



The Senate of the State of Texas

ASARCO In El Paso

“Moving to a Bright Future - Away from a Polluted Past”
September 2008

Today, El Paso is at a crossroads. Whether ASARCO reopens will define our community for the next generation. We will brand ourselves either as a polluted city dependent on 19th century industry, or a clean city on the move in a 21st century economy.

In 2007, the *El Paso Times* said, "ASARCO needs to clean up, close up and go away. This polluting industry has outlived its usefulness and welcome in a city that has its eyes on progress."

In the pages that follow, you will read the history of ASARCO in El Paso. Here is the real record:

- ASARCO has left taxpayers from 75 communities in 16 states—from Tacoma, Washington to Corpus Christi, Texas—with billions in environmental remediation and clean-up costs;
- ASARCO has contaminated at least 1,097 El Paso homes and businesses with lead and arsenic;
- ASARCO was fined \$5.5 million and ordered to conduct \$15 million in environmental projects by the Environmental Protection Agency for allegedly illegally transporting, storing, and processing hazardous waste in El Paso;

- ASARCO was granted permission by the Texas Commission on Environmental Quality (TCEQ) to put more than 7,000 tons of pollutants into our air; and
- ASARCO was also granted TCEQ permission to put 2.59 tons of lead and 6,673 tons of sulfur dioxide back into our air.

With our Medical Center of the Americas growing every day, thousands of troops and new businesses coming to El Paso, and Downtown ready to revitalize, now is the time to make our move to build better jobs.

All across America, cities with clean air are the ones that get the best jobs and have the brightest future. Right now, El Paso is the place to be. So let's move forward to a bright future, away from a polluted past!

Senator Eliot Shapleigh
District 29

The Arrival of the Smelter

The chain of events leading to ASARCO's smelter began in 1881. That year, Robert Safford Towne arrived in El Paso after touring mines in the Mexican state of Chihuahua. Two years later, he organized the Mexican Ore Company, a small plant that sampled and graded ore from the Mexican mines. Towne built a lead grading and sampling facility in 1883 but was forced to transport the lead to Socorro, New Mexico for smelting. Towne soon realized it made financial sense to locate the smelting operations in El Paso. In 1887, Towne went to Argentine, Kansas, where he secured the backing of the Kansas City Consolidated Smelting and Refining Company for the construction of a major smelter on the northwest outskirts of El Paso to process lead and copper ore from mines in Mexico and in the American Southwest. Towne bought 1,156 acres along the Rio Grande for \$3,757, and within five months he had erected the El Paso Smelter, with a 100-foot tall, sheet-iron smokestack built within a wooden frame.¹ The smelter boasted a workforce of 250 and was ready to begin processing the high-grade Mexican ore from the Santa Eulalia and Sierra Mojada mines.²

The original construction of the smelter was apparently difficult, as Kansas City Consolidated had to build six miles of railroad track to link the site with the nearest track, owned by Santa Fe Railroad.³ Despite its remote location, the smelter was successful: in its first year of operation, the plant smelted over 12,000 tons of lead bullion.⁴

¹ Isaac F. Marcossou, [Metal Magic: The Story of the American Smelting and Refining Company](#), New York: Farrar, Strauss, and Company, 1949, 150; Monica Perales, "Smelertown: A Biography of a Mexican-American Community, 1880-1973," PhD dissertation, Stanford University, 2004, 20-22.

² *Id.*

³ Isaac F. Marcossou, [Metal Magic: The Story of the American Smelting and Refining Company](#), New York: Farrar, Strauss, and Company, 1949, 150.

⁴ Monica Perales, "Smelertown: A Biography of a Mexican-American Community, 1880-1973," PhD dissertation, Stanford University, 2004, 22.

The Origins of ASARCO

Officially organized in New Jersey on April 4, 1899, the stated purposes of ASARCO were "to acquire, deal in, sell, and otherwise dispose of ores, minerals, metals; and to manufacture, acquire, deal in, sell, or otherwise dispose of the products of ores, minerals, and metals." The corporation was founded by Henry H. Rogers and Leonard Lewisohn and organized to own and manage the properties of eleven companies, including, amongst others, Omaha Grant, National United Colorado, and Kansas City Consolidated, owner of the El Paso smelter.⁵

Noticeably absent from the creation of ASARCO was the Guggenheim family. Originally emigrating to the United States from Switzerland in 1848, Meyer Guggenheim and his family settled in Philadelphia.⁶ By 1881, Meyer and his seven sons had secured an enormous fortune through various types of industry, including lace and embroidery.⁷ The family's first involvement with mining began that same year when Meyer Guggenheim purchased a one-half interest in two lead and silver mines in Leadville, Colorado.⁸ The mines would eventually reach an output that would net the owners \$100,000 a month.⁹

After their success with the mines, the Guggenheims soon expanded their foray into the metal industry. Decrying the "smelter extortion" due to the high profits the smelters extracted, the Guggenheims purchased a controlling interest in a smelter in Denver, Colorado and soon thereafter built their own smelter located in Pueblo, Colorado.¹⁰ Although labor troubles and low silver prices encumbered

⁵ Isaac F. Marcossou, Metal Magic: The Story of the American Smelting and Refining Company, New York: Farrar, Strauss, and Company, 1949, 63-64.

⁶ *Id.* at 25.

⁷ *Id.* at 35.

⁸ *Id.* at 36.

⁹ *Id.* at 41.

¹⁰ *Id.* at 41-42.

the initial progress of the Pueblo smelter, it soon proved extremely profitable, netting the Guggenheims \$50,000 in profits each month.¹¹

Despite their success in the metals industry, the Guggenheims turned down an initial offer to participate in ASARCO. The Guggenheims insisted that any venture in which they entered be controlled by the family, stating: "[O]ur business is a family affair. We control it and we will not enter into any arrangement that we cannot control."¹² Soon, however, they would control ASARCO.

After ASARCO's incorporation, the Colorado Legislature passed a law instituting an eight hour work day. The ASARCO plants in Colorado refused to recognize the law, resulting in massive strikes by miners. At the same time, the Guggenheims respected the new law, had no strikes, and were soon inundated with ore that would otherwise have been smelted elsewhere. ASARCO's debts soared, and soon a deal was struck between ASARCO and the Guggenheims. The Guggenheims would exchange their properties, working capital, and \$6 million in cash for \$45.2 million of ASARCO stock and a controlling interest in the corporation. The merger was officially completed on April 8, 1901. Five of the seven Guggenheim sons took over managing ASARCO, securing positions as chairman of the board and president, treasurer, and members of the board.¹³ ASARCO would be headed by a member of the Guggenheim family until 1957.¹⁴

¹¹ *Id.* at 46.

¹² *Id.* at 63.

¹³ *Id.* at 67-72.

¹⁴ ASARCO, "Asarco: 1899-1999, Celebrating a Century of Accomplishment," 31.



At the smelter [ASARCO], El Paso, 1899
(Aultman Collection, B198, El Paso Public Library)

ASARCO's Growth

In 1901, a fire destroyed about \$100,000 worth of ASARCO property and equipment at the El Paso smelter, but it rebuilt and reopened in 1902 with seven new lead furnaces. The new facility doubled production and expanded the local payroll to nearly 900 workers.¹⁵ ASARCO would continue to grow over the coming decades.

In Mexico, an economic crisis from 1908-10 was felt across the country but most keenly in the northern states.¹⁶ This led ASARCO to shut down its mines at Santa Eulalia and Santa Bárbara in

¹⁵ Leon Metz, City at the Pass: An Illustrated History of El Paso, 1980, Windsor Publications: Woodland Hills, CA.

¹⁶ Friedrich Katz, The Life and Times of Pancho Villa, 1998, Stanford University Press: Stanford, CA, 48.

Chihuahua.¹⁷ This economic crisis linked opposition movements across the country that were plotting against President Porfirio Díaz. In late November 1910, Francisco Madero released the Plan of San Luis Potosí and ushered in the Mexican Revolution.¹⁸ Soon, Pancho Villa and Pascual Orozco joined Madero as military leaders in the insurrection.¹⁹ Early in 1911, Madero's revolutionary army camped directly across the Rio Grande from the ASARCO smelter.²⁰ Eventually, the Battle of Juárez began on May 8, 1911, leading to the May 21 Treaty of Ciudad Juárez, which removed Díaz from power and replaced him with Madero.²¹

A copper smelter was added to the El Paso property in 1910, receiving ore from the Guggenheim-owned Chino copper mine until 1939.²² In 1925, the El Paso smelter processed more than 2,000 tons of ore on a daily basis. The ore was transported from mines in Arizona, New Mexico, and northern Mexico.²³ As one could expect, ASARCO was polluting El Paso even then. In 1930, the company proclaimed that it would be installing improvements in the smelter in order to "abolish smoke," leading to fumes being "entirely eliminated."²⁴ Clearly, the smelter's fumes were never eliminated.

In 1948, slag fuming facilitators were built for the recovery of zinc from the slag produced by the lead furnaces. In 1966, however, demands for more pollution controls led to the company's building a 828-foot chimney, at the time the world's largest smokestack, designed

¹⁷ *Id.*

¹⁸ *Id.* at 52-54.

¹⁹ Leon Metz, *City at the Pass: An Illustrated History of El Paso*, 1980, Windsor Publications: Woodland Hills, CA, 56-57.

²⁰ *Id.*

²¹ *Id.* at 59-61.

²² ASARCO, "Asarco: 1899-1999, Celebrating a Century of Accomplishment," 20.

²³ George Young, "The El Paso Smelter: A Description of the Lead and Copper Plant of the American Smelting and Refining Company," *Engineering and Mining Journal*, June 27, 1925, 1041.

²⁴ "Wages Increased; El Paso Smelter to Abolish Smoke," *El Paso Times*, August 22, 1930.

to help alleviate local air pollution.²⁵ The stack was raised to disperse smoke and gases from ASARCO's copper smelter at a higher altitude in an attempt to alleviate smoke problems in areas of the city.²⁶ In 1969, however, El Paso still had a higher concentration of lead in the air than any other city in Texas.²⁷

²⁵ "Tallest Stack Being Constructed," *El Paso Times*, May 5, 1966; Ken Flynn,

"Sleeping Giant," *El Paso Times*, December 21, 2003.

²⁶ "Tallest Stack Being Constructed," *El Paso Times*, May 5, 1966.

²⁷ Texas State Historical Association, The Handbook of Texas Online, "ASARCO," available online at: <http://www.tshaonline.org/handbook/online/articles/AA/dka2.html>. Last accessed on August 1, 2008.

ASARCO and the Environment

Originally erected in the 19th century as a company town for ASARCO, Smelertown rested at the foot of the ASARCO smokestacks.²⁸ For decades, Smelertown residents accepted ASARCO's pollution as a fact of life.²⁹ However, in the late 1960s, El Paso leaders grew concerned over potential lead poisoning in the area surrounding the smelter, including Smelertown. Based on complaints about air pollution from El Pasoans, the city sued ASARCO on April 24, 1970 for violating the 1967 Air Safety Code and Texas Clean Air Act, citing numerous instances of specific violations.³⁰ Less than a month later, the State of Texas joined the suit against ASARCO.³¹

²⁸ For an overview of Smelertown and its residents, see Monica Perales, "Smelertown: A Biography of a Mexican-American Community, 1880-1973," PhD dissertation, Stanford University, 2004.

²⁹ Allen Pusey, "Buildings in Shadow of Stack Their Homes," *El Paso Times*, March, 26, 1972.

³⁰ *The City of El Paso v. American Smelting and Refining Company, et. al.*, Cause No. 70-1701, Original Petition (El Paso County, Texas, 41st District Court, April 24, 1970).

³¹ *The City of El Paso and State of Texas v. American Smelting and Refining Company, et. al.*, Cause No. 70-1701, Petition in Intervention (El Paso County, Texas, 41st District Court, May 17, 1970).



Source: Edgar Ruiz

As a result of evidence raised in depositions for the city's lawsuit, Dr. Bernard F. Rosenblum, director of the El Paso City-County Health Department, discovered in December 1971 that ASARCO had emitted 1012 metric tons of lead into the El Paso air from 1969 to 1971.³² In addition, ASARCO had emitted 508 metric tons of zinc, 11 metric tons of cadmium, and one metric ton of arsenic.³³ Dr. Rosenblum thus estimated that 2,700 people between the ages of one and 19, in a four-mile radius around the smelter, had elevated blood lead levels at or above 40 micrograms per deciliter.³⁴ For comparison's sake, it should be noted that the current Centers for Disease Control and Prevention (CDC) standard for elevated blood levels in children is now only 10 micrograms per deciliter, and a

³² Letter from Dr. Bernard Rosenblum, Director of El Paso City-County Health Department, to Mr. William D. Ruckelshaus, Administrator of the U.S. Environmental Protection Agency, February 21, 1972.

³³ Jake Bernstein, "Clean Up or Cover Up?," *The Texas Observer*, October 8, 2004.

³⁴ *Id.*

debate exists regarding whether that figure should be lowered further.³⁵

Lead particularly affects young children and infants. Children and others can be exposed to lead not only through the air, but also through accidentally or intentionally eating soil or paint chips, as well as food or water contaminated with lead. Urban areas with high levels of traffic, trash incinerators, or other industry, as well as areas near lead smelters, battery plants, or industrial facilities that burn fuel, may still have high lead levels in air.³⁶

People, animals, and fish are mainly exposed to lead by breathing and ingesting it in food, water, soil, or dust. Lead accumulates in blood, bones, muscles, and fat. Infants and young children are especially sensitive to even low levels of lead. Lead causes damage to the kidneys, liver, brain, nerves, and other organs. Exposure to lead may also lead to osteoporosis (brittle bone disease) and reproductive disorders. Excessive exposure to lead causes seizures, mental retardation, behavioral disorders, memory problems, and mood changes. Low levels of lead damage the brain and nerves in fetuses and young children, resulting in learning deficits and lowered IQ. Lead exposure also causes high blood pressure and increases heart disease, especially in men, and may lead to anemia, or weak blood.³⁷

Additionally, the arsenic emitted by ASARCO was dangerous to public health. Chronic exposure to arsenic can lead to dermatitis, mild pigmentation keratosis of the skin, vasospasticity, wart formation,

³⁵ Mary Jean Brown and Patrick Meehan, "Health Effects of Blood Lead Levels Lower than 10 mg/dl in Children," *American Journal of Public Health*, January 2004, 8-9.

³⁶ Centers for Disease Control and Prevention, Department of Health and Human Services, "Lead: Basics," available online at: <http://www.cdc.gov/lead/basics.htm>. Last accessed July 14, 2008.

³⁷ *Id.*

decreased nerve conduction velocity, and lung cancer. Acute exposures can cause lung distress and even death.³⁸

As a result of Dr. Rosenblum's analysis, the CDC—the federal government's premier health promotion, prevention, and preparedness agency—sent Dr. Philip Landrigan and a colleague to El Paso to investigate.³⁹ Dr. Landrigan soon discovered that more than half of their study subjects had elevated lead levels.⁴⁰ Up until the early 1970s, lead attributable to emission and dispersion into the general ambient environment was not thought to have any known harmful effects. The investigations conducted around the ASARCO smelter played a significant role in identifying the public health impact of lead released into the environment.⁴¹ Following extensive testing and a landmark study, Dr. Landrigan and his colleagues found that 53 percent of children aged one to 9 years living within 1.6 kilometers of ASARCO had elevated lead levels that were considered dangerous.⁴²

³⁸ U.S. Department of Labor, Occupational Safety & Health Administration, "Arsenic - Hazard Recognition," online at <http://www.osha.gov/SLTC/arsenic/recognition.html>. Last accessed August 1, 2008.

³⁹ "Smelting Probe," *The Washington Post*, March 29, 1972.

⁴⁰ Jake Bernstein, "Clean Up or Cover Up?," *The Texas Observer*, October 8, 2004.

⁴¹ The Texas Department of Health under a cooperative agreement with the Agency for Toxic Substances and Disease Registry, "El Paso Historical Soil Sample Health Consultation," July 20, 2001, available online: <http://www.dshs.state.tx.us/epitox/consults/HistSoil.pdf>. Last accessed: July 17, 2008.

⁴² Philip Landrigan, Stephen Gehlbach, Bernard Rosenblum, et. al., "Epidemic Lead Absorption Near an Ore Smelter: The Role of Particulate Lead," *The New England Journal of Medicine*, Volume 292: 123-129, January 16, 1975.



The Smelertown Cemetery. Source: Juan Garza

The City and State's suit against ASARCO commenced before the Honorable Charles Schulte in the 41st District Court on February 28, 1972.⁴³ The plaintiffs presented their case over the course of nine weeks, bringing in witnesses who Mayor Bert Williams would later call "the finest experts available in the country."⁴⁴ During testimony, Ken Nelson, then director of environmental sciences for ASARCO operations in the western U.S., stated that the possibility of lead contamination in Smelertown had been "overlooked" by the company.⁴⁵ ASARCO officials also stated that it "never occurred" to them to include Smelertown in the company's air pollution monitoring system.⁴⁶ Dr. Elenor Berman, a professional toxicologist, told the

⁴³ Interview with Mayor Bert Williams. On file with author.

⁴⁴ *Id.*

⁴⁵ Allen Pusey, "Possibility of Lead is 'Overlooked,'" *El Paso Times*, April 4, 1972.

⁴⁶ Allen Pusey, "Pollution Monitoring Idea 'Never Occurred,'" *El Paso Times*, April 6, 1972.

court that the figures on lead levels in soil were "among the highest" she had ever seen.⁴⁷ Dr. Albert Applegate, a professor of environmental engineering at the University of Texas at El Paso, stated that, on the basis of soil samples, "the closer you get to Smelertown, the higher the lead concentration is."⁴⁸ He continued: "Practically speaking, this, in my professional opinion, means that the lead is coming from ASARCO."⁴⁹ A chemist for the Texas State Department of Health, Dr. Jim Payne, echoed that sentiment when he stated that, in his professional opinion, the lead in the community was directly attributable to ASARCO.⁵⁰

At the end of the City and State's case, ASARCO opted not to present any evidence, and a settlement was soon reached and approved by the court on May 11, 1972.⁵¹ Mayor Williams felt that the evidence was so overwhelming that the settlement should actually be viewed as a "judgment for the city."⁵² As part of the settlement agreement, ASARCO was ordered to pay \$80,000 for pollution violations, post \$30,000 against future violations, and install additional emissions control equipment.⁵³ Additionally, the parties jointly agreed to undertake sampling of the air and soil in Smelertown and monitor ambient air quality in the city limits. The settlement also required both parties to "collect on a monthly basis random samples of house dust and soil in selected areas of the following west side El Paso locations: Kern Place; Sunset Heights; South El Paso; Old Fort Bliss; Buena Vista; and all west side schools and monthly reports are to be filed with the court of these samples which are likewise to be jointly

⁴⁷ Allen Pusey, "'Potentially Hazardous.'" *El Paso Times*, March 9, 1972.

⁴⁸ "U.S. Guidelines Apply in El Paso, Doctor Says," *El Paso Times*, April 1, 1972.

⁴⁹ *Id.*

⁵⁰ Allen Pusey, "Chemist Traces ASARCO Lead," *El Paso Times*, April 11, 1972.

⁵¹ Interview with Mayor Bert Williams. On file with author; *The City of El Paso and State of Texas v. American Smelting and Refining Company, et. al.*, Cause No. 70-1701, Judgment and Order of Injunction (El Paso County, Texas, 41st District Court, May 11, 1972).

⁵² Interview with Mayor Bert Williams. On file with author.

⁵³ *The City of El Paso and State of Texas v. American Smelting and Refining Company, et. al.*, Cause No. 70-1701, Judgment and Order of Injunction (El Paso County, Texas, 41st District Court, May 11, 1972).

analyzed by Plaintiff and Defendant, using standardized laboratory techniques, for lead, cadmium, zinc and arsenic."⁵⁴ The settlement required this sampling to continue until January 1, 1974, after which time the parties could continue to sample as they saw fit.⁵⁵

ASARCO was also ordered to provide medical examinations and care for children with elevated blood lead levels and monitor all main flues at the smelter for lead, zinc, cadmium, and arsenic on a monthly basis.⁵⁶ In 1977, El Paso City Attorney John Ross, Jr. stated that he had counted 148 children for whom ASARCO was required to provide medical treatment due to elevated blood levels.⁵⁷ The remaining 120 families of Smelertown were evicted, and the community was razed in 1973.⁵⁸

In 1973, Fred Hervey, backed by business interests, succeeded Bert Williams as El Paso's mayor.⁵⁹ Two years later, Mayor Hervey ordered the city attorneys to enter an amended judgment in the city's case against ASARCO. On May 14, 1975, the parties revisited the settlement and agreed upon an amended judgment.⁶⁰ The amended order allowed ASARCO to postpone its required compliance with many of the air quality regulations until specific emission control systems and equipment were installed. Further, ASARCO was ordered to pay \$250,000 as satisfaction for all claims for which ASARCO might have been liable due to the emission of air contaminants in excess of that allowed by the previous settlement agreement.⁶¹ Finally, the amended order stated that ASARCO is

⁵⁴ *Id.* at 3.

⁵⁵ *Id.* at 4.

⁵⁶ *Id.*

⁵⁷ "El Paso Smelter Still Poses Lead-Poisoning Peril to Children in Juarez," *The New York Times*, November 28, 1977.

⁵⁸ Ken Flynn, "Sleeping Giant," *El Paso Times*, December 21, 2003.

⁵⁹ Interview with Mayor Bert Williams. On file with author.

⁶⁰ *The City of El Paso and State of Texas v. American Smelting and Refining Company, et. al.*, Cause No. 70-1701, Agreed Amended Judgment and Agreed Order of Injunction (El Paso County, Texas, 41st District Court, May 14, 1975).

⁶¹ *Id.*

"permanently and mandatorily enjoined ... from causing, suffering, allowing, or permitting the emission of any lead, zinc, cadmium, or any other heavy metal ... in such concentration and of such duration to be injurious to human health, animal life or vegetation."⁶²

Mayor Williams is unaware of how this occurred, and stated that "it is a sad commentary when a new administration can change language in a lawfully acquired judgment in the previous administration."⁶³ Mayor Hervey had previously served as President of the El Paso Chamber of Commerce, the primary advocate for El Paso's business community.⁶⁴ After the lawsuit, the Chamber made no attempt to hide the fact that it publicly sided with ASARCO, writing that "the City's suit against [ASARCO] brought much unfavorable publicity, despite that company's willingness to voluntarily correct problems," and "El Paso has never been included in any list of heavy pollution areas by recognized official agencies."⁶⁵ In 1972, a Chamber report stated that it was "ridiculous" to claim that ASARCO indiscriminately discharged poisonous materials from its plant.⁶⁶ Later, in 1975, the Hervey administration tried to team up with ASARCO to get the City of El Paso to float up to \$80 million in revenue bonds to help ASARCO pay for air pollution abatement equipment.⁶⁷ When it appeared that the city council would not unanimously approve the resolution, ASARCO decided to withdraw its request, leading Mayor Hervey to comment, "Let's hope you have a better council next time."⁶⁸

⁶² *Id.*

⁶³ Interview with Mayor Bert Williams. On file with author.

⁶⁴ *El Paso Today*, January 1966, 8.

⁶⁵ Milton Hopper, *El Paso Today*, January 1973, 20.

⁶⁶ "El Paso Enjoys Economic Boom; Experts Disagree Over Reasons," *El Paso Times*, March 10, 1972.

⁶⁷ "Question of Constitutionality Affects ASARCO's Bond Request," *El Paso Herald Post*, March 13, 1975.

⁶⁸ Fred Williams, "City Bond Help for ASARCO Must Wait for New Council," *El Paso Times*, March 13, 1975.

Throughout the hearing process, ASARCO maintained that the lead contamination could not be directly attributed to the operation of the El Paso smelter.⁶⁹ To bolster this argument, ASARCO hired Dr. James McNeil. Acting as a counterweight to the research performed by Dr. Landrigan and his colleagues, Dr. McNeil claimed that the children's elevated lead levels were due to lower income children eating lead-based paint.⁷⁰ Further, Dr. McNeil felt that blood lead levels from 40 to 80 micrograms per deciliter were safe, provided a child had good nutrition.⁷¹ Again, note that the current CDC standard for elevated blood levels in children is only 10 micrograms per deciliter, and a debate exists regarding whether that figure should be lowered further.⁷²

In March 1972, before the lawsuit was settled, the El Paso Pediatric Society announced that "[f]rom the statistical data available to us there is no evidence that there is a lead intoxication problem outside of Smelertown."⁷³ The Pediatric Society's statement was seconded at the June 28, 1972 meeting of the Lead Surveillance Committee of the El Paso County Medical Society, which reached the conclusion that "[a]ny further massive blood lead sampling outside the Smelertown-Old Fort Bliss area is at this time unjustified, based on the data available to us at this time."⁷⁴ The committee, consisting of Drs. Román, Magaña, McNeil, Nickey, and Rosenblum, also rejected a \$50,000 grant from the CDC for Dr. Landrigan to do more research.⁷⁵

⁶⁹ Monica Perales, "Smelertown: A Biography of a Mexican-American Community, 1880-1973," PhD dissertation, Stanford University, 2004, 297.

⁷⁰ Jake Bernstein, "Clean Up or Cover Up?," *The Texas Observer*, October 8, 2004.

⁷¹ *Id.*

⁷² See, e.g., Mary Jean Brown and Patrick Meehan, "Health Effects of Blood Lead Levels Lower than 10 mg/dl in Children," *American Journal of Public Health*, January 2004, 8-9.

⁷³ Jake Bernstein, "Clean Up or Cover Up?," *The Texas Observer*, October 8, 2004.

⁷⁴ Minutes from Lead Surveillance Committee of the El Paso County Medical Society, June 28, 1972.

⁷⁵ *Id.*; Jake Bernstein, "Clean Up or Cover Up?," *The Texas Observer*, October 8, 2004.

The attack on Dr. Landrigan's research continued into 1973, when Dr. Rosenblum, director of the El Paso City-County Health Department, wrote Dr. Landrigan and cancelled the remainder of his lead study. From Dr. Rosenblum's May 16 letter:

I regret to inform you that our Board of Health unanimously voted to cancel the remaining portion of your study and in its place accept Dr. McNeil's study from the International Lead Zinc Research Organization. Dr. McNeil was present at the Board meeting and stated that his studies and protocol were identical to yours. First, there was disagreement as to the validity of the studies. Secondly, Dr. McNeil's studies are being funded where your studies would be done at taxpayers' expense.⁷⁶

Citing defects in Dr. McNeil's studies, the Centers for Disease Control did not associate itself with the studies by the International Lead Zinc Research Organization.⁷⁷ The organization was, and is, an industry-funded group whose "sponsors include most of the major producers of lead, zinc and silver," thus suggesting a clear bias in favor of ASARCO.⁷⁸ Dr. Landrigan complained to the Office of the Texas Attorney General. According to Dr. Landrigan, "I don't know who spoke to whom, but within a day or two the invitation was reinstated and we got to work."⁷⁹

Based on their research, Dr. Landrigan and his colleagues went on to publish a seminal article on the subject of lead absorption in

⁷⁶ Letter from Dr. Bernard Rosenblum to Dr. Philip Landrigan, May 16, 1973.

⁷⁷ Letter from Dr. Philip Landrigan to The Honorable Troy Webb, Assistant Attorney General of Texas, April 23, 1973.

⁷⁸ International Lead Zinc Research Organization, "ILZRO Home," available online at: <http://www.ilzro.org/home.htm> Last accessed August 1, 2008. See also Paul Sweeney, "'No Ill Effects' From Asarco Smelter," *El Paso Times*, June 22, 1978, discussing the fact that ASARCO was a member of the International Lead and Zinc Research Association.

⁷⁹ Jake Bernstein, "Clean Up or Cover Up?," *The Texas Observer*, October 8, 2004.

children in the influential medical journal, *The Lancet*.⁸⁰ The article found that the IQs of children with higher lead levels were significantly lower than those of children without elevated blood lead levels, and "inhalation and ingestion of lead particulates emitted by the smelter were considered to have been the principal causes of the increased absorption."⁸¹ At the same time, Dr. McNeil did an ASARCO-funded study of IQ that failed to find a negative effect due to elevated blood levels.⁸² Dr. McNeil's study, however, was only published in a local journal, while Dr. Landrigan's was published in a journal of international repute.⁸³

In 1977, Dr. Landrigan and colleagues returned to the Paso del Norte region for a follow-up study.⁸⁴ As a result of the engineering improvements mandated by ASARCO's settlement with the City, mean blood lead levels were found to have decreased from 41.4 to 17.7 micrograms per deciliter in children living within 0.8 km of the plant and from 31.2 to 20.2 micrograms per deciliter in children living at 0.8 to 1.6 km. Dr. Landrigan thus concluded that data argue for the feasibility of reducing children's lead absorption near lead smelters.⁸⁵ Dr. Landrigan has since gone on to become one of the nation's foremost experts in children's diseases and environmental exposures and currently serves as the director of the Mount Sinai Center for Children's Health and the Environment.⁸⁶

⁸⁰ Philip Landrigan, Randolph Whitworth, Robert Baloh, et. al., "Neuropsychological dysfunction in children with chronic low-level lead absorption," *The Lancet*, March 29, 1975.

⁸¹ *Id.*; Philip Landrigan, D.L. Morse, Bernard Rosenblum, et. al., "El Paso revisited: Epidemiologic follow-up of an environmental lead problem," *The Journal of the American Medical Association*, Vol. 242 No. 8, August 24, 1979.

⁸² Jake Bernstein, "Clean Up or Cover Up?," *The Texas Observer*, October 8, 2004.

⁸³ *Id.*

⁸⁴ Philip Landrigan, D.L. Morse, Bernard Rosenblum, et. al., "El Paso revisited: Epidemiologic follow-up of an environmental lead problem," *The Journal of the American Medical Association*, Vol. 242 No. 8, August 24, 1979.

⁸⁵ *Id.*

⁸⁶ Center for Children's Health and the Environment of the Mount Sinai School of Medicine, "About the CEH Center," available online at: <http://www.childenvironment.org/index.html#about>. Last accessed July 30, 2008.

Unfortunately, El Paso is not the only majority Hispanic area in the United States to suffer from ASARCO's toxins. In a 1990 investigation of an ASARCO smelter in Hayden, Arizona, William E. Craig, an ASARCO worker with the Local 886 Steelworkers Union, found that the results of Mexican-Americans receiving OSHA physical examinations had been falsified to make them look healthier than the actual exams had shown them to be.⁸⁷ He reported:

Basically, if a Hispanic employee has a pulmonary function of 85% of capacity, when using the Company's [ASARCO's] method, this employee is still rated as having 100% of pulmonary function because of the 15% margin the Company has in fact [sic] self-imposed upon all Hispanics being tested at this time.⁸⁸

A year before, Dr. David K. Parkinson, with the SUNY-Stony Brook School of Medicine, delivered a letter to ASARCO's medical director, Dr. Charles Hine, raising the same concern.⁸⁹ Dr. Parkinson wrote:

... I noted that the predicated values in Hispanics were being reduced by 15%. I do not know of any literature which supports this practice except in Blacks and I would be grateful if you could comment on this practice and provide any literature documenting the 15% reduction.⁹⁰

In response, Dr. Hine is quoted by *Arizona Republic* columnist E.J. Montini as saying, "Blacks had better performance (in lung-capacity tests), and we put the Hispanics closer to blacks. ...

⁸⁷ See William E. Craig, Jr., "Preliminary Analysis of: ASARCO's Medical Surveillance Program, Arsenic Exposure and their Correlative Effects," October 26, 1990.

⁸⁸ *Id.*

⁸⁹ See Letter from Dr. David Parkinson to Dr. Charles Hine, November 3, 1989.

⁹⁰ *Id.*

Somebody had studied it—a long time ago.⁹¹ With these practices allegedly in effect as recently as twenty years ago, former workers may be suffering health consequences today which could have been avoided—but for the color of their skin.

After the City of El Paso's lawsuit, ASARCO continued operating and polluting the Paso del Norte airshed. In 1981, ASARCO requested to convert one of its major natural gas furnaces to coal, which met heavy opposition from El Paso residents, from El Paso County, from the state of New Mexico, and from the city of El Paso.⁹² Much of the opposition stemmed from the fact that ASARCO failed to make plans to add air pollution control equipment to the furnace to catch the additional sulfur dioxide that would pour into the airshed as a result of burning coal.⁹³ Eventually, the Texas Air Control Board ruled, over ASARCO's objections, that the company would need a new permit in order to convert the furnace to coal.⁹⁴ ASARCO would soon become only a copper smelter after shutting down the zinc and lead plants in 1982 and 1985, respectively.⁹⁵ The chart on the following page shows the reduction in lead levels in El Paso's air. Please note that the national standard for ambient lead levels is 1.5 micrograms per cubic meter.⁹⁶

⁹¹ E.J. Montini, "Last gasp all that's left of smelter story," *Arizona Republic*, April 15, 1990.

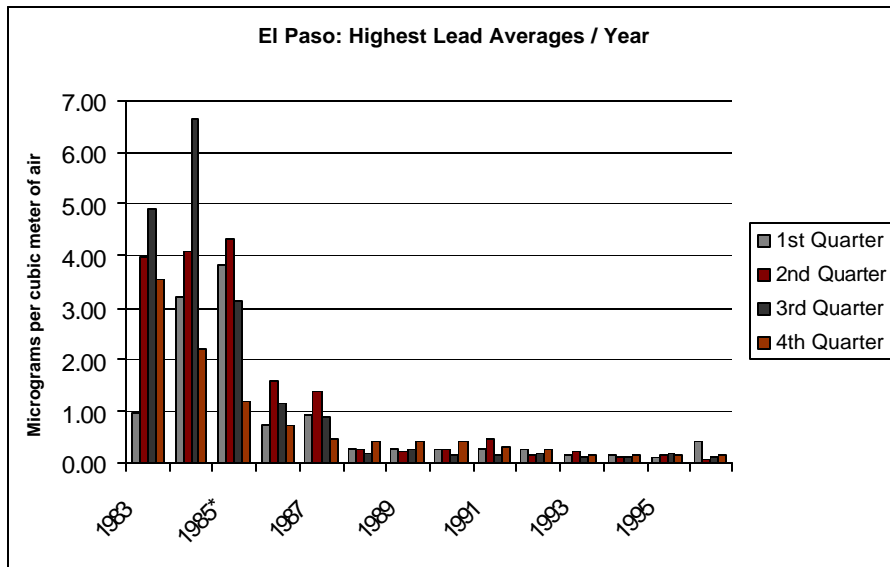
⁹² Laura Hlavach, "Asarco needs permit to burn coal," *El Paso Times*, November 21, 1981.

⁹³ David Crowder, "County wary of Asarco plan to use coal," *El Paso Times*, April 28, 1981.

⁹⁴ Laura Hlavach, "Asarco needs permit to burn coal," *El Paso Times*, November 21, 1981.

⁹⁵ ASARCO, "Asarco El Paso Site - El Paso Plant History," available online at: <http://www.asarco.com/elpaso/history.htm>. Last accessed July 7, 2008.

⁹⁶ U.S. Environmental Protection Agency, "National Ambient Air Quality Standards," available online at: <http://epa.gov/air/criteria.html>. Last accessed August 1, 2008.



Source: Texas Natural Resources Conservation Commission⁹⁷

Some of the much-needed air control equipment came in the 1990s. On May 11, 1992, after a contested case hearing, ASARCO received Air Quality Permit No. 20345 for the construction and operation of two ConTop (Continuous Top-Feed Oxygen Process) furnaces at the El Paso smelter. ConTop was implemented at ASARCO in March 1993 and has been the exclusive operating unit used for the production of copper since then.⁹⁸ In ConTop, two cyclone furnaces, combined with a gas plant, produce around 450 tons of oxygen a day to be used in the smelting process.⁹⁹ ConTop furnaces

⁹⁷ The table contains the results of ambient air monitoring of lead levels in El Paso. The data show those sites with the highest quarterly average lead concentrations for the years 1983 through 1995. The units are in micrograms per cubic meter of air. The national standard for lead is 1.5 micrograms per cubic meter. The air quality standard for lead (1.5 micrograms per cubic meter) was adopted by EPA in October of 1978.

⁹⁸ Texas State Office of Administrative Hearings, "Order concerning Application of ASARCO, Incorporated to Renew Air Quality Permit No. 20345," TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-0593, October 27, 2005.

⁹⁹ David Sheppard, "Furnaces to snag smoke coming from stacks," *El Paso Times*, May 18, 1992.

replaced burners built in the 1940s that were based on technology from the early 1900s.¹⁰⁰

ConTop, touted by ASARCO as the answer to concerns over the thousands of tons of sulfur dioxide and lead pouring from its smelter, could not stop the company from emitting pollutants. A 1997 report from the EPA summarized environmental releases from mineral processing sites such as ASARCO's smelter.¹⁰¹ A section titled "Spills and Improper Waste Management Results in Heavy Metals Soil Contamination" details how, during a two week period in 1994, a state inspection of the ASARCO site revealed that "[n]umerous samples showed that various processes at the plant were being managed without regard for protecting the environment from releases of heavy metals."¹⁰² Further, the inspection showed "unauthorized discharges to soil from spills, fugitive dust, breaches in berms, and cracked monitoring well pads ..."¹⁰³

Pollutants released by ASARCO also contaminated El Paso's drinking water. In the same 1997 EPA report, a section titled "Contaminated Ground Water Seeps to a Canal Supplying Drinking Water" discusses how state officials concluded that arsenic contamination originated from discharges at the ASARCO smelter.¹⁰⁴ The officials found that excessive arsenic concentrations in the ground water had seeped into the American Canal, which contains water eventually withdrawn for use as drinking water, and was a direct threat to the Rio Grande River.¹⁰⁵

¹⁰⁰ *Id.*

¹⁰¹ U.S. Environmental Protection Agency, Office of Solid Waste, "Damage Cases and Environmental Releases from Mines and Mineral Processing Sites," 1997, 219. Available online: http://www.law.miami.edu/library/everglades/news/save/1997/030097_epa_Damage_cases_and_enviro_ct.pdf. Last accessed July 31, 2008.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 215.

¹⁰⁵ *Id.*

During the same time period, ASARCO may have also been emitting toxins of a much more heinous nature: hazardous waste. In 1999, the EPA announced a landmark Consent Decree requiring ASARCO to spend \$15 million on several environmental actions and a \$5.5 million penalty settling claims that it broke federal hazardous waste and clean water laws in Texas and two other states.¹⁰⁶ In their press release, the EPA stated that:

... [t]he EPA and TNRCC alleged that Encycle/Texas, Inc., ASARCO's wholly-owned subsidiary in Corpus Christi, violated the Resource Conservation and Recovery Act (RCRA) at the facility by failing to properly manage hazardous waste and otherwise engaging in unlawful recycling practices. ASARCO's East Helena, MT, lead smelter and El Paso, TX, copper smelter allegedly accepted shipments of unmanifested hazardous waste from Encycle/Texas in violation of RCRA.

RCRA is a federal law that gives EPA the authority to control hazardous waste from "the cradle-to-the-grave." This includes the generation, transportation, treatment, storage, and disposal of hazardous waste.¹⁰⁷

Beyond the press release, the EPA did not release any details as to the alleged violations committed by ASARCO. However, a 1998 EPA internal memorandum, which was not meant to become public but was obtained via public information requests, discussed how ASARCO, along with its subsidiary Encycle, burned more than 5,000 tons of hazardous waste in the El Paso smelter from 1992 until 1997.¹⁰⁸ In addition, the investigation confirmed that

¹⁰⁶ U.S. Environmental Protection Agency, "Asarco will address alleged hazardous waste, clean water violations," Press Release, April 15, 1999.

¹⁰⁷ 42 U.S.C. §§ 6901 *et. seq.* (2007).

¹⁰⁸ "EPA Response to Encycle/Asarco Settlement Agreement," U.S. Department of Justice, Environment and Natural Resources Division, Michael D. Goodstein, July

ASARCO/Encycle was storing and smelting the hazardous wastes received from Encycle and that ASARCO was producing slag from the smelter hazardous wastes. As the 1998 EPA memorandum states, "[t]his activity, plain and simple, was illegal treatment and disposal of hazardous waste ..."¹⁰⁹ According to further EPA documentation, the evidence indicates that ASARCO accepted 46,486 tons of waste from Encycle from 1992 to 1997.¹¹⁰ Evidence indicates that ASARCO:

1. failed to notify EPA or Texas of its hazardous waste activity for waste received from Encycle;
2. operated a hazardous waste storage facility without interim status or a permit;
3. operated an industrial furnace without a permit or interim status; and
4. operated waste piles without a permit or interim status.

Documents show that ASARCO and Encycle likely engaged in a sophisticated scheme, spanning nearly a decade, to circumvent federal and state environmental laws that protect our health, safety, and well-being. In 2007, the National Sierra Club and the Get The Lead Out Coalition, an El Paso-based community organization, requested that El Paso County Attorney José Rodríguez seek criminal prosecution of ASARCO for burning hazardous waste in its smelter.¹¹¹ On October 29, 2007, County Attorney Rodríguez forwarded to Glenn Shankle, TCEQ's Executive Director, a peace officer's written request for review of possible criminal conduct by ASARCO.¹¹² County

31, 1998; *see also* Ralph Blumenthal, "Copper Plant Illegally Burned Hazardous Waste, E.P.A. Says," *The New York Times*, October 11, 2006.

¹⁰⁹ "EPA Response to Encycle/Asarco Settlement Agreement," U.S. Department of Justice, Environment and Natural Resources Division, Michael D. Goodstein, July 31, 1998.

¹¹⁰ "ASARCO - El Paso Meeting," Texas Natural Resource Conservation Commission, Mac Vilas, August 17, 2000.

¹¹¹ Darren Meritz, "Group says Asarco illegally burned waste," *El Paso Times*, October 3, 2007.

¹¹² Letter from El Paso County Attorney José Rodríguez to TCEQ Executive Director Glenn Shankle, October 29, 2007, available online at:

Attorney Rodríguez calculated that ASARCO "owes the taxpayers over \$30 million to cover costs for contaminating the soils in El Paso and violating environmental laws."¹¹³ In response, TCEQ rejected County Attorney Rodríguez's request, thus preventing any local law enforcement from seeking criminal action against ASARCO.¹¹⁴

Despite the fact that ASARCO's obvious violations have not resulted in criminal prosecution, less comprehensive offenses have resulted in harsher penalties in Texas. On August 16, 2007, the U.S. Department of Justice announced that Dennis Rodriguez was sentenced to five months imprisonment, five months home confinement, two years of supervised release, and fined \$10,000 for environmental crimes related to the operation of his company, North American Water Assistance, LLC.¹¹⁵ Under a plea agreement, Rodriguez pleaded guilty to making a material false statement or representation in a manifest used to transport hazardous waste and two counts of transporting hazardous waste to a facility that did not have a permit issued pursuant to RCRA.¹¹⁶

The case was investigated by special agents of the EPA, with the assistance of the Criminal Investigation Division of TCEQ, and was prosecuted by the Justice Department's Environmental Crimes Section and the U.S. Attorney's Office for the Western District of Texas.¹¹⁷ It should be noted that the Supreme Court has ruled that RCRA does not have a statute of limitations.¹¹⁸

[http://newspapertree.com/system/news_article/document1/1770/Asarco Enforcement Review Letter and Exhibits.pdf](http://newspapertree.com/system/news_article/document1/1770/Asarco_Enforcement_Review_Letter_and_Exhibits.pdf). Last accessed July 29, 2008.

¹¹³ *Id.* at 1.

¹¹⁴ "TCEQ rejects criminal enforcement against Asarco," *El Paso Times*, February 27, 2007.

¹¹⁵ U.S. Department of Justice, "Texas Man Sentenced to Five Months in Jail for Environmental Crimes," Press Release, August 16, 2007. Available online at: http://www.usdoj.gov/opa/pr/2007/August/07_enrd_625.html. Last accessed July 31, 2008.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Meghrig et al. v. KFC Western, Inc.*, 516 U.S. 479 (1996).

Evidence indicates that ASARCO disregarded the requirements of its own hazardous waste permit and the laws and regulations governing hazardous waste transportation, treatment, storage, and disposal in the United States and Texas. The allegations of RCRA violations by ASARCO are much worse than North American Water Assistance's RCRA violations outlined above, yet ASARCO has only been cited with civil penalties. Even then, they have failed to meet their obligations.

Following inspections in 2001 and 2002, ASARCO was found to be in contempt of the 1999 Consent Decree and was assessed penalties.¹¹⁹ ASARCO was further required to enter into a 2004 Consent Decree Modification to come into legal compliance.¹²⁰ ASARCO failed to meet its El Paso obligations under the 1999 Consent Decree.¹²¹ As part of the Consent Decree, ASARCO was required to spend \$1.8 million "to pave roads, alleys, and parking lots in a dust-control project in El Paso ..."¹²² However, ASARCO failed to pay the City the balance of \$1,110,000 under the paving contract, requiring the City of El Paso to file a proof of claim in the case for the \$1,110,000 still owed by ASARCO under the 1999 Consent Decree, plus interest and penalties.¹²³ In May 2008, the Bankruptcy Court approved a \$1,272,800 claim to be paid by ASARCO to the City.¹²⁴

¹¹⁹ *United States of America, et. al. v. Encycle/Texas, Inc. et. al.*, Civil Action No. H-99-1136, Stipulation and Order Modifying Consent Decree (S. Dist. Texas, October 7, 1999).

¹²⁰ *Id.*

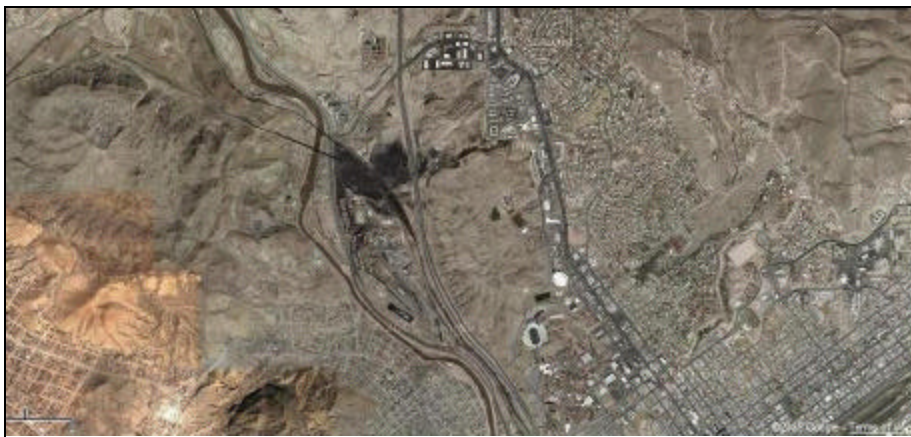
¹²¹ E-mail from Laura P. Gordon, Asst. City Attorney to Susannah Byrd, El Paso City Council Representative (re: Asarco/Encycle Consent Decree), August 30, 2007.

¹²² U.S. Environmental Protection Agency, "Asarco will address alleged hazardous waste, clean water violations," Press Release, April 15, 1999.

¹²³ E-mail from Laura P. Gordon, Asst. City Attorney to Susannah Byrd, El Paso City Council Representative (re: Asarco/Encycle Consent Decree), August 30, 2007.

¹²⁴ *In re: ASARCO, LLC, et al.*, Case No. 05-21207, Order Approving Compromise and Settlement Between ASARCO LLC and The City of El Paso Regarding The El Paso Particulate Matter Reduction Project (Paving Contract), (U.S. Bankruptcy Court, S.D. Texas, May 16, 2008).

Again, the record demonstrates that ASARCO has consistently disregarded the requirements of federal and state environmental law, the requirements of its own hazardous waste permit, and the 1999 Consent Decree regulating the transportation, treatment, storage and disposal of hazardous waste in El Paso.



Source: Google Maps

When copper prices fell to only 60 cents a pound in 1999, the ASARCO smelter went on care and maintenance status, effectively ceasing all operations.¹²⁵

¹²⁵ Gary Scharrer, "Reopening of El Paso copper smelter worries some," *San Antonio Express-News*, October 7, 2007; see also Ramon Renteria, "Death in a family," *El Paso Times*, February 7, 1999.

ASARCO's Financial Struggles

On August 9, 2005, ASARCO filed for Chapter 11 bankruptcy protection in U.S. Bankruptcy Court in Corpus Christi, Texas.¹²⁶ At the time, ASARCO's CEO Daniel Tellechea blamed environmental and asbestos liabilities, a recent credit-rating downgrade, and a copper strike that, at the time, had been taking place for five weeks.¹²⁷ The company, however, was not pushed over the edge of financial ruin overnight. Indeed, ASARCO's financial problems had been brewing for some time. A complaint filed in court by a group of ASARCO's creditors highlights the egregious fiscal mismanagement.¹²⁸

According to the complaint, ASARCO executives, including the heads of one of Mexico's richest families, "systematically liquidated" the company's most valuable assets, thus leaving the company in financial ruin and facing billions in liabilities.¹²⁹ Generally, the complaint alleges that "the Directors and Officers breached their fiduciary duties when they systematically liquidated ASARCO's assets in order to strip out as much value as possible for the benefit of ASARCO's parent corporation, Americas Mining Corporation, and ultimate parent Grupo México S.A. de C.V., while that the same time trapping ASARCO's liabilities in ASARCO, all to the detriment of ASARCO and its creditors."¹³⁰

The complaint provides a comprehensive overview of how ASARCO went from a company with over \$4 billion in assets and

¹²⁶ For more information, see ASARCO, LLC Restructuring-Information Website at <http://www.asarcorg.com>

¹²⁷ Thomas Stauffer, Joseph Barrios and Andrea Kelly, "Asarco seeks bankruptcy protection," *Arizona Daily Star*, August, 11, 2005.

¹²⁸ *In re: ASARCO, LLC, et al.*, Case No. 05-21207, Derivative Complaint by the Official Committee of Unsecured Creditors of ASARCO LLC on Behalf of the ASARCO LLC Bankruptcy Estate Against Certain Directors and Officers of ASARCO LLC for Breaches of Fiduciary Duties (U.S. Bankruptcy Court, S.D. Texas, August 8, 2007).

¹²⁹ *Id.* at 5.

¹³⁰ *Id.*

\$1.4 billion in stockholder equity to a company in total financial ruin. In 1999, Grupo México, the largest mining corporation in Mexico, purchased ASARCO's stock in a buy-out in order to gain control of ASARCO's 54.2 percent ownership in the Southern Peru Copper Corporation, a copper producer that had recently discovered significant copper reserves in South America.¹³¹ When structuring the buy-out, Grupo México left ASARCO with enormous amounts of additional debt and insufficient capital, preventing the company from paying its debts as they came due.¹³² According to the complaint, Grupo México's long term goal was simply to obtain the ownership interest in the Southern Peru Copper Corporation, and in order to make that transfer occur, Grupo México's executives "systematically and methodically liquidated ASARCO's assets, often times for far less than reasonably equivalent value, all to the detriment of ASARCO and its creditors."¹³³ This liquidation, per the complaint, included the sale of key mining equipment, the monetization of ASARCO's insurance policies, and the redemption of bonds for which the company did not have the funds.¹³⁴ As a result of these actions, ASARCO began making plans for a possible bankruptcy as early as late 2001, according to the complaint.¹³⁵

In 2000, ASARCO began the process of transferring its ownership interest in the Southern Peru Copper Corporation to its parent company, American Mining Corporation (AMC). According to the complaint, Grupo México shopped around for the lowest valuation of the Southern Peru shares in the hopes of obtaining a "sweetheart deal," i.e., to pay significantly less than market value to obtain the shares.¹³⁶ This inevitably drew the interest of the U.S. Department of Justice (DOJ), which filed a suit in August 2002 to enjoin ASARCO's transfer of the Southern Peru shares. According to the DOJ, "[i]f allowed to proceed, this transfer will strip ASARCO of its most

¹³¹ *Id.* at 7.

¹³² *Id.* at 7-8.

¹³³ *Id.* at 8.

¹³⁴ *Id.*

¹³⁵ *Id.* at 14.

¹³⁶ *Id.* at 13.

significant asset and will not only create a situation wherein the company will be unable to meet its environmental obligations in the future, but will endanger the future viability of the company."¹³⁷

In January 2003, however, DOJ and ASARCO reached a deal allowing it to sell the Southern Peru shares to its parent company AMC.¹³⁸ As part of the agreement, AMC agreed to increase the purchase price of the shares by \$100 million. This \$100 million funded an environmental trust to pay for cleanup of environmental contamination across the U.S.¹³⁹ The environmental trust was guaranteed by Grupo México, thus ensuring that ASARCO's precarious financial situation would not prevent the funds from being used to clean up ASARCO's mess.¹⁴⁰ To date, EPA Region 6, which encompasses Texas, Arkansas, Louisiana, New Mexico, and Oklahoma, has received \$8 million from the environmental trust fund.¹⁴¹ This money has been used to fund the residential soil cleanups that have been taking place in El Paso since 2002.¹⁴²

The complaint then alleges that Grupo México turned its focus toward ensuring that the sale of ASARCO's ownership interest in the Southern Peru shares would withstand any fraudulent transfer claims by trying to "outrun the statute of limitations."¹⁴³

¹³⁷ Alysson Pisculli, "US blocks Asarco asset sale as 'fraudulent' move," *American Metal Market*, August 13, 2002.

¹³⁸ See U.S. Department of Justice, "U.S. Reaches Deal with Copper Giant ASARCO to Sell Assets to Parent Company," Press Release, January 30, 2003, available online at: http://www.usdoj.gov/opa/pr/2003/January/03_enrd_063.htm Last accessed July 29, 2008.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ E-mail from Cynthia Fanning, EPA, to David Edmonson, Office of Senator Eliot Shapleigh, "Re: More ASARCO questions," August 16, 2007.

¹⁴² *Id.*

¹⁴³ *In re: ASARCO, LLC, et al.*, Case No. 05-21207, Derivative Complaint by the Official Committee of Unsecured Creditors of ASARCO LLC on Behalf of the ASARCO LLC Bankruptcy Estate Against Certain Directors and Officers of ASARCO LLC for Breaches of Fiduciary Duties (U.S. Bankruptcy Court, S.D. Texas, August 8, 2007, 26).

When ASARCO personnel reported that the company was in financial trouble, the Directors and Officers, loyal to the interests of Grupo México and AMC, did what they could to keep ASARCO operating. The Directors and Officers, at Grupo México and AMC's insistence, continued to cannibalize itself, abusing its mines, selling key assets, and monetizing insurance policies.¹⁴⁴

Eventually, ASARCO's financial situation became so dire that, in August 2005, the company declared Chapter 11 bankruptcy.¹⁴⁵ As recently as September 27, 2007, more than \$25.2 billion in claims had been filed against ASARCO in Corpus Christi's U.S. Bankruptcy Court.¹⁴⁶ Nearly \$11 billion of these claims were environmental claims filed by 16 states, two Indian tribes, the federal government, and numerous private parties.¹⁴⁷ These claims have been steadily whittled down by the Court, however, as ASARCO attempts to emerge from bankruptcy.¹⁴⁸

Among the numerous parties that filed proofs of claim against ASARCO is the United States Section International Boundary and Water Commission (USIBWC). USIBWC is a federal government agency which has the mission to provide binational solutions to issues that arise during the application of United States - Mexico treaties regarding boundary demarcation, national ownership of waters,

¹⁴⁴ *Id.*

¹⁴⁵ *In re: ASARCO, LLC, et al.*, Case No. 05-21207, Chapter 11 Voluntary Petition (U.S. Bankruptcy Court, S.D. Texas, August 9, 2005).

¹⁴⁶ See ASARCO, LLC Restructuring-Information Website at

<http://www.asarcocoreorg.com>

¹⁴⁷ Les Blumenthal, "Asarco case twists again," *The News Tribune*, October 9, 2007.

¹⁴⁸ For filings related to settlements, see ASARCO, LLC Restructuring-Information Website, *Court Docket Information*, available online at:

<https://www.asarcocoreorg.com/docketsearch.aspx?CaseID=112>. Last accessed July 31, 2008.

sanitation, water quality, and flood control in the border region.¹⁴⁹ In its proof of claim, USIBWC sought an undetermined sum for response actions needed to clean the soil and groundwater within the American Canal and at its field office located immediately across from ASARCO's smelter.¹⁵⁰ USIBWC stated that the ambient environments at the American Dam and Canal and the USIBWC Field office were contaminated "because of releases from the El Paso Smelter."¹⁵¹ Further, the proof of claim alleged that "the soil and groundwater contamination are related to the historic operations of the [ASARCO] smelter."¹⁵²

In late September 2007, ASARCO filed a motion in the bankruptcy court asking the judge to accept a settlement agreement the company had reached with the EPA and Texas Commission on Environmental Quality (TCEQ) for past costs associated with the cleanup of El Paso residential yards. The motion asked the judge to accept a settlement of about \$13.3 million with the EPA and \$419,200 with TCEQ.¹⁵³ In December 2007, the Court approved the settlement.¹⁵⁴

¹⁴⁹ U.S. International Boundary & Water Commission, "History of the International Boundary and Water Commission," online at: <http://www.ibwc.state.gov/home.html>. Last accessed August 4, 2008.

¹⁵⁰ U.S. Department of Justice Proof of Claim, *In re: ASARCO, LLC, et al.*, Case No. 05-21207, Chapter 11 Voluntary Petition (U.S. Bankruptcy Court, S.D. Texas).

¹⁵¹ *Id.*

¹⁵² *Id.* For more information on IBWC's claim, see also 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, 1-59; and 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, 1-37.

¹⁵³ *In re: ASARCO, LLC, et al.*, Case No. 05-21207, Motion for Order Approving Compromise and Settlement Regarding Past Cost Claims at El Paso County Metals Survey Site (U.S. Bankruptcy Court, S.D. Texas, September 28, 2007).

¹⁵⁴ *In re: ASARCO, LLC, et al.*, Case No. 05-21207, Order Approving Past Costs Compromise and Settlement and Future Work Stipulation After Public Comment For the El Paso County Metals Survey Site (U.S. Bankruptcy Court, S.D. Texas, December 4, 2007).

In June 2008, Senator Eliot Shapleigh wrote the EPA to express his concerns as to whether the agency—and its state counterpart—would ensure that all onsite and offsite liabilities would be cleaned up with funding obtained in the bankruptcy process.¹⁵⁵ The Senator stated his concern "that both the EPA and the negligent TCEQ will leave El Paso landowners and taxpayers with significant liabilities because their interests were not adequately protected in the bankruptcy," as El Paso's citizens "demands that they be protected from the lead, arsenic, and other pollutants that have been deposited in their air, soil, and water over the past century."¹⁵⁶ Additionally, the Senator was concerned with contamination that may have resulted from years of an El Paso-based fertilizer company, Ionate, selling a fertilizer that was used on lawns and other hazardous heavy metals. The now out-of-business company used slag from the Oglebay Norton slag-crushing company in west El Paso as part of the fertilizer. Oglebay Norton obtained the slag, a byproduct of the smelting process, from ASARCO.¹⁵⁷ As of August 6, 2008, the EPA had not responded to the Senator's letter.

As part of the bankruptcy process, ASARCO's assets were put up for sale. In late May 2008, it was announced that the highest bidder

¹⁵⁵ Letter from Senator Eliot Shapleigh to EPA Administrator Stephen Johnson, June 6, 2008. Available online at: http://www.shapleigh.org/system/reporting_document/file/227/JohnsonS_ASARCO_plus_attachments.pdf. Last accessed August 6, 2008. See also letter from Senator Eliot Shapleigh to EPA Administrator Stephen Johnson, June 21, 2008. Available online at: http://www.shapleigh.org/system/reporting_document/file/233/JohnsonS_ASARCO_bankruptcy.pdf. Last accessed August 6, 2008.

¹⁵⁶ Letter from Senator Eliot Shapleigh to EPA Administrator Stephen Johnson, June 6, 2008. Available online at: http://www.shapleigh.org/system/reporting_document/file/227/JohnsonS_ASARCO_plus_attachments.pdf. Last accessed August 6, 2008.

¹⁵⁷ See KVIA, "TCEQ: Other Sources for Lead, Arsenic in Region Found," September 25, 2005, available online at: <http://www.kvia.com/Global/story.asp?s=3840391>. Last accessed August 6, 2008; Connie Falk, John G. Mexal, and Richard Ng, "Survey Says: Iron Is A Must For Southwest Superintendents," *Turfgrass Trends*, November 1, 2003; Letter from Myron Knudson, Director, Superfund Division of U.S. Environmental Protection Agency Region 6, to ASARCO Incorporated, July 16, 2002, Enclosure 1.

for the assets was Sterlite Industries, an India-based company that is a subsidiary of Vedanta Resources Ltd., a London-based natural-resources firm with annual sales of about \$6.5 billion.¹⁵⁸ The winning bid of \$2.6 billion was later confirmed in the reorganization plan filed by ASARCO with the bankruptcy court.¹⁵⁹

For El Pasoans, it is extremely important to note that the El Paso ASARCO smelter was not part of Sterlite's bid.¹⁶⁰ So, assuming that another party does not purchase the smelter as a standalone asset before the reorganization plan is formally approved by the bankruptcy court, what will happen to ASARCO in El Paso? According to the TCEQ, the proposed plan "will call for title to the El Paso smelter to be transferred to an environmental custodial trust which will be funded to address onsite remedies."¹⁶¹ TCEQ states that the cleanup, funded through this trust, will include the following activities:

- Groundwater monitoring, recovery, treatment, and installation of a slurry wall
- Design and construction of an additional waste management cell
- Additional asphalt paving to prevent exposure
- Operation and maintenance of the engineered measures
- Demolition of onsite structures including both bridges and installation of an access control fence.¹⁶²

¹⁵⁸ Emily Chasan, "Asarco picks highest bidder, not Grupo Mexico," *Reuters*, May 29, 2008.

¹⁵⁹ Dawn McCarty, "Asarco Bankruptcy Plan Calls for \$2.6 Billion Sale to Sterlite," *Bloomberg*, August 1, 2008.

¹⁶⁰ Diana Washington Valdez, "Asarco sale of assets omits plant in El Paso," *El Paso Times*, August 1, 2008.

¹⁶¹ Letter from TCEQ Executive Director Mark Vickery to Senator Eliot Shapleigh, July 22, 2008. **See also** Diana Washington Valdez, "Asarco sale of assets omits plant in El Paso," *El Paso Times*, August 1, 2008.

¹⁶² Letter from TCEQ Executive Director Mark Vickery to Senator Eliot Shapleigh, July 22, 2008.

A September 23, 2008 hearing in the bankruptcy court will address ASARCO's disclosure statement explaining its reorganization plan.¹⁶³ A hearing on the plan itself is scheduled for November 17, 2008.¹⁶⁴

¹⁶³ ASARCO LLC, "ASARCO Files Bankruptcy Reorganization Plan," Press Release, July 31, 2008.

¹⁶⁴ *Id.*

El Paso Metals Site: ASARCO, a Potentially Responsible Party

Despite ASARCO's attempts to clean up its act, in the late 1980s and throughout the 1990s ASARCO was still contributing to a heavily polluted El Paso. In 1989, ASARCO was El Paso's number two company in total pounds of toxic chemicals released into the environment and far ahead of any other company in terms of air releases.¹⁶⁵ In 1991, El Paso was given the dishonor of being named the city with the worst environment in the United States.¹⁶⁶

During the 1990s, numerous graduate students at the University of Texas at El Paso studied the potential contamination of El Paso soils by heavy metals.¹⁶⁷ After reviewing reports of elevated lead levels on property at the University at Texas at El Paso, Senator Eliot Shapleigh requested advice from a group made up of representatives from the Texas Department of Health, the TNRCC, the El Paso City-County Health and Environment Department, the University of Texas at El Paso, and the EPA.¹⁶⁸ The group then requested that the EPA evaluate the potential risk, which eventually led to an EPA study of areas within a 3 mile radius of ASARCO.¹⁶⁹

The EPA began its investigation to determine the extent of the contamination in July 2001, conducting an initial soil screening of El

¹⁶⁵ Vic Kolenc, "EPA: Toxic pollution is down," *El Paso Times*, June 10, 1991.

¹⁶⁶ Vic Kolenc, "El Paso pollution rated worst," *El Paso Times*, April 17, 1991.

¹⁶⁷ For a summary of those investigations, see Weston Solutions, Inc., "Quality Assurance Sampling Plan and Response Plan for El Paso County Metals Survey Site," prepared for U.S. Environmental Protection Agency, July 2002, available online at: http://www.epa.gov/earth1r6/6sf/pdf/epaso_qasp7d.pdf. Last accessed October 15, 2007.

¹⁶⁸ Letter from Myron Knudson, Director, Superfund Division of U.S. Environmental Protection Agency Region 6, to ASARCO Incorporated, July 16, 2002, Enclosure 1.

¹⁶⁹ For a site background, see U.S. Environmental Protection Agency, "El Paso County/Dona Ana County Metals," available online at: http://www.epa.gov/earth1r6/6sf/el_paso_index.htm. Last accessed October 15, 2007.

Paso schools and parks.¹⁷⁰ After analyzing those soil samples and air samples, EPA found that several areas needed further investigation.

On February 25, 2002, EPA started sampling soil throughout El Paso, showing that some residential yards contained arsenic and lead levels as high as 81 parts per million (ppm) arsenic and 1700 ppm lead, which EPA declared to be "a threat to human health and the environment."¹⁷¹ EPA Region 6, which includes Texas, had a residential soil action based benchmarks of 24 ppm for arsenic and 500 ppm for lead.¹⁷² Thus, EPA determined that a removal action was necessary to decontaminate residential soils in El Paso.¹⁷³ It should be noted, however, that the testing performed by EPA did not address ASARCO's alleged burning of hazardous waste discussed previously.

On July 16, 2002, the EPA named ASARCO a potentially responsible party for the contaminated soils located throughout El Paso.¹⁷⁴ Potentially responsible parties are individuals, companies, or any other parties that may be liable for payment of Superfund cleanup costs due to pollution. "Superfund" is the nickname for the trust fund set up by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a 1980 law which created a tax on the chemical and petroleum industries and provided broad federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment.¹⁷⁵

EPA began cleanup of residential properties in 2002, and those cleanups continue to this day. The current cleanups are being funded by the \$100 million environmental remediation trust fund between

¹⁷⁰ Letter from Myron Knudson, Director, Superfund Division of U.S. Environmental Protection Agency Region 6, to ASARCO Incorporated, July 16, 2002.

¹⁷¹ *Id.* at Enclosure 1.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ For more information on CERCLA, see U.S. Environmental Protection Agency, "Superfund," at <http://www.epa.gov/superfund/>. Last accessed October 15, 2007.

ASARCO, EPA and DOJ. The chart below details the number of residential properties tested and remediated in El Paso as of July 2008:

Residential Properties Tested and Cleaned, El Paso

	Properties Tested	Properties Cleaned
2002	1944	7
2003	566	329
2004	1103	168
2005	0	200
2006	0	124
2007	41	127
2008	177	--

Source: EPA¹⁷⁶

Are you an El Paso homeowner? If you have not contacted the EPA to find out if your property is contaminated by lead and arsenic, we urge you to do so right away. Here is the risk: if lead or arsenic contamination is found on your property and you want to sell it, a title company will not insure your property until it is clean. So any buyer will want a clean property before taking title. EPA recommends that your property be cleaned up if the lead level is above 500 ppm or 46 ppm for arsenic. That is why it's in your very best interest to find out if your property is contaminated so you can have it cleaned up as soon as possible by the EPA cleanup effort currently underway.

If your property has not been tested, we urge that you test it to establish safe levels in your yard. Residents can have their properties tested by contacting Charles Fisher (fisher.charles@epa.gov) or Jon Rinehart (rinehart.jon@epa.gov) with the EPA at 1-800-533-3508.

Unfortunately, El Paso homeowners are left with precious few choices. ASARCO's bankruptcy bar date, the last date that an individual or other entity can file a proof of claim against ASARCO,

¹⁷⁶ E-mail from Cynthia Fanning, EPA, to David Edmonson, Office of Senator Eliot Shapleigh, "Updated numbers," July 31, 2008.

has already come and gone. (The date was August 1, 2006.)¹⁷⁷ Thus, El Pasoans are now barred from filing a monetary claim against ASARCO for the environmental contamination of their home properties. If the environmental remediation trust fund is emptied after paying for nationwide cleanups, there will no longer be any dedicated source of funds with which to pay homeowners for the environmental damage to their property. At that point, it is likely that footing the bill will be the homeowner's responsibility.

Through the bankruptcy and the limited nature of the trust fund, ASARCO has almost succeeded in leaving the tab of their environmental destruction to homeowners across the country.

¹⁷⁷ For more information, see ASARCO, LLC Restructuring-Information Website at <http://www.asarcorg.com>

Air permit renewal

As discussed previously, following a contested case hearing in May 1992, ASARCO received Air Quality Permit No. 20345 for the construction and operation of ConTop at the El Paso smelter. State law requires that the permit be renewed every ten years, so, in 2002, ASARCO applied to renew the air permit to authorize the continued operation of its copper smelter.¹⁷⁸ As approved by the TCEQ on March 27, 2008, Air Quality Permit No. 20345 will allow ASARCO to emit the following types and amounts of pollutants into El Paso's air:

Air Quality Permit No. 20345

Pollutants (tons per year)	Allowables
Lead	2.59
Oxides of Nitrogen	230.04
Carbon Monoxide	287.68
Volatile Organic Compounds	7.66
Sulfur Dioxide	6,673.15
Particulate Matter	352.60
Particulate Matter (equal to or less than 10)	349.63
Sulfuric Acid	16.21

Source: TCEQ¹⁷⁹

TCEQ received the renewal application on March 28, 2002.¹⁸⁰ ASARCO published notice of the company's intent to renew the

¹⁷⁸ For background on the procedural posture of Air Quality Permit No. 20345, see Texas Commission on Environmental Quality, "Executive Director's Report to the Commission on the Renewal of ASARCO Incorporated's Air Quality Permit No. 20345," TCEQ Docket No. 2004-0049-AIR, May 1, 2007, available online at: http://www.tceq.state.tx.us/assets/public/agency/ed_report_arasco.pdf. Last accessed July 31, 2008.

¹⁷⁹ Texas Commission on Environmental Quality, Emission Sources - Maximum Allowable Emission Rates, Permit Number 20345, March 27, 2008.

¹⁸⁰ Texas Commission on Environmental Quality, "Executive Director's Report to the Commission on the Renewal of ASARCO Incorporated's Air Quality Permit No. 20345," TCEQ Docket No. 2004-0049-AIR, May 1, 2007, available online at: http://www.tceq.state.tx.us/assets/public/agency/ed_report_arasco.pdf. Last accessed July 31, 2008.

permit in the *El Paso Times* and *El Diario*, and numerous contested case-hearing requests were received by TCEQ.¹⁸¹ The Commission considered the timely hearing requests in April 2004 and, on May 14, 2004, issued an interim order exercising its plenary authority to hold a hearing in the public interest.¹⁸² The Commission then referred two issues to administrative law judges (ALJs) in the State Office of Administrative Hearings:

1. Whether the operation of the El Paso copper smelter under the terms of the proposed permit will cause or contribute to a condition of air pollution; and
2. Whether ASARCO's compliance history during the last five years that the El Paso copper smelter was in operation can be said to warrant the renewal of Air Quality Permit No. 20345.

The ALJs conducted the hearing on the merits in El Paso from July 11-22, 2005 and issued their proposal for decision on October 27, 2005, recommending denial of the permit renewal.¹⁸³ Specifically, the ALJs found that ASARCO failed to meet their burden of proof on both of the issues referred by the Commission. The ALJs concluded that ASARCO failed to prove that its operation under Permit 20345, if renewed, would likely not cause or contribute to air pollution or that its compliance during the last five years of operation under that permit could be said to warrant renewal.¹⁸⁴ The findings of fact that the ALJs issued included the following:

1. ASARCO did not prepare an up-to-date dispersion model for this case. Instead, ASARCO relied on its 1992 and 1995 versions, neither of which modeled all the concentrations of

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ State Office of Administrative Hearings, "Proposal for Decision," Application of ASARCO, Incorporated to Renew Air Quality Permit No. 20345, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, October 27, 2005, available online at <http://www.soah.state.tx.us/pfdsearch/pfds/582/05/582-05-0593-pfd0.pdf>. Last accessed July 31, 2008.

¹⁸⁴ *Id.*

each pollutant that the Permit, if renewed, would authorize ASARCO to emit.¹⁸⁵

2. ASARCO will emit the following Particulate Matter constituents if Permit 20345 is renewed and ASARCO resumes operation, but ASARCO never modeled those emissions: manganese, barium, and cadmium.¹⁸⁶
3. If it resumed operation, ASARCO would be emitting more than 12 times more SO₂ in El Paso County than all others combined emitted in 2002.¹⁸⁷
4. After the 1995 modeling, ASARCO's permit was changed many times, and no modeling was conducted to support the changes except once.¹⁸⁸

The ALJs' findings, however, were not conclusive—the Commission still had the final say over whether ASARCO's permit would get renewed.

On February 8, 2006, the Commission considered the proposal for decision, determining that ASARCO failed to demonstrate the effectiveness of its existing emission control equipment and practices.¹⁸⁹ Statutory law, however, prevented the Commission from denying the permit application outright.¹⁹⁰ Instead, the Commission explained that in order to make the required determinations to comply with the Texas Health and Safety Code, current air modeling and an investigation were required. On March 10, 2006, the Commission issued an interim order again remanding the permit application to the Executive Director of TCEQ, Mr. Glenn Shankle, and ordered

¹⁸⁵ *Id.* at 23.

¹⁸⁶ *Id.* at 30.

¹⁸⁷ *Id.* at 34.

¹⁸⁸ *Id.*

¹⁸⁹ Texas Commission on Environmental Quality, "Executive Director's Report to the Commission on the Renewal of ASARCO Incorporated's Air Quality Permit No. 20345," TCEQ Docket No. 2004-0049-AIR, May 1, 2007, available online at: http://www.tceq.state.tx.us/assets/public/agency/ed_report_arasco.pdf. Last accessed October 15, 2007.

¹⁹⁰ TEX. HEALTH & SAFETY CODE § 382.0555.

ASARCO to submit, within six months, current air modeling results on a fifty-kilometer basis.¹⁹¹ Further, TCEQ's Executive Director was ordered to conduct a thorough inspection of all air quality control equipment at the El Paso smelter and then submit a report with recommendations on the air permit application.¹⁹²

During the TCEQ Executive Director's required investigation under the Commission's Interim Order, he indicated in a letter to ASARCO that the required investigation "exceed[ed] the scope of the agency's normal permit renewal process and will require resources beyond those appropriated to the agency for that process."¹⁹³ As a result, TCEQ's Executive Director stated that he must require additional information from ASARCO. In order to obtain that information, the Executive Director required "that ASARCO retain one or more qualified independent third parties to perform" three tasks, including: 1) a modeler to audit all modeling performed by ASARCO; 2) a process engineer to determine the condition and effectiveness of all air quality control equipment; and 3) a process engineer to review air quality control equipment in comparison with ASARCO's existing air permit.¹⁹⁴

Under Texas law, underfunding or incompetence is no basis for substituting an objective investigatory process with an applicant-driven investigation. Yet, TCEQ's Executive Director used that argument as the basis for creating a conflict of interest according to which ASARCO was allowed to hire and pay for its own modeling and

¹⁹¹ Texas Commission on Environmental Quality, "Interim Order concerning Application of ASARCO, Incorporated to Renew Air Quality Permit No. 20345," SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, March 10, 2006, available online at:

http://www.tceq.state.tx.us/assets/public/agency/attachment_a.pdf. Last accessed October 15, 2007.

¹⁹² *Id.*

¹⁹³ Letter from Mr. Glenn Shankle, Executive Director of TCEQ, to Mr. Lairy Johnson, ASARCO, May 5, 2006, available online at:

http://www.tceq.state.tx.us/assets/public/agency/attachment_c.pdf. Last accessed October 15, 2007.

¹⁹⁴ *Id.*

its own investigation on its own air quality permit. On September 22, 2006, ASARCO hired Arnold Srackangast to conduct the "independent modeling audit" for Air Quality Permit No. 20345.¹⁹⁵

Despite assurances from ASARCO that "Mr. Srackangast will not act as an advocate for ASARCO, but as an independent third-party consultant paid for by ASARCO," allowing ASARCO to hire Mr. Srackangast to conduct its air modeling audit is as absurd as having each of the contesting parties fund and hire its own personnel to evaluate ASARCO's permit. As the contesting parties had no role in the air modeling audit, neither should ASARCO have had a role in determining who conducted the investigation required by the March 10 Interim Order. By allowing ASARCO to influence the investigation into their air permit renewal, TCEQ effectively aligned its interests with the company at the expense of El Paso's citizens. These concerns were brushed aside by TCEQ's Executive Director.¹⁹⁶

Furthermore, numerous delays were associated with ASARCO's investigation, and these delays did not comply with the mandatory deadlines in the Interim Order. The March 10, 2006 Interim Order explicitly provided a set timeline for TCEQ's Executive Director to conduct certain evaluations of emissions impacts, air modeling, and on-site equipment within a six-month period, ending September 10, 2006.¹⁹⁷ On November 10, 2006, however, the

¹⁹⁵ ASARCO, "Asarco LLC: Wants Srackangast as Special Environmental Auditor," Press Release, September 22, 2006, available at http://bankrupt.com/TCR_Public/060922.mbx. Last accessed July 31, 2008.

¹⁹⁶ Texas Commission on Environmental Quality, Executive Director's Response to Comments Regarding the ED's May 1, 2007 Report on Renewal of Asarco, Incorporation's Air Quality Permit No. 20345, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, July 27, 2007, available online at: http://www.tceq.state.tx.us/assets/public/agency/ed_response_asarco.pdf. Last accessed July 31, 2008.

¹⁹⁷ Texas Commission on Environmental Quality, "Interim Order concerning Application of ASARCO, Incorporated to Renew Air Quality Permit No. 20345," SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, March 10, 2006, Ordering Provisions No. 2 and 3, available online at:

Executive Director filed a request for an extension of the deadline, despite the relevant statute clearly stating that "[i]f the applicant does not meet those requirements in accordance with the schedule, the applicant must show in a contested case proceeding why the permit should not expire immediately."¹⁹⁸ Once again, TCEQ's Executive Director ignored these concerns.¹⁹⁹

Eventually, the investigations required under the Interim Order were completed, and the Executive Director issued his report to the Commission on the renewal of Air Quality Permit No. 20345 on May 1, 2007.²⁰⁰ In the report, the Executive Director recommended the issuance of a five-year, rather than ten-year, permit provided that ASARCO meets certain requirements, including certain repairs, replacements, and other maintenance activities.

During the public comment period on the Executive Director's report, numerous interested parties submitted comments. The City of El Paso argued that the air permit should be evaluated on a multi-media basis, as ASARCO's pollutants do not just dissipate in the air

http://www.tceq.state.tx.us/assets/public/agency/attachment_a.pdf. Last accessed October 15, 2007.

¹⁹⁸ Texas Commission on Environmental Quality, Executive Director Interim Report and Request for Extension, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, November 10, 2006, available online at:

http://www.tceq.state.tx.us/assets/public/agency/attachment_f.pdf. Last accessed October 15, 2007; TEX. HEALTH & SAFETY CODE § 382.055(g) (2006).

¹⁹⁹ Texas Commission on Environmental Quality, Executive Director's Response to Comments Regarding the ED's May 1, 2007 Report on Renewal of Asarco, Incorporation's Air Quality Permit No. 20345, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, July 27, 2007, available online at:

http://www.tceq.state.tx.us/assets/public/agency/ed_response_asarco.pdf. Last accessed October 23, 2007.

²⁰⁰ Texas Commission on Environmental Quality, Executive Director's Report to the Commission, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, May 1, 2007, available online at:

http://www.tceq.state.tx.us/assets/public/agency/ed_report_arasco.pdf. Last accessed October 15, 2007

but instead settle into the region's soils, water, and other surfaces.²⁰¹ The City also stated that the smelter could contribute to existing soil contamination in neighborhoods near the smelter by emitting arsenic and other pollutants.²⁰² As discussed previously, Senator Shapleigh argued that the Executive Director created a conflict of interest when it allowed ASARCO to hire and fund an employee to conduct its own air modeling audit on its own air quality permit.²⁰³ Further, he argued that ASARCO and TCEQ each failed to meet mandatory deadlines ordered by TCEQ Commissioners in the March 10, 2006 interim order, and therefore Air Quality Permit No. 20345 is effectively denied.²⁰⁴ Despite these and other arguments by interested parties, the Executive Director concluded that he did not recommend any revisions to his May 1, 2007 report.²⁰⁵

The TCEQ Commissioners finally considered ASARCO's renewal application and the Executive Director's report on February 13, 2008. Hundreds of El Pasoans traveled to Austin to voice their opposition to the potential reopening of ASARCO's smelter.²⁰⁶ After oral arguments, however, all three Commissioners voted to adopt the Executive Director's report and approved the issuance of ASARCO's air permit renewal.²⁰⁷ The Commissioners agreed to slight revisions of

²⁰¹ See Texas Commission on Environmental Quality, Executive Director's Response to Comments Regarding the ED's May 1, 2007 Report on Renewal of Asarco, Incorporation's Air Quality Permit No. 20345, SOAH Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR, July 27, 2007, available online at: http://www.tceq.state.tx.us/assets/public/agency/ed_response_asarco.pdf. Last accessed October 23, 2007.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 40.

²⁰⁶ Sito Negron, "Asarco Permit Approved, With Conditions; City Vows Appeal," *Newspaper Tree*, February 13, 2008. Online. Available at: <http://www.newspapertree.com/politics/2092-asarco-permit-approved-with-conditions-city-vows-appeal>. Last accessed July 31, 2008.

²⁰⁷ *Id.* See also Alicia Caldwell, "Asarco wins smelter permit in Texas," *Arizona Daily Star*, February 14, 2008.

the permit.²⁰⁸ For example, ASARCO will not be allowed to receive or process East Helena matte and speiss, thus reducing the amount of lead released by the smelter.²⁰⁹ Further, the permit is only effective for five years, rather than the usual ten.²¹⁰ Finally, ASARCO was required to establish, maintain, and operate, under the direction of TCEQ staff, four additional air monitors to record the levels of lead emitted by the site.²¹¹

The Commissioners also required ASARCO to assess the physical status of the smelter and its various components and report back to TCEQ by July 1, 2008.²¹² ASARCO hired consultants to complete the investigation, which found that the two existing acid plants had suffered significant corrosion.²¹³ According to ASARCO, if the company chooses to build a new acid plant, "it could take nearly two years before the plant is ready to go back online."²¹⁴ The next report is due to TCEQ in September 2008.²¹⁵

Since the approval of the air permit renewal, El Pasoans have continued to fight. On February 14, 2008 and February 18, 2008, Senator Eliot Shapleigh filed two Texas Public Information Act

²⁰⁸ Sito Negron, "Asarco Permit Approved, With Conditions; City Vows Appeal," *Newspaper Tree*, February 13, 2008. Online. Available at: <http://www.newspapertree.com/politics/2092-asarco-permit-approved-with-conditions-city-vows-appeal>. Last accessed July 31, 2008.

²⁰⁹ Texas Commission on Environmental Quality, *Special Conditions, Permit Number 20345*, March 27, 2008.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Texas Commission on Environmental Quality, *An Order Concerning the Application by ASARCO Incorporated for Renewal of Air Quality Permit No. 20345 and All Related Filings*, March 27, 2008.

²¹³ See ASARCO LLC, "Air Quality Control Equipment Assessment Report and Maintenance Plan," July 1, 2008. On file with the Texas Commission on Environmental Quality.

²¹⁴ ASARCO LLC, "ASARCO Studying Ways to Reduce SO2 Emissions Upon Restart," Press Release, July 1, 2008.

²¹⁵ Texas Commission on Environmental Quality, *An Order Concerning the Application by ASARCO Incorporated for Renewal of Air Quality Permit No. 20345 and All Related Filings*, March 27, 2008.

requests with TCEQ asking for key documents, emails, and cell phone records. The requests were made under the "legislative purpose" statute, which allows legislators to gain access to otherwise confidential information, provided that it is for a legislative use.²¹⁶ Instead of releasing any relevant materials, TCEQ submitted an 18 page letter to Texas Attorney General Greg Abbott (AG) on March 4, arguing that the Senate office should not be given access to confidential information, despite the clear intent of the statute.²¹⁷ On May 16, however, the AG disagreed with TCEQ and said Senator Shapleigh was entitled to all requested materials.²¹⁸ In a further attempt to deny access to the documents, TCEQ filed suit on May 29 in the 345th Judicial District in Travis County in order to challenge the AG's ruling and continue to withhold documents from the Senator.²¹⁹ Senator Shapleigh filed a plea in intervention, requesting that the court allow the Senator to act as a party in the lawsuit.²²⁰ The case is currently pending.

On April 9, 2008, the EPA submitted a letter to TCEQ raising "several significant questions" regarding the issuance of ASARCO's air permit renewal.²²¹ Thomas Diggs, the EPA Region 6's Associate Director for Air, sent the letter to Richard Hyde, TCEQ's Director of the Air Permit Division, and enclosed a series of questions regarding

²¹⁶ TEX GOV'T CODE § 552.008.

²¹⁷ Letter from TCEQ Assistant General Counsel Celeste Baker to Texas Attorney General Greg Abbott, March 4, 2008.

²¹⁸ Texas Attorney General Greg Abbott, *Open Letter Ruling No. OR2008-06742*, May 15, 2008.

²¹⁹ *Texas Commission on Environmental Quality v. The Honorable Greg Abbott, Attorney General of Texas*, Texas Commission on Environmental Quality's Original Petition, Cause No. D-1-GN-08-001855 (345th Travis County Dist., May 29, 2008).

²²⁰ *Texas Commission on Environmental Quality v. The Honorable Greg Abbott, Attorney General of Texas*, Plea in Intervention, Cause No. D-1-GN-08-001855 (345th Travis County Dist., June 25, 2008).

²²¹ Letter from EPA Associate Director for Air Thomas Diggs to TCEQ Director of Air Permits Division Richard Hyde, April 9, 2008. See also David Crowder, "EPA Questions TCEQ on Asarco Permit," *Newspaper Tree*, April 11, 2008. Online.

Available at: <http://www.newspapertree.com/news/2322-epa-questions-tceq-on-asarco-permit>. Last accessed July 31, 2008.

TCEQ's conclusions during the permitting process.²²² In particular, the EPA had questions regarding whether ASARCO's ten years of dormancy would require the company to meet additional requirements, including upgrading to the newest technologies and applying for a new permit instead of just a renewal.²²³ On July 24, 2008, TCEQ responded, stating that the TCEQ Executive Director "maintains the position that the renewal of state permit 20345 authorizes continued operation of the plant."²²⁴

On April 16, 2008, the City of El Paso filed a motion for rehearing, requesting the TCEQ Commissioners to reopen specific issues related to the permit renewal's issuance.²²⁵ The City supplemented their motion less than eight days later.²²⁶ In the supplement, the City described information recently brought to their attention that suggested ASARCO and its representatives had been engaging in illegal ex parte communications.²²⁷ The supplement contained billing records from ASARCO's law firm, Baker Botts, showing that ASARCO representatives repeatedly met with TCEQ Commissioners and staff with regard to the air permit proceeding while the matter was pending before the Commission.²²⁸ Citing statutory provisions that prohibit ex parte communications, the supplement argued that these communications "would be a violation of state law, TCEQ rules, and the City's due process rights as a protestant in the proceeding, and would undermine the impartiality required for

²²² Letter from EPA Associate Director for Air Thomas Diggs to TCEQ Director of Air Permits Division Richard Hyde, April 9, 2008.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Application of ASARCO Incorporated for Renewal of Air Quality Permit No. 20345*, Protestant's, The City of El Paso's, Motion for Rehearing, TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-0593, April 16, 2008.

²²⁶ *Application of ASARCO Incorporated for Renewal of Air Quality Permit No. 20345*, Protestant's, The City of El Paso's, Supplement to Motion for Rehearing, TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-0593, April 24, 2008.

²²⁷ *Id.*

²²⁸ *Id.*

the final determination in this proceeding."²²⁹ Unfortunately, the TCEQ Commissioners failed to act on the City's motion for rehearing, thus overruling the motion by operation of law.²³⁰ In response, on June 11, 2008, the City filed a lawsuit against TCEQ to set aside the air permit renewal.²³¹ The Sierra Club also filed a similar suit.²³² These cases are currently pending.

In July 2008, ASARCO filed its first bimonthly assessment report and maintenance plan with the TCEQ.²³³ The report, required by the Commissioners' March 2008 order, examined the current status of equipment and systems at the plant.²³⁴ In part, the report inspected the smelter's sulfuric acid plants, which are the primary collectors of sulfur emissions from the facility, and stated:

The majority of equipment in the #1 acid plant fell into categories C [i.e., cannot be used but has some asset value] and D [i.e., only good for scrap value], while the absorbing towers, dry towers, pump tanks, and interpass heat exchangers in the #2 acid plant fell in Category D ... FENCO concluded that prior to restart, the two acid plants will require major repairs to correct for the amount of structural damage and the buildup of sulfates in the systems.²³⁵

²²⁹ *Id.* at 6.

²³⁰ Letter from TCEQ Assistant General Counsel Celeste Baker to Persons on TCEQ Docket No. 2004-0049-AIR Mailing List, May 23, 2008.

²³¹ *City of El Paso v. Texas Commission on Environmental Quality*, Original Petition, Cause No. D-1-CV-08-001232 (98th Travis County Dist., June 11, 2008).

²³² *Sierra Club v. Texas Commission on Environmental Quality*, Original Petition, Cause No. D-1-GN-08-002064 (345th Travis County Dist., June 12, 2008).

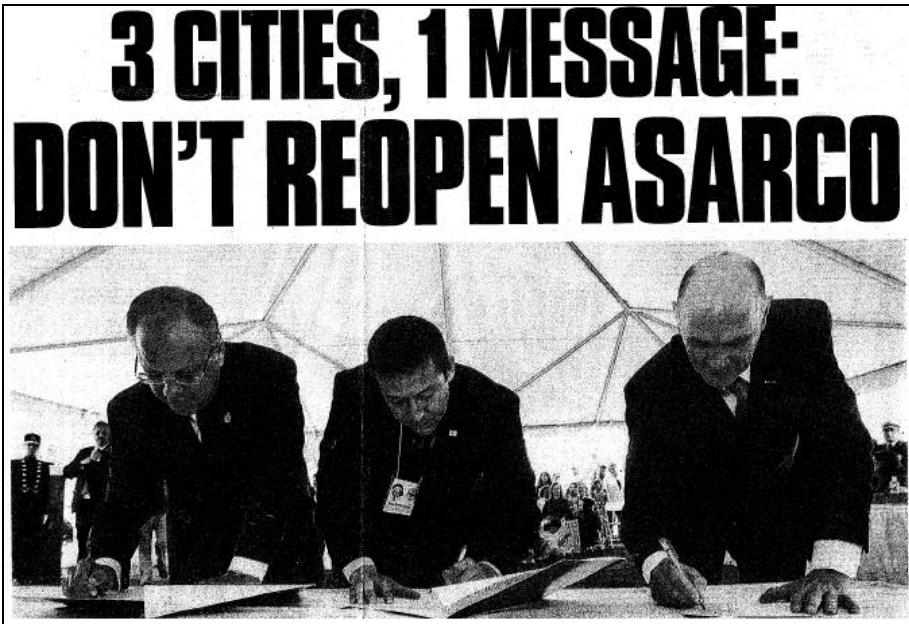
²³³ *ASARCO LLC El Paso Copper Plant Air Control Equipment Assessment Report and Maintenance Plan*, submitted to Texas Commission on Environmental Quality Executive Director, July 1, 2008.

²³⁴ *Id.*

²³⁵ *Id.* at 10-11.

Given that a substantial portion of the plant must be rebuilt prior to restart, questions remain as to whether the federal Clean Air Act would require ASARCO to obtain an entirely new air permit.

It must be noted that the TCEQ Commissioners reached their decision despite massive public pressure to deny the permit outright.



Source: *El Paso Times*

Leaders from across the three-state, two-nation region joined together in opposition of the permit renewal. The City of El Paso, the City of Juarez, and the City of Sunland Park, New Mexico all passed resolutions against the air permit.²³⁶ The mayors of the three cities met and signed a historic resolution against ASARCO.²³⁷ Additionally, 11 legislators from the three-state region of Texas, New

²³⁶ Mark Muecke, "El Pasoans in Austin to oppose Asarco reopening," *El Paso Times*, March 28, 2007; Tika Milan, "The Dark Side of the Rio Grande: Tika Milan Reports on Asarco's Texas Refinery," *Rolling Stone*, March 9, 2007.

²³⁷ Tammy Fonce-Olivas, "Mayors urge state to deny smelter air permit," *El Paso Times*, June 1, 2007.

Mexico, and Chihuahua signed a bi-national joint resolution in opposition to the renewal of ASARCO's air permit.²³⁸ New Mexico Governor Bill Richardson also spoke out against the permit's renewal.²³⁹



Source: Robert Ardovino

The community has also played a vital role in showing the public's opposition to the air permit renewal. On September 23, 2007, the "Faces Against ASARCO" event brought together over 1,000 area residents in a visual representation of their opposition to ASARCO's reopening. The photo was delivered to the Commissioners at TCEQ.

From hundreds traveling to Austin to voice their opposition to the air permit to thousands writing to TCEQ, El Paso and the surrounding region responded with one consistent message: deny Air Quality Permit No. 20345.

²³⁸ Bi-national Joint Resolution in Opposition to Renewal of ASARCO's Air Permit.

²³⁹ Darren Meritz, "Richardson says deny Asarco its air permit," *El Paso Times*, October 3, 2007.

ASARCO and Other Communities

El Paso is not alone. Other communities in the United States have battled with the polluting giant, ASARCO, only to emerge triumphant with a brighter, cleaner future. These battles have not been won overnight, nor has the resulting cleanup taken place without great effort. But it can be done: ASARCO's pollution did not have to define these communities, nor does it have to define El Paso.

Tacoma, Washington

Just northwest of Tacoma, Washington, on the banks of Commencement Bay, a copper smelter began operating in 1890.²⁴⁰ ASARCO became the operator and owner in 1905.²⁴¹ The Tacoma smelter used ore with high arsenic content, resulting in high levels of arsenic pollution.²⁴² When the federal government began efforts to regulate arsenic in the workplace and environment, the Tacoma smelter became the center of attention.²⁴³

The EPA projected that two Tacoma residents each year would contract lung cancer from ASARCO's arsenic emissions if more air quality controls were not installed, yet ASARCO insisted that the emissions posed no harm to residents.²⁴⁴ In June 1984, ASARCO announced that it would be closing the copper smelter, which by that point was the nation's biggest source of arsenic pollution.²⁴⁵ At the time, an ASARCO vice president claimed that the smelter was closing

²⁴⁰ Arthur R. Dammhoeher, Puget Sound Air Pollution Control Agency, "History of Relations - Puget Sound Air Pollution Control Agency and American Smelting and Refining Company Copper Smelter," January 2, 1971.

²⁴¹ *Id.*

²⁴² Philip Shabecoff, "Tacoma gets choice: cancer risk or lost jobs," *The New York Times*, July 13, 1983.

²⁴³ Marianne Sullivan, "Contested Science and Exposed Workers: ASARCO and the Occupational Standard for Inorganic Arsenic," *Public Health Reports*, Vol. 122, Jul-Aug 2007, 541.

²⁴⁴ "Smelter putting arsenic in air is set to close," *The New York Times*, June 30, 1984.

²⁴⁵ *Id.*

due to depressed copper prices and "federal, state, and local environmental regulations ..."²⁴⁶

ASARCO never completely cleaned up the property, despite a 1997 consent decree between the company and EPA mandating cleanup of the uplands portions of the smelter property.²⁴⁷ Further, a 2000 EPA administrative order required ASARCO to permit sediment and groundwater work, much of which was not completed as of 2006.²⁴⁸

Fortunately, the federal government recently reached an agreement with ASARCO that will allow the company to sell the smelter property to a Washington-based developer.²⁴⁹ The developer intends to clean up the land to residential environmental standards and then undertake residential and commercial development on the property.²⁵⁰ As Granta Nakayama, EPA's assistant administrator for Enforcement and Compliance Assurance said, "The cleanup and redevelopment of this land is a win all around. It enhances the environment, improves the local community, and promotes economic development."²⁵¹

Omaha, Nebraska

From 1899 to 1997, ASARCO operated a lead refinery in the heart of Omaha, Nebraska.²⁵² While the refinery was at one point the largest employer in Omaha, ASARCO eventually became the only smelter or refinery in town.²⁵³ When Mayor Hal Daub took office in

²⁴⁶ *Id.*

²⁴⁷ U.S. Environmental Protection Agency, "Government Reaches Agreement with Asarco and Point Ruston to Clean Up Contaminated Site in Washington State," Press Release, July 27, 2006.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Sierra Club - Missouri Valley Group, "Local Issues: Soil Contamination - ASARCO," online at <http://nebraska.sierraclub.org/movalley/local/asarco/index.asp>. Last accessed August 4, 2008.

²⁵³ Interview with Mayor Hal Daub. On file with author.

1995, he pinpointed the ASARCO plant as a major impediment to the revitalization of a downtown area that was "dying," in Daub's words.²⁵⁴ This "contaminated and polluted" 800 acre area of the city was "just sitting there except for the ASARCO plant."²⁵⁵ Mayor Daub approached ASARCO and asked them to close and relocate their plant, and he committed to working with the state to repermit the facility at another location with more modern air pollution controls.²⁵⁶

Later that year, the facility announced that, rather than implement the remainder of the estimated \$40 million control strategy needed to meet the ambient air lead standard, it would be scaling back operations.²⁵⁷ On December 31, 1997, the ASARCO facility ceased operations and began the process of demolition, which was completed in late 1999.²⁵⁸ Through the closure of the ASARCO facility, the once "contaminated and polluted" area of downtown is now vibrant, serving as the location of the city's convention center, the Qwest Center Omaha.²⁵⁹

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ U.S. Environmental Protection Agency, "ASARCO (Omaha) Lead Redesignation Plan", March 7, 2006, available online at:

<http://www.epa.gov/Region7/programs/artd/air/rules/nebraska/asarcoplan.htm>. Last accessed August 4, 2008.

²⁵⁸ *Id.*

²⁵⁹ C. David Kotok, "Bridge aims to create picture-perfect scene," *Omaha World-Herald*, May 16, 2006.



The overall development site for Qwest Center Omaha spans about 100 city blocks.²⁶⁰ Opened in September 2003, the center contains more than 1,100,000 square feet, including a 194,000 square foot exhibition hall, more than 62,000 square feet of meeting space, and an 18,300 seat arena.²⁶¹

In 1998, the Omaha City Council solicited help from EPA in addressing problems with lead contamination in Omaha as a result of ASARCO's pollution.²⁶² According to the EPA, during ASARCO's operational period, "lead and other heavy metals were emitted into the atmosphere through smoke stacks and fugitive emissions from plant activities."²⁶³ ASARCO left a cleanup so large that had to be addressed through federal action. In April 2003, the EPA placed Omaha on the National Priority List for Superfund cleanup, making it the largest residential Superfund site in the country.²⁶⁴ As of July 2007, EPA had tested approximately 32,000 residential properties since March 1999,

²⁶⁰ Qwest Center Omaha, "Qwest Center - Overview," online at <http://www.qwestcenteromaha.com> Last accessed August 4, 2008.

²⁶¹ *Id.*

²⁶² U.S. Environmental Protection Agency, "Omaha Lead Site," July 3, 2007, available online at http://www.epa.gov/region7/cleanup/npl_files/nesfn0703481.pdf. Last accessed August 4, 2008.

²⁶³ *Id.*

²⁶⁴ Jonah Deppe, "Local Issues: Soil Contamination - ASARCO, Update on Omaha Lead Superfund Site" Sierra Club, March 2004.

with cleanup consisting of removing and replacing contaminated soil.²⁶⁵

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²⁶⁵ U.S. Environmental Protection Agency, "Omaha Lead Site," July 3, 2007, available online at http://www.epa.gov/region7/cleanup/npl_files/nesfn0703481.pdf. Last accessed August 4, 2008.