

Bankruptcy as Corporate Makeover

ASARCO
demonstrates
how to evade
environmental
responsibility.



BY MARA KARDAS-NELSON, LIN NELSON, AND ANNE FISCHER

“At around noon [every] July and August...our folks would bring us into the house, because the smoke, the pollution, the sulfur, would settle into our community for about two or three hours...when there was no breeze to take that away. When we would breathe that, we could not be outside because we were constantly coughing. So nobody can tell me that there was no ill effect on the majority of the folks that lived in Smelertown.”

—Daniel Solis, resident of Smelertown, a Mexican-American neighborhood in El Paso, Texas located next to an ASARCO smelter.

AFTER FIVE LONG YEARS IN COURT, THE BANKRUPTCY OF THE AMERICAN Smelting and Refining Company, or ASARCO, has finally been determined.

Hailed as one of the earliest and largest multinational corporations and responsible for the employment of hundreds of thousands, ASARCO has a long history of polluting both the environment and the workplace. After racking up billions in environmental damages, the company filed for bankruptcy in 2005.

It is billed as the largest environmental bankruptcy in United States history; 90 communities from 21 states will share a \$1.79 billion settlement to cover the costs of environmental monitoring and cleanup and limited compensation to some of its workers. This figure, however, represents less than one percent of the funds originally identified as needed by claimants.

The ASARCO case emerged in the context of a diminished and disabled “Superfund,” as the federal environmental program established to deal with hazardous waste sites is known. The fund was originally created by Congress to hold companies accountable for environmental damage and to ensure that communities are not left with large bills and no means to pay them. But years of corporate pressure on Capitol Hill has depleted Superfund, placing the financial burden of environmental cleanups on taxpayers, rather than on corporations. >>



A thousand El Pasoans gather to express their opposition to ASARCO, as part of a regional campaign that included former ASARCO workers, environmentalists, members of El Paso’s city government, State Senator Eliot Shapleigh, and residents of El Paso, Juarez, Mexico and Sunland Park, New Mexico.

Photograph by Robert Ardovino

This use of bankruptcies to avoid responsibility, coupled with a cash-strapped Superfund, offers a chilling glimpse into the world of corporate irresponsibility allowable under U.S. bankruptcy provisions and environmental policy. As the case closes, ASARCO is transforming from an aging corporation weighed down by shuttered factories and contaminated communities into a lean and profitable company. This is setting a precedent for how others can use legal loopholes to evade liability and undermine government protections.

Damaging Health and Environment, Yet Shaping Environmental Policy

ASARCO began operations in the late 1890s, mining, smelting, and refining essential ores (first lead, then copper) in order to provide base materials for industrial production. By the mid-20th century, the company had expanded to include holdings and operations in Latin America, Australia, Canada, Africa, and the Philippines. In 1914 company workers unionized through the Western Federation of Miners, which later became the Mine, Mill & Smelterworkers, eventually merging with the United Steelworkers in the 1960s. In its heyday, ASARCO operated in close to 90 U.S. communities in 22 states, employing thousands.

By the mid-1970s, employees and communities were growing concerned about environmental and public health risks resulting from company operations. Researchers, health departments, unions, and workers began tracking the impact of exposure to arsenic, lead, cadmium, and sulfur dioxide, all byproducts of the smelting process. In

Chronic arsenic exposure can lead to skin pigmentation, numbness, cardiovascular disease, diabetes, vascular disease, and a variety of cancers, including skin, kidney, bladder, lung, prostate and liver.

Lead exposure can result in damage to the kidneys, liver, brain, nerves, and other organs, and the development of osteoporosis, reproductive disorders, seizures, mental retardation, behavioral and learning disorders, lowered IQ, high blood pressure and elevated risk of heart disease.

Tacoma, WA, site of one of ASARCO's largest smelting operations, dissident workers launched "The Smelterworker" newsletter, one of the first union-based occupational health efforts in the country. The Puget Sound Air Pollution Control Agency began to voice similar concerns when ASARCO's lobbying regarding federal laws and regulations successfully slowed development of a federal arsenic standard.

Health concerns also emerged in El Paso, Texas, site of a large ASARCO smelter that had polluted both sides of the U.S.-Mexico border. In 1970, following passage of the Clean Air Act, the City of El Paso sued ASARCO over its sulfur dioxide emissions. During the process of discovery, ASARCO submitted documentation of its emissions to the City for the first time. These reports showed that between 1969 and 1971, 1,012 metric tons of lead, 508 metric tons of zinc, eleven metric tons of cadmium, and one metric ton of arsenic had been released during operations.

By 1969 the city had a higher concentration of airborne lead than any other in the state. In the early 1970s a research team from the Centers for Disease Control (CDC), led by Dr. Philip Landrigan, confirmed a pattern of smelter-sourced lead threatening the children on the U.S. side.

The studies conducted by the CDC linked the high levels of lead in air, soil, and dust to the ASARCO smelter. They also linked the lead in soil and dust to elevated lead levels in children's blood. Landrigan's research team administered IQ tests and reaction time tests, and found significant differences in performance between lead-impacted children and those with lower blood levels. This pathbreaking research transformed scientific thinking about the impact of lead on children's development, and confirmed numerous dangers, even in children without obvious clinical symptoms.

At the time of research the threshold for lead in blood was 40 micrograms per deciliter. Today it is 10 micrograms per deciliter, and many health researchers and physicians want to see it set even lower. Yet some researchers had asserted that lead from smelters was not harmful to humans, and an El Paso pediatrician, in a study funded by an organization connected to the industry, claimed that levels of 40 to 80 micrograms were acceptable, as long as the children were properly nourished. As a result of the CDC studies, however, "it is now widely accepted in the scientific commu-

nity that lead is toxic at extremely low levels,” according to Landrigan.

Some of the affected children were treated with painful chelation therapy. Daniel Solis, a Smelertown resident, recalls his siblings’ reaction to the treatment:

They would get hysterical because of how much the treatment would hurt, they would literally go underneath their cribs and they would hold on to the bottom of the bed. I would literally have to go underneath and drag them out...It was excruciating. My mom would cry to see... the pain that her kids would be going through. But we had no other choice, you know, my siblings were that infected with lead that they had to get that treatment.

In 1991, through its subsidiary Encycle, ASARCO received highly hazardous waste, sourced from a Department of Defense site at Rocky Mountain Arsenal in Colorado. Napalm, sarin nerve gas, cluster bombs, and white phosphorous had all been produced at this site, and private pesticide companies also rented space in the facility. At Encycle, hazardous waste labels were removed and materials were shipped to ASARCO facilities in El Paso and in East Helena, Mont. Neither facility was licensed to manage hazardous waste; it is possible that the waste was shipped to other sites as well. In El Paso, workers were not informed of the risks of such incineration and were not trained to deal with these hazardous materials. This lack of protection and withholding of information violates the federal right-to-know workplace law.

The Government Accountability Office (GAO) has verified that from 1991 to 1999, the El Paso and East Helena plants received and incinerated waste meant only for licensed hazardous waste facilities. This illegal disposal potentially exposed hundreds of workers and both communities. In 1998, the federal government fined ASARCO \$50 million for these violations and problems at other ASARCO sites. The settlement did not include provisions for testing workers, soil, air, water, or community members for exposure to potential contaminants. The El Paso community was not informed about these illegal activities; the extent of knowledge in East Helena is unclear. The wrist-slap against the company—and the actions that provoked it—became public only through the investigative work of citizen activists in El Paso, leading to a *New York Times* exposé in 2006.

Although many communities endure severe health effects and environmental problems, ASARCO’s ties to powerful politicians gave it substantial influence on public health policy. During the George W. Bush years, James Connaughton, one of ASARCO’s key attorneys, served as head of the White House Council for Environmental Quality. A key ASARCO scientist was positioned for the federal Lead



Advisory Board, while other prominent, independent scientists were pushed to the margins. ASARCO has also promoted the corporate “audit privilege,” allowing companies to self-monitor hazards.

Superfund: Hope and Disappointment for Polluted Communities

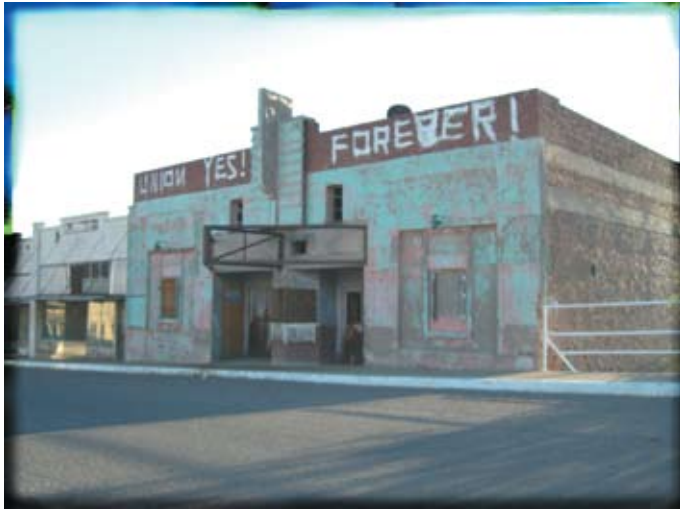
ASARCO was hardly the only company polluting communities throughout the industrial boom of the 20th century. As research linked contamination to birth defects, higher cancer rates, and other serious illnesses, community advocates and municipal and state leaders took collective action. In 1980, in response to the discovery of hazardous waste at Love Canal, N.Y., Congress passed the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), better known as “Superfund.” The Act made companies legally and financially responsible for environmental degradation that occurred as a result of their operations. Additionally, cleanup costs for “orphan sites” where specific companies could not be identified or held responsible >>

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The Smelertown Cemetery, established in the 1880s, just across the railroad tracks from Asarco’s smelter. Smelertown was a vibrant Mexican-American community, demolished by the company after lead poisoning from Asarco’s emissions was discovered in children.

Photograph by Lin Nelson

would draw money from the Superfund, made of a series of corporate taxes, or “polluter-pays fees,” and supported by government revenue. The legislation authorized the Environmental Protection Agency (EPA) to place heavily contaminated sites on the National Priorities List. If identified as a “Superfund site,” a community qualified for enforced cleanup and funds. Since the inception of Superfund, the EPA has identified over 1,200 sites, including 20 ASARCO operations. One in four Americans lives within four miles of a Superfund site.

In 1995, under the watch of President Clinton and a Republican Congress, Superfund’s polluter-pays fees expired, thus shifting most of the financial burden onto taxpayers. As of 2010, these fees have yet to be reinstated. By 2003, all corporate funds



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Downtown Hayden, Arizona, union slogans on the shuttered theater. Hayden workers endured a prolonged and bitter strike against Asarco and its parent, Grupo Mexico.
Photograph by John Regan

were exhausted and the Superfund now relies solely on taxpayer-funded government revenues. According to the U.S. Public Interest Research Group, in 1995 taxpayers paid only 18% (\$300 million) of the Superfund, but by 2005, they contributed 100%—approximately \$1.2 billion.

As a result of under-financing and lack of political will, the number of Superfund sites undergoing cleanup has diminished. While the EPA averaged 87 completed cleanups a year from 1997 to 2000, in 2008 only 30 sites were processed, representing a drop of over 50% in the pace of cleanups. Without polluter-pays fees and in light of the bankruptcy, the affected communities at ASARCO sites are left with few options to ensure comprehensive cleanup and reparations.

Penny Newman of the Center for Community Action & Environmental Justice calls the fund “impotent” without corporate contributions: “It’s disingenuous to pretend a program exists without the funding.” In spring 2009, the Obama administration directed \$600 million in stimulus money to 50 Superfund sites—including the ASARCO site in Tacoma—that have shown significant progress in their cleanups. Obama and the EPA call this a “stopgap measure,” setting the restoration of the polluter-pays tax as an important environmental health goal.

The Bankruptcy “Solution”

As environmental and community health concerns mounted, public pressure increased, and projected cleanup costs skyrocketed, ASARCO closed most of its operations. All of ASARCO’s sites—operating, shuttered, or in remediation—were affected by the 2005 Chapter 11 bankruptcy filing. The company cited environmental liabilities as a primary explanation for the action.

The bankruptcy was not a last-minute act of desperation. On the contrary, the company had been re-arranging itself for some time, shedding liabilities and cutting costs through sales and mergers. In 1999, ASARCO was “bought” by its major subsidiary, Grupo México, a Mexican-based company that is one of the largest metal producers in the world. This sale is significant because ASARCO’s assets and records were shifted outside of the United States and therefore no longer under U.S. government jurisdiction; citizens requesting records and remediation from the company now had difficulty doing so. In 2002, ASARCO sold one of its most valuable mining complexes, Southern Peru Copper, to its new parent company, transferring even more valuable resources beyond national boundaries. Fearing a potential bankruptcy, the Department of Justice forced ASARCO to set up a \$100 million trust to cover liabilities for impacted U.S. communities.

Chapter 11 of the U.S. Bankruptcy Code permits corporate reorganization and invokes “automatic stay,” in which most litigation is put on hold until it can be resolved in court, with creditors ceasing collection attempts. This status allowed ASARCO to legally avoid paying for environmental damage at sites that required it for the duration of the bankruptcy. Additionally, pension payments and other monies owed to workers as negotiated by the United Steelworkers, which represents most employees, were threatened and delayed. As a re-

sult of the bankruptcy, the Steelworkers, a member of the bankruptcy creditors' committee, settled with a one-year extension of their collective bargaining agreement.

Complexities stemming from ASARCO's multinational status became more apparent during the 2005-2009 bankruptcy proceedings. During the case, Grupo México, by court ruling, was removed as the controlling agent of ASARCO. As such, Grupo México battled with another corporate suitor, India-based Sterilite/Vedanta Corporation, for control; Grupo México eventually prevailed. This competition prolonged proceedings, as the judge assessed competing purchase offers and changing promises to affected communities and workers.

Through bankruptcy negotiations, ASARCO significantly reduced its debts to damaged communities. The *Tacoma News Tribune* reported that more than a dozen states and the federal government originally collectively filed \$6 billion in environmental claims involving 20 ASARCO sites. Other estimates placed cleanup and liability costs as high as \$25.2 billion. This figure was subsequently reduced to \$3.6 billion in early bankruptcy court proceedings, which was later sliced to the final settlement of \$1.79 billion.

In the days following the announcement of the settlement, government spokespeople and community members expressed a mix of relief and disappointment. According to U.S. Associate Attorney General Tom Perrelli, "The effort to recover this money was a collaborative and coordinated response by the states and federal government. Our combined efforts have resulted in the largest recovery of funds to pay for past and future cleanup of hazardous materials in the nation's history. Today is a historic day for the environment and the people affected across the country."

But activists and affected communities insist the ruling did not go far enough. In addition to paying less than originally projected, ASARCO's parent company, Grupo México, faces fewer responsibilities than it did before the bankruptcy. While the company had previously been pegged with penalty payments for the transfer of Southern Peru Copper, the bankruptcy decision, which reinstated Grupo México control, nullified this.

The \$1.79 billion settlement will also be unevenly split between affected communities. While Washington State celebrated the perseverance of their attorneys and coordinated work of depart-

ments, Texas, which had relatively little sustained support and attention by federal authorities, will not be as well served. The El Paso area has a modest \$52 million to address complex and hazardous contamination.

ASARCO's Legacy and Communities' Call for Responsibility

Throughout the bankruptcy proceedings, U.S. Senator Maria Cantwell (D-WA) warned that ASARCO's use of bankruptcy will be imitated by other companies aiming to minimize their liability for environmental and health damages. The *Tacoma News Tribune* has reported that companies in eight of the ten regions under EPA jurisdiction have considered bankruptcy in order to elude responsibility. A 2007 study identified six companies connected to approximately 120 Superfund sites in 28 states filing for bankruptcy, with four of these companies successfully avoiding over half a billion dollars in cleanup costs. In 2009, eleven states involved in the ASARCO bankruptcy and the Justice Department reaffirmed the warning that more companies will follow suit.

Twice Cantwell has introduced bills to curtail companies' use of bankruptcies and other "legal" techniques to avoid responsibility; twice the bills have failed.

Texas State Senator Shapleigh has witnessed the city of El Paso's struggle with the high cost of environmental cleanup and jeopardized public health. Commenting on the bankruptcy and echoing Cantwell's concerns, he warns, "This is a strategy that will be used over and over again in the United States. The corporations will play out this environmental saga...this is the first one."

A Familiar Story

The story of ASARCO is a complicated one. It is a story of environmental degradation, of countless hidden occupational health hazards, of a corporation comfortably connected to federal and state administrations, and of a broken safety net that offers little compensation for communities impacted by a century of industrial operations.

Yet the story of ASARCO is not an unfamiliar one. The company's evasion of corporate responsibility in the face of weakened federal regulations demonstrates how companies can shift billions of dollars of environmental cleanup costs onto affected communities.



The special brew of corporate bankruptcies and an under-funded Superfund leaves us extremely vulnerable to industrial contamination. ASARCO's bankruptcy left thousands of exposed workers and family members, 21 states, two Indian tribal communities, and unions in limbo for years, and now with very limited reparation for life-altering health effects and degraded environments. Despite the company's responsibility for extensive environmental and health damage, the settlement holds them accountable for only a sliver of originally projected cleanup costs. A lack of political will from Congress to ensure corporate funding for Superfund and to pass legislation that tightens legal loopholes has left communities who believed they were protected by the 1980 CERCLA legislation strapped for cash and with few legal protections to enforce corporate responsibility.

Current and former ASARCO employees, affected communities, and allies are organizing to push for corporate accountability and government regulations. In El Paso, as a result of the bankruptcy, the Superfund dysfunction, and the special burden of illegal hazardous waste incineration, community advocates are working to shape a strategy for activating workplace right-to-know for former employees at high risk for illness. They are further insisting on transparency in the cleanup and corporate accountability for public health.

In February 2010, a group of over two dozen organizations and individuals, including current and former ASARCO employees and several Mexican government officials, wrote to the EPA with concerns that the cleanup plan for the El Paso site is "inadequate to protect the health of the [El Paso] community and does not address offsite-pollution in [New Mexico], Mexico and Texas." The current plan only addresses hazards in El Paso, but according to Mariana Chew of the Sierra Club, "Cuidad Juárez in Mexico and Sunland Park in [New Mexico] are the communities most affected by ASARCO's legal and illegal operations and yet are not taken in account." Chew and others are especially concerned about the health of children at an elementary school in Cuidad Juárez that sits just 400 feet downwind from the smelter.

The group demands larger payments from ASARCO, specifically for its illegal incineration

of hazardous waste. In the interim, the group claims that federal monies from the Superfund should be used.

The 2010 National Latino Congress has also condemned ASARCO's contamination of the border region and the company's bankruptcy. The Congress, supported by hundreds of organizations and over 40 elected U.S. officials, demanded full disclosure of the illegal incineration of hazardous waste, and comprehensive testing and treatment for workers and community members who may have been exposed.

Meanwhile, in Hayden, Ariz., site of the company's only operating U.S. smelter, ASARCO officials have reassured residents that blowing dust from mine tailings is not a hazard. According to ASARCO vice president Thomas Aldrich, "Across the board these are very low in metals, about what you'd expect here, comparable to the background levels in soil."

Such statements offer little comfort for communities still struggling for information, protection, and accountability. **D&S**

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This article is based on the project "No Borders: Communities Living and Working with Asarco" based at Evergreen and guided by Fischel and Nelson. The project examines the occupational and environmental health and social justice implications of ASARCO's operations with a focus on three communities: Ruston/Tacoma, Wash., Hayden, Ariz. and El Paso, Texas. A documentary film, "Borders of Resistance," to be released in the summer of 2010, documents the El Paso story of community and labor advocates pressing for accountability and health protections. Other films and writing are forthcoming.

SOURCES: For a full list of sources, visit www.dollarsandsense.org.