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.

Recently, 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 almost $11 billion 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 EPA for allegedly
illegally transporting, storing, and processing hazardous waste in El Paso;

- ASARCO still owes the City of El Paso $1.11 million, not including penalties and interest, for a street paving project in El Paso;

- ASARCO is asking Texas for permission to put 7,000 tons of new pollutants into our air;

- ASARCO is also asking permission to put 4.7 tons of lead back into our air—more than any plant in the U.S.; and

- ASARCO is also asking permission to put 6,673 tons of sulfur dioxide back into our air—more than 10 times what the next highest polluter puts into El Paso 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—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 the 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 complete the smelting 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 in on the northwest outskirts of El Paso to process lead and copper ores 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 the El Paso Smelter, with a 100-foot high, sheet-iron smokestack built within a wooden frame. The smelter boasted a workforce of 250 and was ready to begin processing the high-grade Mexican ore from Santa Eulalia and Sierra Mojada mines. 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 nearest track, owned by Santa Fe Railroad. Despite its remote location, the smelter was successful: in the first year of operation, the plant smelted over 12,000 tons of lead bullion.

2 Id.
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.  

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. By 1881, Meyer and his seven sons had secured an enormous fortune through various types of industry, including lace and embroidery. The family's first involvement with mining began that same year when Meyer Guggenheim purchased an one-half interest in two lead and silver miles in Leadville, Colorado. The mines would eventually reach an output that would net the owners $100,000 a month. 

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. Although labor troubles and low silver prices encumbered

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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.\textsuperscript{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."\textsuperscript{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 have otherwise 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.\textsuperscript{13} ASARCO would be headed by a member of the Guggenheim family until 1957.\textsuperscript{14}

\begin{footnotes}
\footnotetext{11} Id. at 46.  
\footnotetext{12} Id. at 63.  
\footnotetext{13} Id. at 67-72.  
\end{footnotes}
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.\footnote{Leon Metz, \textit{City at the Pass: An Illustrated History of El Paso}, 1980, Windsor Publications: Woodland Hills, CA.} 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.\footnote{Friedrich Katz, \textit{The Life and Times of Pancho Villa}, 1998, Stanford University Press: Stanford, CA, 48.} This led ASARCO to shut down its mines at Santa Eulalia and Santa Barbara in

\footnote{At the smelter [ASARCO], El Paso, 1899 \textit{(Adltman Collection, B198, El Paso Public Library)}.}
This economic crisis linked opposition movements across the country who were plotting against President Porfirio Diaz. In late November 1910, Francisco Madero released the Plan of San Luis Potosí and ushered in the Mexican Revolution. Soon, Pancho Villa and Pascual Orozco joined Madero as military leaders in the insurrection. Early in 1911, Madero's revolutionary army camped directly across the Rio Grande from the ASARCO smelter. Eventually, the Battle of Juarez began on May 8, 1911, leading to the May 21 Treaty of Ciudad Juarez which removed Diaz from power and replaced him with Madero.

A copper smelter was added to the El Paso property in 1910, receiving ore from the Guggenheim-owned Chino copper mine until 1939. In 1925, the El Paso smelter processed more than 2,000 tons of ore on a daily basis. The order was transported from mines in Arizona, New Mexico, and northern Mexico. As one could expect, ASARCO was polluting El Paso even then. In 1930, the company proclaimed that they would be installing improvements in the smelter in order to "abolish smoke," leading to fumes being "entirely eliminated." 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 building a 828-foot chimney, at the time the world's largest smokestack, designed

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17 Id.
18 Id. at 52-54.
20 Id.
21 Id. at 59-61.
24 "Wages Increased; El Paso Smelter to Abolish Smoke," El Paso Times, August 22, 1930.
to help alleviate local air pollution.\textsuperscript{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.\textsuperscript{26} In 1969, however, El Paso still had a higher concentration of lead in the air than any other city in Texas.\textsuperscript{27}

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ASARCO and the Environment

Originally erected in the 19th century as a company town for ASARCO, Smeltertown was at the foot of the ASARCO smokestacks. For decades, Smeltertown residents accepted ASARCO's pollution as a fact of life. However, in the late 1960s, El Paso leaders grew concerned over potential lead poisoning in the area surrounding the smelter, including Smeltertown. 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. Less than a month later, the State of Texas joined the suit against ASARCO.

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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).
As a result of evidence raised 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. In addition, ASARCO had emitted 508 metric tons of zinc, 11 metric tons of cadmium, and 1 metric ton of arsenic. Dr. Rosenblum thus estimated that 2,700 people between the ages of 1 and 19 in a four-mile radius around the smelter had elevated blood lead levels at or above 40 micrograms per deciliter. For comparison sake, it should be noted that the current Centers for Disease Control standard for elevated blood levels in children is now only 10 micrograms per

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.
34 Id.
deciliter, and a debate exists regarding whether figure that should be lowered further.\textsuperscript{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.\textsuperscript{36}

People, animals, and fish are mainly exposed to lead by breathing and ingesting it in food, water, soil, or dust. Lead accumulates in the 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 and 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.\textsuperscript{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,


\textsuperscript{36} Centers for Disease Control and Prevention, Department of Health and Human Services, "Lead: Basics," available online at: \url{http://www.cdc.gov/lead/basics.htm} Last accessed October 11, 2007.

\textsuperscript{37} \textit{Id.}
decreased nerve conduction velocity, and lung cancer. Acute exposures can cause lung distress and even death.\textsuperscript{38}

As a result of Dr. Rosenblum’s analysis, the Centers for Disease Control, the federal government’s premier health promotion, prevention, and preparedness agency, sent Dr. Philip Landrigan and a colleague to El Paso to investigate.\textsuperscript{39} Dr. Landrigan soon discovered that more than half of their study subjects had elevated lead levels.\textsuperscript{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.\textsuperscript{41} Following extensive testing and in a landmark study, Dr. Landrigan and his colleagues found that 53 percent of children aged 1 to 9 years living within 1.6 kilometers of ASARCO had elevated lead levels that were considered dangerous.\textsuperscript{42}

\textsuperscript{40} Jake Bernstein, “Clean Up or Cover Up?,” The Texas Observer, October 8, 2004.
The City and State's suit against ASARCO commenced before the Honorable Charles Schulte in the 41st District Court on February 28, 1972. The plaintiffs presented their case over the course of nine weeks, bringing in who Mayor Williams would later call "the finest experts available in the country." 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 Smeltertown had been "overlooked" by the company. ASARCO officials also stated that it "never occurred" to them to include Smeltertown in the company's air pollution monitoring system. Dr. Elenor Berman, a professional toxicologist, told the court that the

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43 Interview with Mayor Bert Williams. On file with author.
44 Id.
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 Smeltiertown, 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. 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 Smeltiertown 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

49 Id.
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.
analyzed by Plaintiff and Defendant, using standardized laboratory techniques, for lead, cadmium, zinc and arsenic.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{57} The remaining 120 families of Smeltertown were evicted, and the community was razed in 1973.\textsuperscript{58}

Three years later, El Paso's Mayor after Bert Williams, Fred 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.\textsuperscript{59} 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.\textsuperscript{60} Finally, the amended order stated that ASARCO is "permanently and mandatorily enjoined ... from causing, suffering, allowing, or permitting the emission of any lead, zinc, cadmium, or

\textsuperscript{54} Id. at 3.
\textsuperscript{55} Id. at 4.
\textsuperscript{56} Id.
\textsuperscript{59} 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).
\textsuperscript{60} Id.
any other heavy metal … in such concentration and of such duration to be injurious to human health, animal life or vegetation.”

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." Mayor Hervey had previously served as President of the El Paso Chamber of Commerce, the primary advocate for El Paso's business community. 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." In 1972, the a Chamber report stated that it was "ridiculous" to claim that ASARCO indiscriminately discharged poisonous materials from their plant. 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. 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."

Throughout the hearing process, ASARCO maintained that the lead contamination could not be directly attributed to the operation of

61 Id.
62 Interview with Mayor Bert Williams. On file with author.
the El Paso smelter. 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. Further, Dr. McNeil felt that blood lead levels from 40 to 80 micrograms per deciliter were safe provided a child had good nutrition. Again, note that the current Centers for Disease Control standard for elevated blood levels in children is only 10 micrograms per deciliter, and a debate exists regarding whether figure that should be lowered further.

In March 1972, before the lawsuit was settled, the El Paso Pediatrics Society announced that "[f]rom the statistical data available to us there is no evidence that there is a lead intoxication problem outside of Smeltertown." 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 made the recommendation that "[a]ny further massive blood lead sampling outside the Smeltertown-Old Fort Bliss area is at this time unjustified, based on the data available to us at this time." The committee consisting of Drs. Roman, Magana, McNeil, Nickey, and Rosenblum also rejected a $50,000 grant from the CDC for Dr. Landrigan to do more research.

The attack on Dr. Landrigan's research continued into 1973, when Dr. Rosenblum, director of the El Paso City-County Health

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70 Id.


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

74 Id.; Jake Bernstein, “Clean Up or Cover Up?,” The Texas Observer, October 8, 2004.
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.75

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.76 The International Lead Zinc Research 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.77 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."78

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

75 Letter from Dr. Bernard Rosenblum to Dr. Philip Landrigan, May 16, 1973.
children in the influential medical journal, *The Lancet*. The article found that the IQs of children with higher lead levels were significantly lower than the 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." 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. Dr. McNeil's study, however, was only published in a local journal, while Dr. Landrigan's was published in a journal of international repute.

In 1977, Dr. Landrigan and colleagues returned to the Paso del Norte region for a follow-up study. 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.

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.

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82 *Id*.


84 *Id*.

85 Center for Children’s Health and the Environment of the Mount Sinai School of Medicine, "Biography of Dr. Landrigan," available online at:
After this large battle, 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, El Paso County, New Mexico, and the city of El Paso.\(^8\) 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.\(^7\) 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.\(^8\) ASARCO would soon become only a copper smelter after shutting down the zinc and lead plants in 1982 and 1985, respectively.\(^9\) 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.\(^{10}\)

\(^{8}\) Laura Hlavach, "Asarco needs permit to burn coal," *El Paso Times*, November 21, 1981.
\(^{8}\) Laura Hlavach, "Asarco needs permit to burn coal." *El Paso Times*, November 21, 1981.
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. 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. ConTop furnaces

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91 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.


replaced burners built in the 1940s and based on technology from the early 1900s.\textsuperscript{94}

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 of a much more heinous nature: hazardous waste.

In 1999, the Environmental Protection Agency (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.\textsuperscript{95} In their press release, the EPA stated that:

\begin{quote}
... [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.
\end{quote}

RCRA is a federal law that gives EPA the authority to control hazardous waste from the "cradle-to-grave." This includes the generation, transportation, treatment, storage, and disposal of hazardous waste.\textsuperscript{96}

\begin{footnotesize}
\textsuperscript{94} Id.
\textsuperscript{95} U.S. Environmental Protection Agency, "Asarco will address alleged hazardous waste, clean water violations." Press Release, April 15, 1999.
\textsuperscript{96} 42 U.S.C. §§ 6901 et. seq. (2007).
\end{footnotesize}
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, obtained via public information requests, discussed how ASARCO, along with its subsidiary Encycle, burned over 5,000 tons of hazardous waste in the El Paso smelter from 1992 until 1997. In addition, the investigation confirmed that 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 …" According to further EPA documentation, the evidence indicates that Asarco accepted 46,486 tons of waste from Encycle from 1992 to 1997. 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 the federal and state environmental laws that protect our health, safety, and well-being. Recently, the National Sierra Club and the Get The Lead Out Coalition, an El Paso-based community organization,

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requested that El Paso County Attorney José Rodríguez seek criminal prosecution of ASARCO for burning hazardous waste in its smelter. 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. County 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."

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. Under a plea agreement, Rodriguez pled 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.

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.

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102 Id. at 1.
104 Id.
It should be noted that the Supreme Court has ruled that RCRA doesn't have a statute of limitations.\(^{106}\)

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 - and 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 were assessed penalties.\(^{107}\) ASARCO was further required to enter into a 2004 Consent Decree Modification to come into legal compliance.\(^{108}\)

Even today, ASARCO is in violation of its El Paso obligations under the 1999 Consent Decree.\(^{109}\) 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 ..."\(^{110}\) To date, however, ASARCO has yet to pay the City the balance of $1,110,000 under the paving contract.\(^{111}\) Following ASARCO’s bankruptcy filing in 2005, the City of El Paso filed 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.\(^{112}\)

\(^{105}\) Id.


\(^{108}\) Id.

\(^{109}\) 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.


\(^{111}\) 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.

\(^{112}\) Id.; see also ASARCO, LLC Restructuring-Information Website, Claims Register, available online at:
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. Currently, only a skeleton maintenance crew is present at the plant.

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ASARCO's Financial Struggles

On August 9, 2005, ASARCO filed for Chapter 11 bankruptcy protection in U.S. Bankruptcy Court in Corpus Christi. At the time, ASARCO's CEO Daniel Tellechea blamed environmental and asbestos liabilities, a recent credit-rating downgrade, and five-week copper strike that, at the time, had been taking place for five weeks. 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 highlight the egregious fiscal mismanagement.

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

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115 For more information, see ASARCO, LLC Restructuring-Information Website at http://www.asarcoreorg.com
117 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).
118 Id. at 5.
119 Id.
$1.4 billion in stockholder equity to a company in total financial ruin. In 1999, Grupo Mexico, 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 Peru. When structuring the buyout, Grupo Mexico left ASARCO with enormous amounts of additional debt and insufficient capital preventing the company from paying its debts as they came due. According to the complaint, Grupo Mexico'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 Mexico'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." 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. As a result of these actions, ASARCO began making plans for a possible bankruptcy as early as late 2001, according to the complaint.

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 Mexico shopped around for the lowest valuation of the Southern Peru shares in the hopes of obtaining a "sweet heart deal" - i.e., to pay significantly less than market value to obtain the shares. 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

120 Id. at 7.
121 Id. at 7-8.
122 Id. at 8.
123 Id.
124 Id. at 14.
125 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.\textsuperscript{126}

In January 2003, however, DOJ and ASARCO reached a deal allowing it to sell the Southern Peru shares to its parent company AMC.\textsuperscript{127} 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.\textsuperscript{128} The environmental trust was guaranteed by Grupo Mexico, thus ensuring that ASARCO's precarious financial situation would not prevent the funds from being used to clean up ASARCO's mess.\textsuperscript{129} To date, EPA Region 6, which encompasses Texas, Arkansas, Louisiana, New Mexico, and Oklahoma, has received $8 million from the environmental trust fund.\textsuperscript{130} This money has been used to fund the residential soil cleanups that have been taking place in El Paso since 2002.\textsuperscript{131}

The complaint then alleges that Grupo Mexico 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."\textsuperscript{132}

\begin{flushleft}
\textsuperscript{126} Alysson Pisculli, "US blocks Asarco asset sale as 'fraudulent' move," American Metal Market, August 13, 2002.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} E-mail from Cynthia Fanning, EPA, to David Edmonson, Office of Senator Eliot Shapleigh, "Re: More ASARCO questions," August 16, 2007.
\textsuperscript{131} Id.
\textsuperscript{132} 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).
\end{flushleft}
When ASARCO personnel reported that the company was in financial trouble, the Directors and Officers, loyal to the interests of Grupo Mexico and AMC, did what they could to keep ASARCO operating. The Directors and Officers, at Grupo Mexico and AMC’s insistence, continued to cannibalize itself, abusing its mines, selling key assets, and monetizing insurance policies.\(^\text{133}\)

Eventually, ASARCO’s financial situation became so dire that, in August 2005, the company declared Chapter 11 bankruptcy.\(^\text{134}\) As of September 27, 2007, over $25.2 billion in claims have been filed against ASARCO in Corpus Christi’s U.S. Bankruptcy Court.\(^\text{135}\) Nearly $11 billion of these claims are environmental claims filed by 16 states, two Indian tribes, the federal government, and numerous private parties.\(^\text{136}\) If ASARCO is unable to pay for the environmental cleanups, it will be our country's, state's, and city's taxpayers that have to foot the bill.\(^\text{137}\)

Amongst 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, sanitation, water quality, and flood control in the border

\(^\text{133}\) Id.
\(^\text{134}\) In re: ASARCO, LLC, et al., Case No. 05-21207, Chapter 11 Voluntary Petition (U.S. Bankruptcy Court, S.D. Texas, August 9, 2005).
\(^\text{137}\) Id.
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.\textsuperscript{139} USIBWC stated that the contamination at the American Dam and Canal and the USIBWC Field office were contaminated "because of releases from the El Paso Smelter."\textsuperscript{140} Further, the proof of claim alleged that "the soil and groundwater contamination are related to the historic operations of the [ASARCO] smelter."\textsuperscript{141}

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 U.S. Environmental Protection Agency and $419,200 with the Texas Commission on Environmental Quality.\textsuperscript{142}

\begin{flushright}
\textsuperscript{139} U.S. Department of Justice Proof of Claim, \textit{In re: ASARCO, LLC, et al.}, Case No. 05-21207, Chapter 11 Voluntary Petition (U.S. Bankruptcy Court, S.D. Texas).
\textsuperscript{140} \textit{Id.}
\textsuperscript{142} \textit{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).
\end{flushright}
El Paso Metals Site: ASARCO, a Potentially Responsible Party

Despite ASARCO’s attempts to clean up its act, 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 was far ahead of any other company in terms of air releases. In 1991, El Paso was given the dishonor of being named the city with the worst environment in the United States.

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. In 1996, 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. 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.

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

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146 Letter from Myron Knudson, Director, Superfund Division of U.S. Environmental Protection Agency Region 6, to ASARCO Incorporated, July 16, 2002, Enclosure 1.
As a result of those soil samples and air samples, EPA found that several areas needed further investigations. 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 as "a threat to human health and the environment." EPA Region 6, which includes Texas, had a residential soil action based benchmark of 24 ppm for arsenic and 500 ppm for lead. Thus, EPA determined that a removal action was necessary to remove contaminated residential soils in El Paso. 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. Potentially responsible parties are individuals, companies, or any other parties that may 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.

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

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148 Letter from Myron Knudson, Director, Superfund Division of U.S. Environmental Protection Agency Region 6, to ASARCO Incorporated, July 16, 2002.
149 Id. at Enclosure 1.
150 Id.
151 Id.
152 Id.
ASARCO, EPA, and DOJ. The chart below details the number of residential properties tested and remediated in El Paso as of August 2007:

<table>
<thead>
<tr>
<th>Year</th>
<th>Properties Tested</th>
<th>Properties Cleaned</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>1944</td>
<td>7</td>
</tr>
<tr>
<td>2003</td>
<td>566</td>
<td>329</td>
</tr>
<tr>
<td>2004</td>
<td>1103</td>
<td>168</td>
</tr>
<tr>
<td>2005</td>
<td>0</td>
<td>200</td>
</tr>
<tr>
<td>2006</td>
<td>0</td>
<td>124</td>
</tr>
<tr>
<td>2007</td>
<td>48</td>
<td>40</td>
</tr>
</tbody>
</table>

Source: EPA

As an El Paso homeowner, if you have not contacted the EPA to find out if your property has lead and arsenic, we urge you to do so. Here is the risk: if your property does have lead or arsenic contamination and you want to sell your property, a title company will not insure it until your property 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. Accordingly, it is in your interest to find out if your property is contaminated and 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 within the three mile radius of the smelter 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

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154 E-mail from Cynthia Fanning, EPA, to David Edmonson, Office of Senator Eliot Shapleigh, "Re: ASARCO clean up info request," August 2, 2007.
individual or other entity can file a proof of claim against ASARCO, passed on August 1, 2006.\textsuperscript{155} Thus, El Pasoans are now barred from filing a monetary claim against ASARCO for the environmental contamination of the homeowner's property. Unless an individual homeowner filed their own claim, there is no governmental entity seeking payment for funds to be used for prospective cleanups. If and when the environmental remediation trust fund is either attacked in bankruptcy or emptied after paying for nationwide cleanups, there will not be any dedicated source of funds with which to pay homeowners for the environmental damage to their property. At that point, it will likely be the responsibility of the homeowner to foot the bill.

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.

\textsuperscript{155} For more information, see ASARCO, LLC Restructuring-Information Website at http://www.asarcoreorg.com
Air permit renewal

In May 1992, after a contested case hearing, 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. Air Quality Permit No. 20345 would allow ASARCO to emit the following types and amounts of pollutants into El Paso’s air:

### Air Quality Permit No. 20345

<table>
<thead>
<tr>
<th>Pollutants (tons per year)</th>
<th>Allowables</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lead</td>
<td>7.69</td>
</tr>
<tr>
<td>Oxides of Nitrogen</td>
<td>230.04</td>
</tr>
<tr>
<td>Carbon Monoxide</td>
<td>287.68</td>
</tr>
<tr>
<td>Volatile Organic Compounds</td>
<td>7.66</td>
</tr>
<tr>
<td>Sulfur Dioxide</td>
<td>6,673.15</td>
</tr>
<tr>
<td>Particulate Matter</td>
<td>352.60</td>
</tr>
<tr>
<td>Particulate Matter (equal to or less than 10)</td>
<td>349.64</td>
</tr>
<tr>
<td>Sulfuric Acid</td>
<td>16.21</td>
</tr>
</tbody>
</table>

Source: TCEQ

Further discussion is warranted to place these numbers in context. ASARCO’s air permit would allow the company to emit 6,673 tons of sulfur dioxide on an annual basis. The highest annual emissions of sulfur dioxide currently emitted by an El Paso facility is less than 550 tons. Air Quality Permit No. 20345 would allow

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ASARCO to become the facility with the highest level of lead emissions in the U.S. When looking at facilities that report lead and/or lead-compound emissions, ASARCO would qualify as the seventh-highest lead emitter in the nation and second highest in Texas, behind ASARCO's copper smelter in Amarillo.\textsuperscript{158} In terms of arsenic emissions, the permit does not provide a limit. During the El Paso smelter's operation in the 1990s, however, ASARCO reported arsenic emission levels ranging from 0.28 to 2.69 tons per year.\textsuperscript{159} In 2005, the highest level of arsenic emitted into the air was from a facility which emitted 1.28 tons, and the highest level of arsenic compounds emitted in the nation was 2.7 tons.\textsuperscript{160}

The Texas Commission on Environmental Quality (TCEQ), the state's environmental agency, received the renewal application on March 28, 2002.\textsuperscript{161} ASARCO published notice of the company's intent to renew the permit in the \textit{El Paso Times} and \textit{El Diario}, and numerous contested case hearing requests were received by TCEQ.\textsuperscript{162} 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.\textsuperscript{163} 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

\textsuperscript{158}Id.  Note that, under EPA rules, some facilities report emissions of "lead." Others, however, report emissions of "lead compounds," which include lead and the weight of other chemicals in the compound.

\textsuperscript{159}Id.

\textsuperscript{160}Id.


\textsuperscript{162}Id.

\textsuperscript{163}Id.
2. Whether ASARCO's compliance history for the last five years of operation of the El Paso copper smelter 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. Specifically, the ALJs found that ASARCO failed to meet their burden of proof on both issues referred by the Commission, concluding 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 its last five years of operation under that permit warrants renewal. The findings of fact issued by the ALJs, 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, neither of which modeled all of the concentrations of each pollutant that the Permit, if renewed, would authorize ASARCO to emit.

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.

3. If it resumed operation, ASARCO would be emitting more than 12 times more SO$_2$ in El Paso County than all others combined emitted in 2002; and

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165 Id.

166 Id. at 23.

167 Id. at 30.

168 Id. at 34.
4. After the 1995 modeling, ASARCO's permit was changed many times, and no modeling was conducted to support the changes except once.\textsuperscript{169}

Their 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.\textsuperscript{170} Statutory law, however, prevented the Commission from denying the permit application outright.\textsuperscript{171} 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 was 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 ASARCO to submit within six months current air modeling results on a fifty-kilometer basis.\textsuperscript{172} Further, the 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.\textsuperscript{173}

\textsuperscript{169} Id.
\textsuperscript{171} TEX. HEALTH & SAFETY CODE § 382.0555.
\textsuperscript{173} Id.
During the Executive Director's required investigation under the Commission's Interim Order, the Executive Director 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."\(^{174}\) As a result, the 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.\(^{175}\)

Under Texas law, underfunding or incompetence is no basis for substituting an objective process with an applicant-driven investigation. Yet, the Executive Director provided that argument as the basis for creating a conflict of interest in which ASARCO was allowed to hire and fund its own modeling and investigation on its own air quality permit. On September 22, 2006, ASARCO hired as an employee, not a third-party consultant, Arnold Srackangast to conduct the "independent modeling audit" for Air Quality Permit No. 20345.\(^{176}\)

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," the legal relationship established in the agreement between Mr. Srackangast and ASARCO was an

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\(^{175}\) Id.

employer-employee relationship, not the independent third-party relationship required under the March 10 Interim Order.\textsuperscript{177} It is well established that an employer-employee relationship creates a fiduciary relationship in which the employee owes his allegiance to the employer, not a third party.\textsuperscript{178}

Moreover, allowing ASARCO to hire an employee to conduct its air modeling audit is as absurd a process as having the contesting parties fund and hire their own employee to evaluate ASARCO's permit. As the contesting parties had no role, 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 citizens. These concerns were brushed aside by the Executive Director.

Further, there were numerous delays associated with ASARCO's investigation that did not comply with the mandatory deadlines in the Interim Order. The March 10, 2006 Interim Order explicitly provided a set timeline for the Executive to conduct certain evaluations of emissions impacts, air modeling, and on-site equipment within a six-month period, ending September 10, 2006.\textsuperscript{179} On November 10, 2006, however, the 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

\textsuperscript{177}Id.
\textsuperscript{178}See, e.g., Daniel v. Falcon Interest Realty Corp., 190 S.W.3d 177 (Tex. App. Houston [1st Dist.], 2005, no pet.).
case proceeding why the permit should not expire immediately.\textsuperscript{180}

Once again, the Executive Director ignored these concerns.

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.\textsuperscript{181} In the report, the Executive Director recommended the issuance of a five-year permit, rather than ten, 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 but instead settle into the region's soils, water, and other surfaces.\textsuperscript{182} The City also stated that the smelter could contribute to existing soil contamination in neighborhoods near the smelter by emitting arsenic and other pollutants.\textsuperscript{183} 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


\textsuperscript{183} Id.
modeling audit on its own air quality permit.\textsuperscript{184} 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.\textsuperscript{185} 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.\textsuperscript{186}

After the public comment period and response to those comments by the Executive Director, El Paso is waiting. It is up to the Commission’s discretion to determine when the Executive Director’s report and any related comments will be scheduled for consideration during a public meeting. In the meanwhile, public pressure continues to mount on the Commission to deny the permit outright.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{3_Cities_1_Message_Dont_Reopen_Asarco.png}
\caption{3 CITIES, 1 MESSAGE: DON’T REOPEN ASARCO}
\end{figure}

Source: El Paso Times

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Id
\item \textsuperscript{186} Id. at 40.
\end{enumerate}
\end{footnotesize}
Leaders from across the three-state, two-nation region have 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 have all passed resolutions against the air permit. The mayors of the three cities met and signed a historic resolution against ASARCO. Additionally, 11 legislators from the three-state region of Texas, New Mexico, and Chihuahua signed a bi-national joint resolution in opposition to the renewal of ASARCO's air permit. New Mexico's Governor Bill Richardson recently spoke out against the permit's renewal.

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189 Bi-national Joint Resolution in Opposition to Renewal of ASARCO's Air Permit.
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 a visual representation of their opposition to ASARCO's reopening. The photo will be delivered to the Commissioners at TCEQ. From hundreds strong traveling to Austin to voice their opposition to the air permit to thousands writing to TCEQ, El Paso and the surrounding region has responded with one consistent message: deny Air Quality Permit No. 20345.
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.\textsuperscript{191} ASARCO became the operator and owner in 1905.\textsuperscript{192} The Tacoma smelter used ore with high arsenic content, resulting in high levels of arsenic pollution.\textsuperscript{193} When the federal government began efforts to regulate arsenic in the workplace and environment, the Tacoma smelter became the center of attention.\textsuperscript{194}

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.\textsuperscript{195} 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.\textsuperscript{196} At the time, an ASARCO vice president claimed that the smelter was closing

\textsuperscript{192} Id.
\textsuperscript{196} Id.
due to depressed copper prices and “federal, state, and local environmental regulations …”\(^{197}\)

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.\(^{198}\) Further, a 2000 EPA administrative order required ASARCO to permit sediment and groundwater work, much of which was not completed as of 2006.\(^{199}\)

Fortunately, the federal government recently reached an agreement with ASARCO that will allow the company to sell the smelter property with a Washington-based developer.\(^{200}\) The developer intends to clean up the land to residential environmental standards and then undertake residential and commercial development on the property.\(^{201}\) 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.”\(^{202}\)

**Omaha, Nebraska**

From 1899 to 1997, ASARCO operated a lead refinery in the heart of Omaha, Nebraska.\(^{203}\) While the refinery was at one point the largest employer in Omaha, ASARCO eventually became the only smelter or refinery in town.\(^{204}\) When Mayor Hal Daub took office in

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\(^{197}\) *Id.*


\(^{199}\) *Id.*

\(^{200}\) *Id.*

\(^{201}\) *Id.*

\(^{202}\) *Id.*


\(^{204}\) 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.\textsuperscript{205} This "contaminated and polluted" 800 acre area of the city was "just sitting there except for the ASARCO plant."\textsuperscript{206} 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.\textsuperscript{207}

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.\textsuperscript{208} On December 31, 1997, the ASARCO facility ceased operations and began the process of demolition, which was completed in late 1999.\textsuperscript{209} 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.\textsuperscript{210}

The overall development site for Qwest Center Omaha spans about 100 city blocks.\textsuperscript{211}

\begin{flushright}
205 Id.
206 Id.
207 Id.
209 Id.
\end{flushright}
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.\footnote{212}

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.\footnote{213} 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."\footnote{214} 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.\footnote{215} As of July 2007, EPA had tested approximately 32,000 residential properties since March 1999, with cleanup consisting of the removal and replacement of contaminated soil.\footnote{216}

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\footnote{212}{Id.}
\footnote{214}{Id.}
\footnote{215}{Jonah Deppe, "Local Issues: Soil Contamination - ASARCO, Update on Omaha Lead Superfund Site" Sierra Club, March 2004.}