

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

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

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

II. SITE HISTORY

A. SITE CONTAMINATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. AMERICAN CANAL PROJECT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. SUMMARY OF CLAIMS

A. PAST COSTS

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

B. FUTURE COSTS

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

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

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

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

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

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

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

IV. GOVERNING ENVIRONMENTAL LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

V. ARGUMENT

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

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

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

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

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

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

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

Paso's drinking water during the irrigation season (February through October) when the City draws water from the American Canal. The TCEQ concluded that, while the American Canal is a source of drinking water for part of the year, there is the potential for the Canal to be used for drinking water at any time of the year, particularly considering the water issues facing West Texas.^{25/} TCEQ recommended that either the maximum contaminant levels ("MCLs")^{26/} should be met for a surface water in the American Canal, or a series of quarterly samples that indicate a consistent trend of concentrations below the MCL should be demonstrated.^{27/}

Data collected by USIBWC and Debtor have identified contaminated groundwater along the American Canal's three sections (upper, middle and lower). Concentrations of arsenic and lead exceeded the MCLs in the upper, middle and lower sections; concentrations of selenium exceeded the MCLs in the upper section, and concentrations of cadmium in the middle section.^{28/} Concentrations of contaminants exceeding the MCLs along the American Canal are a serious concern due to at least one documented example of contaminated groundwater entering the

^{25/} Letter to Lairy Johnson, ASARCO Incorporated, from Brad Wilkinson, Texas Natural Resource Conservation Commission, dated February 14, 2001. (IBWC005275-5283) Exhibit No. USIBWC032, (TCEQ formerly known as TNRCC, see fn 4).

^{26/} The maximum contaminant level is defined as the maximum permissible level of a contaminant in water which is delivered to any user of a public water system. See, 40 C.F.R. § 141.2

^{27/} Letter to Lairy Johnson, ASARCO Incorporated, from Brad Wilkinson, Texas Natural Resource Conservation Commission, dated February 14, 2001. (IBWC005275-5283) Exhibit No. USIBWC032.

^{28/} Medine, July 27, 2007 Report at p. 12 (IBWC004062), Exhibit No. USIBWC032.

American Canal.^{29/}

Debtor's own expert groundwater modeling report ("Asarco Groundwater Report"), based on recent sampling, concludes that arsenic concentrations in the Rio Grande and American Canal during the "low flow" periods (March through August) have increased in recent years.^{30/} The Asarco Groundwater Report attributes the increase in the arsenic concentrations to arsenic impacted groundwater discharging to the Rio Grande. The Report did not evaluate arsenic loading during the "high flow" periods (September through February), but indicated it is probable that significant leakage along the American Canal may occur due to cracking of the concrete liner as identified in the MWH Report. While the Asarco Groundwater Report did not evaluate arsenic loading during the "high flow" periods, recent groundwater sampling conducted by Asarco during the Winter period of 2006 and the Winter period of 2007 demonstrates certain wells on the USIBWC property exceeding the MCL levels for Arsenic.^{31/}

b. A Release or Threatened Release of Hazardous Substances affects the Soils

- i. Canal Soils are and have potential to be continually contaminated due to migration from the Asarco Facility.

^{29/} Letter to Lairy Johnson, ASARCO Incorporated, from Brad Wilkinson, Texas Natural Resource Conservation Commission, dated July 13, 2000. (IBWC011638-11640), Exhibit No. USIBWC039.

^{30/} Arcadis Groundwater Model Report, dated, September 28, 2007. ((IBWC015784-15798), Exhibit No. USIBWC060.

^{31/} Thomas Klempel Deposition, November 9, 2007 at p. 169-74, Exhibit No. USIBWC091, Environmental Services - Semi Annual Sampling, ASARCO's Remedial Investigation, Winter 2006 (IBWC001092-1146), Exhibit No. USIBWC094, Environmental Services - Semi Annual Sampling, ASARCO's Remedial Investigation, Winter 2007, (IBWC001039-1076) Exhibit No. USIBWC095.

The parties agree that the MWH report identified contamination in 18 soil borings located along all three sections of the American Canal.^{32/} Arsenic exceeded both the residential and industrial soil screening levels at all 18 locations. Lead exceeded the residential standard in 5 of 18 location and the industrial standard in 2 of 18 locations. Due to elevated levels attributed to contamination from the Asarco Smelter, USIBWC will need to provide worker protection measures and manage and dispose of the contaminated soil.^{33/}

The soil remediation level proposed by the MWH Conceptual Report reflects the need to consider the protection of the groundwater and the surface water of the Rio Grande and the American Canal because both are sources of drinking water. Accordingly, standards such as the Safe Drinking Water MCLs must be considered because the groundwater is directly linked to a City of El Paso public water supply. In contrast, Debtor's experts simply propose an industrial standard for soil remediation, without taking into consideration the effect of "cross-media protection".^{34/} Cross-media protection refers to situations where the soil contamination has the potential to leach contaminants into a public water supply. In this case, the soil contamination at the USIBWC Site poses such a risk to a drinking water supply.

- ii. The American Canal Complex Office and Island faces a Release or Threat of Release from the Asarco Facility.

Lead, arsenic, cadmium, and other metals have been found at the American Canal

^{32/} Medine, July 27, 2007 Report at p. 12 (IBWC004062), Exhibit No. USIBWC032.

^{33/} Zelikson Report, App. B-17, July 27, 2007 at 13, (IBWC004264), Exhibit No. USIBWC035.

^{34/} Medine, September 15, 2007 Report at p. 4 (IBWC011715), Exhibit No. USIBWC046.

Complex and “Island” area. Debtor took five soil samples in October 2002.^{35/} Two soil samples showed lead concentrations exceeding the industrial screening level and one sample exceeding the residential screening level.^{36/} In addition two other soil samples exceeded the residential screening level for arsenic. These elevated levels are consistent with previous sampling conducted when a Guardhouse project within the Canal Compound was constructed, which also found elevated levels of arsenic, cadmium, lead, and, mercury.^{37/} The USIBWC preliminarily identified the need to excavate and replace the contaminated soils at both areas based on these elevated levels of contaminants.

The American Dam Compound areas houses the offices of the USIBWC’s operational and maintenance workers. USIBWC has already incurred significant expenses in this area of the Site associated with past construction of a guard house and a wash rack at the American Dam Compound. To address the remainder of the contaminated soil at the Site and bring it to a residentially safe level due to workers being exposed to the soil on a continuous and daily basis, USIBWC will need to excavate the remainder of the unpaved soil to at least a depth of two feet and replace it with clean fill. Further renovation and reconstruction of buildings on site is expected in 2009 or 2010, which will require removal and replacement under and around those buildings, as well.

^{35/}Asarco Incorporated Remedial Report, Figure 2-2 (IBWC000874-879), Exhibit No. USIBWC018.

^{36/} *Id.* at p. 13 (IBWC000875-879), Exhibit No. USIBWC018; Environmental Testing and Consulting, Inc. (IBWC002188-2273), Exhibit No. USIBWC022.

^{37/}VEGA Environmental Services, 2004. Soil Investigation for the Construction of a Guardhouse at the American Dam Facility. Final report prepared for J&J Contracting and USIBWC, April 7, 2004 (IBWC000672-719), Exhibit No. USIBWC013.

The island area runs between the Rio Grande and the American Canal in the region adjoining USIBWC's property, and is used for storage of equipment and heavy machinery. Arsenic and lead emitted from the Asarco Smelter have also contaminated the soil on this property, which must be excavated to at least a depth of two feet and replaced with clean fill in order to remediate the contamination to a residentially safe level.

2. Debtor Must Clean Up the USIBWC Site to TCEQ Residential Standards

USIBWC has sought assistance from TCEQ to determine the appropriate soil and groundwater cleanup standards at the American Dam and Canal Complex.^{38/} Upon learning that it would have to record deed restrictions for any contamination in excess of the Texas Risk Reduction Program Residential Standards, USIBWC decided that a residential cleanup level was appropriate. It sought advice from TCEQ on how much remediation Debtor must perform to meet this standard, and TCEQ confirmed that Debtor must clean up the Complex to residential standards.^{39/}

3. Debtor is Jointly and Severally Liable as the Major Source of Lead and Arsenic Contamination at the Site

The standard of liability under Section 107(a) of CERCLA is strict, without regard to fault. Liability under Section 107(a) of CERCLA is also joint and several, unless the liable party can prove that the harm caused at the site is divisible. Thus each and every PRP is liable where the harm is indivisible. Debtor attributes the vast majority of contamination to the Asarco

^{38/}Letter from Susan Daniel, IBWC to Brad Wilkinson, TCEQ, September 20, 2007, (IBWC011806), Exhibit No. USIBWC113.

^{39/}Letter from Brad Wilkinson, TCEQ to Susan Daniel, IBWC, September 27, 2007, (IBWC011805), Exhibit No. USIBWC050.

smelter.^{40/} The evidence strongly suggests that the Asarco Smelter is the sole source of contaminants at the USIBWC Site as its emissions are directly linked.

a. Debtor is the Single Liable PRP at the USIBWC Site

There is no serious dispute about who is liable for the pollution. While several minor PRPs have been identified, Debtor has conceded that other PRP contributions are minor in comparison to the contamination caused by the Asarco facility and has admitted it is 90% liable.^{41/} Dr. Powell, an expert offered by Asarco, Inc., has allocated Debtor with 100% liability.^{42/}

Dr. Allen Medine, an expert offered by the United States on historical emissions and lead sites, will testify that all the total lead and arsenic emissions at the Site can be attributed to Asarco operations between 1887 and 1999. Even if the Court does not fully concur in Dr. Medine's opinion of the evidence, the parties agree that the overwhelming proportion of the total lead and arsenic at the Site is due to emissions from the Asarco Smelter.

b. Debtor Cannot Meet the Burden for Proving Actual Divisibility of Harm.

As discussed above, the fact that Debtor was the primary source of contamination

^{40/}Zelikson Report, App. B-17, July 27, 2007, at 16 (IBWC004267), Exhibit No. USIBWC035.

^{41/}Id. "However, because of the relative contribution of the other main contributing PRP (Oglebay Norton Company) appears to be minor in comparison to ASARCO, and the fact that the potential contribution of anthropogenic sources in the United States and the potential Mexican sources have not been quantified to date, we performed a conservative analysis at this Site and have assigned the USIBWC an 10% cost share and ASARCO a 90% cost share for this Site." Exhibit No. USIBWC035.

^{42/} Robert Powell Deposition, November 29, 2007 at p. 77, line 16 to p. 78. (Not Bates Stamped at time of Brief Filing). In the deposition, Powell amended his earlier expert report which had a 90% Debtor 10% USIBWC allocation.

throughout the Site is not in dispute. While the United States believes that Debtor was the primary contributor, the law is absolutely clear that liability arises at a site without regard to the amount of contamination caused by a particular party. See e.g., City of New York v. Exxon Corp., 766 F. Supp. 177, 195-196, 198 (S.D.N.Y. 1991) (defendant held jointly and severally liable even though its waste arguably contained “only trace amounts of hazardous substances” and arguably contributed only slightly to conditions that required response). Debtor has admitted causing the majority of the contamination on the USIBWC Site.^{43/}

Debtor will be unsuccessful in showing “divisibility” in order to argue that it can establish a reasonable basis to apportion liability. As noted in Bell, “whether there is a reasonable basis for apportionment depends on whether there is sufficient evidence from which the court can determine the amount of harm caused by each defendant.” Bell, 3 F.3d at 903. As the Ninth Circuit recently noted in interpreting the Fifth Circuit’s opinion in Bell, defining the “harm” to be divided is a crucial part of this determination. United States v. Burlington N. & Santa Fe Ry. Co., 479 F.3d 1113, 1129 (9th Cir. 2007). After dismissing “disposal,” “contamination,” and “cost of remediation” as potential definitions of harm, the Ninth Circuit held that “it is most useful for purposes of determining divisibility to view the ‘harm’ under CERCLA as the contamination traceable to each defendant.” Id. at 1129-30. This requires a defendant either to establish a direct correlation between disposals and resulting levels of contamination or to separate the hazardous substances remaining onsite as contamination from those which are no longer present or hazardous. Id.

At the USIBWC Site, the harms present are lead and arsenic contamination. Debtor may

^{43/}Id.

attempt to apportion that harm by allocating among industrial sources. Neither fact nor law supports this attempt at divisibility or allocation. While other smelters did operate in the area, the Asarco Smelter was by far the largest and the longest operating, with the greatest impact on the surrounding environment.⁴⁴ Debtor's purported grounds for divisibility simply do not meet the established legal standard.

The USIBWC is not responsible for creating the contamination on its Site, yet it must respond to it in order to protect the public and to carry out its duty to "preserve the international boundary and improve the quality, conservation and utilization of trans-boundary water resources in the border region."⁴⁵ Debtor should be held 100% liable for the contamination at the USIBWC Site and for all of the costs associated with it.

B. USIBWC IS ENTITLED TO RECOVER ALL COSTS

Once it establishes the basic elements of liability, the United States is entitled to recover "all costs of removal or remedial action incurred by the United States. . . not inconsistent with the National Contingency Plan." 42 U.S.C. § 9607(a)(4)(A) (emphasis added). The categories of CERCLA response costs recoverable by the United States are very broad. See United States v. Northeastern Pharma. & Chem. Co., 579 F. Supp. 823, 850 (W.D. Mo. 1984), aff'd in part and rev'd in part on other grounds, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987)); United States v. Lowe, 118 F.3d 399 (5th Cir. 1997). This burden of proof and standard for cost recovery applies not only when EPA is exercising the President's CERCLA authorities, but also to

⁴⁴Medine Report, July 27, 2007, at 9, (IBWC004059), Exhibit No. USIBWC032.

⁴⁵USIBWC Vision Statement: Through binational partnerships with Mexico, preserve the international boundary and improve the quality, conservation, and utilization of transboundary water resources in the border region (IBWC010072), Exhibit No. USIBWC112.

federal land managing agencies exercising that authority to clean up federally-owned land. See United States v. Chrysler, 157 F.Supp. 2d 849 (N.D. Ohio 2001) (U.S. entitled to maintain cost recovery, not contribution action despite being the property owner); United States v. Chrysler, 168 F.Supp. 2d 754 (N.D. Ohio 2001) (U.S. entitled to presumption of consistency with the NCP even where majority of costs were incurred by the National Park Service, the federal land manager).

1. USIBWC has incurred substantial costs and will continue to incur costs relating to the contamination by the Asarco Smelter and the Estimate of Future Costs is Fully Supported and Reasonable.

a. The United States has Incurred \$268,219 in Past Response Costs.

The United States has established the amount of response costs it has incurred at this Site through July 27, 2007, in the amount of \$268,219. This amount is established through an affidavit provided to Debtor that has been routinely relied upon by Courts as being reliable. United States v. Findett Corp., 220 F.3d 842, 849 (8th Cir. 2000); United States v. Gurley Ref. Co., 788 F. Supp 1473, 1480-81 (E.D. Ark. 1992) (*overturned* on other grounds); and United States v. Chromalloy Am. Corp., 158 F.3d 345, 352 (5th Cir. 1998).

b. The United States Will Incur \$27,000,000 in Additional Future Response Costs.

The United States is seeking the direct future costs that will be incurred by responding to the environmental contamination caused by the Asarco Smelter. The USIBWC is not attempting to have Debtor fund the construction portion of the Canal Project.

Among the United States' trial submissions to the Court will be the proffer of Gayle Koch, in which she presents her opinion as to the Expected Value of the United States' future work. Ms. Koch will proffer a detailed and thorough analysis of the likely future response actions to be

performed at the Site and the costs associated with those actions. Many of the core costing assumptions presented by Ms Koch will not be in dispute. As importantly, those areas of material disagreement can be fairly well defined.

Ms. Koch applies accepted costing methodology and concludes that the Expected Value of the future remedial activities at the Site are \$27,453,394.^{46/} The two issues in dispute between each party's experts that impact the cost estimate are: (1) whether the costs sought by the United States pertain to contaminants attributable to Debtor and (2) whether remediation be necessary once Debtor implements its groundwater plan.

The \$27 million includes only those costs relating to environmental remediation, which primarily involve disposing of large volumes of contaminated soil; preventing worker exposure; and treating contaminated water safely before discharge. Specifically, the costs do not include the costs of dewatering the canal. The total costs of the entire project (canal restoration and environmental response actions) is approximately \$40 million. The USIBWC did not have the resources to go forward with the Canal project due to the additional costs related to environmental harm without reaching an agreement with Debtor.

The parties have focused on the costs of the dewatering process, because higher dewatering rates lead to higher water treatment costs. Dr. Medine, the United States' expert, has confirmed that the 8000 gpm rate calculated by the MWH Study is reasonable. Additionally, Dr. Medine provides a range of pumping rates demonstrating that 8000 is a conservative pumping rate which best forecasts actual site conditions to be encountered when the work commences. The 8000 gpm amount is also supported by the Army Corps of Engineers assessment of actual

^{46/}Koch Expert Report, July 27, 2007, at p. 2 (IBWC003993), Exhibit No. USIBWC031.

dewatering at a location at the Site, and computations by an USIBWC engineer. Accordingly, it is appropriate for USIBWC to base its cost estimates on the conservative and reasonable proposal by MWH.

In contrast, Debtor's experts do not rely on site specific information when predicting the lowered dewatering rate. Debtor's experts rely on a set of assumptions which are unverified by any actual site data. According to Dr. Medine, the Asarco Groundwater Report by Debtor's consultant is deficient due to faulty assumptions.^{47/} Additionally, the analytic formula used by Mr. Hansen (Asarco, LLC's expert) does not reflect actual conditions on the Site.^{48/}

Remediation will also still be necessary even if Debtor implements its site-wide groundwater remediation system (on the Asarco Smelter property), because the system will not address the existing contamination that has already migrated to the USIBWC Site. With respect to future contamination, Debtor has not implemented any corrective actions to date and has not set a date for compliance. Dr. Medine will proffer a detailed opinion on the continuing migration of contaminated groundwater into the canal, and the unlikelihood that an Asarco groundwater remediation system will have an effect on the present or future contamination at the USIBWC Site. Therefore, Debtor's site-wide groundwater remediation system required by TCEQ will not be effective in restoring groundwater quality in the near future, nor will it address current contamination on the USIBWC Site, and future costs associated with this risk should not be

^{47/}Arcadis Groundwater Model Report, September 28, 2007.

^{48/} 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. 7-10.

discounted.

Ms Koch's Expected Value opinion has numerous other components beyond the per property costs and the number of properties to be remediated. The United States will not try to summarize all those issues here. Elements that this Court will have to consider include, inter alia.: (1) additional sampling; (2) additional studies that will be required; (3) the timing of the future remediation; (4) the appropriate discount rate to be applied to those future costs; and (5) USIBWC direct costs over and above the mere costs of the contractor performing the work.

To the extent that Debtor disputes some elements of the United States' projected costs, the Expected Value opinion presented by the United States addresses Debtor's concerns based on current and thoroughly documented information derived from the United States' actual experience at this and similar sites. Accordingly, the United States' Expected Value opinion should be given significant weight by this Court.

c. Debtor's Probabilities Lack Reliable Foundations

A principal vehicle for Debtor's effort to reduce its potential liability at this Site is through a "decision-tree" liability analysis by its retained experts. The United States rejects that analysis both as to style and form. To begin with, Debtor's expert includes in his analysis numerous conclusions and opinions that are beyond his expertise. The report is not true opinion in any sense, it is simply a construction of low-cost possibilities created in order to reduce Debtor's responsibility to pay for cleanup costs at the Site.

Debtor's expert asserts that Debtor's liability should be limited to its cost estimates providing for remedy alternatives that were not selected by the USIBWC. The United States will explain at hearing that the Court cannot use these cost estimates as a basis for reducing the United

States' claim. Debtor's estimates rely on unconfirmed statements by Asarco employees which were not evaluated independently, which resulted in significant arbitrary discounts.^{49/} Further, the Debtor's experts do not consider highly pertinent State regulations relating to remediation standards. The experts also fail to weigh the agencies decisions with appropriate deference. The result of this a probabilistic liability estimate that does not properly reflect the issues before the Court and should not be employed by the Court in any calculation that it may conduct.

VI. CONCLUSION

Debtor contaminated the USIBWC's property over the course of its operations and hazardous substances continue to migrate on the Site. Debtor admits it caused 90% of the environmental harm. An 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. Debtor 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.

^{49/}Medine Report, November 25, 2007, pp. 5-7, (IBWC018810-18812), Exhibit No. USIBWC101).

Respectfully submitted,

RONALD J. TENPAS
Acting Assistant Attorney General
Washington, D.C. 20530

_____/s/_____
ALAN TENENBAUM
DAVID DAIN
JEFFREY M. PRIETO
CARA M. MROCZEK
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Attorneys for the United States of America

Dated: November 29, 2007

CERTIFICATE OF SERVICE

I hereby certify that on November 29th, 2007, I caused to be served a copy of the foregoing **UNITED STATES' OPENING PRE-TRIAL BRIEF REGARDING ESTIMATION OF ENVIRONMENTAL CLAIMS AT THE UNITED STATES SECTION, INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO SITE**, via electronic mail on the parties listed on the following pages.

Respectfully submitted,

/s/ David Dain

DAVID L. DAIN

Senior Attorney

Environmental Enforcement Section

Environment and Natural Resources Division

U.S. Department of Justice

P.O. Box 7611

Washington, D.C. 20044-7611