risks for workers. Asarco should be found liable for all costs of contamination its facility has caused. By awarding USIBWC the amount necessary to address this harm it will reduce the threat and impact of contamination on the USIBWC Site and to the surrounding communities.

Respectfully submitted,

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/s/

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Dated: December 3, 2007

**CERTIFICATE OF SERVICE**

I certify that on December 3, 2007, a true copy of the foregoing United States' Reply Brief was served on all parties on the service list entitled to notice through the Court's electronic filing system.

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ALAN TENENBAUM