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March 3, 2016

Freedom of Information Officer
United States Environmental Protection Agency
Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

Re: *Asarco Litigation Regarding Tri-States Mining District Sites*

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the United States Environmental Protection Agency's ("EPA") FOIA regulations, 40 C.F.R. Part 2, ASARCO LLC ("Asarco"), by and through its counsel, McGuireWoods LLP, hereby requests the release of the following documents and information associated with the Tri-States Mining District Sites (the "Site"):

1. All drafts of the March 5, 2012 letter from Michael J. Zoeller (Trial Attorney for the U.S. Department of Justice, Environment and Natural Resources Division) to W. James Foland and Gregory Evans (Counsel for Asarco) (the "March 5, 2012 Letter"), a copy of which is enclosed as Attachment A.

2. All documents related to the March 5, 2012 Letter, including communications regarding the substance of, and concerns related to, the March 5, 2012 Letter.

3. All drafts of the March 14, 2012 letter from Michael J. Zoeller (Trial Attorney for the U.S. Department of Justice, Environment and Natural Resources Division) to Gregory Evans (Counsel for Asarco) (the "March 14, 2012 Letter"), a copy of which is enclosed as Attachment B.

4. All documents related to the March 14, 2012 Letter, including communications regarding the substance of, and concerns related to, the March 14, 2012 Letter.

5. All documents related to the March 8, 2012 letter from Gregory Evans (Counsel for Asarco) to Michael J. Zoeller (Trial Attorney for the U.S. Department of Justice, Environment and Natural Resources Division) (the "March 8, 2012 Letter"), a copy of which is enclosed as Attachment C, including communications regarding the substance of, and concerns related to, the March 8, 2012 Letter.

For purposes of these requests, "document" refers to any electronic, written, graphic, video, or audio matter, however produced or reproduced, whether draft or final versions, and including but not limited to correspondence, e-mails, notes, interoffice communications, reports, memoranda, minutes, summaries, telephone records, telephone message logs or slips, PowerPoint presentations, meeting agendas, transcripts, call lists, spreadsheets, maps, photographs, data compilations, *Vaughn* indices, privilege logs, or calendars.

In responding to these requests, EPA's search should encompass, but should not be limited to: (a) documents sent to or from email addresses used by current or former EPA employees and representatives, regardless of whether such addresses are private or secondary addresses of official addresses; (b) documents generated for any meeting which EPA participated or conducted, including agendas, spreadsheets, PowerPoint presentations, and notes; (c) documents relating to or evidencing presentations made by any party to agencies or entities or than EPA; (d) documents addressing the timing of EPA disclosures of information to Asarco or the public; and (e) documents describing non-public meetings and other communications between EPA and any non-governmental parties.

With respect to these requests, EPA need not provide Asarco with duplicative copies of documents to the extent the same document is located in more than one location. EPA should, however, produce *in toto* any document and its accompanying attachments.

FOIA Exemptions

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information to appeal the denial. *See* 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(F). To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, addressees and recipients, date, length, general subject matter, and location of each item; and

2. Explanations and justifications for the denial, including identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions, identify and describe the withheld portions, specify the applicable exemption, and provide the remainder of the record. *See* 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(F), (b).

Timing and Mechanics of Production

We request that in responding to this letter, EPA comply with all relevant deadlines and other obligations set forth in FOIA and EPA's regulations, and we look forward to receiving your response within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104. Given the

limited nature of the request, Asarco does not agree to any extension of time for the response beyond the statutory deadlines. Please produce records as soon as possible, on a rolling basis; the search for—and deliberation concerning—certain documents should not delay the production of others that EPA has already retrieved and could turn over. Please note that Asarco is interested in working with EPA to ensure that the burden associated with this FOIA request is minimized to the extent practicable, including discussing phased or prioritized document productions.

We understand that there may be fees and costs associated with this request, and we agree to pay any fees or costs up to $200.00 associated with making these materials available to us. If the costs will be in excess of $200.00, please advise me before such costs are incurred. Notwithstanding the above, Asarco does not agree to pay any costs to upload or add these records to the Superfund Document Management System.

We prefer to receive electronic documents, and not paper copies, whenever possible. To the extent possible, we request that EPA provide the requested information in searchable, electronic format on CD, DVD, or external hard drives of sufficient size to contain the production. Electronic files should be provided in their original format, not in PDF containers. Individual e-mails, and their attachments, should be maintained as single msg files. If this is not possible, then e-mails and their attachments should be provided in either PST or NSF containers, thereby preserving all attachments information. Asarco would be happy to provide a hard drive for the records if that is more efficient. We are also amenable to making arrangements for an outside vendor to copy the records identified as responsive to this request.

In responding to the present letter, please mail copies of all requested documents, indices and logs, and any invoice for reasonable FOIA fees to the undersigned at McGuireWoods LLP, 633 West Fifth Street Suite 6700, Los Angeles, California, 90071.

Thank you for your assistance.

Very truly yours,

Laura G. Brys

U.S. Department of Justice

Environment and Natural Resources Division

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Washington, DC 20044-7611

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March 5, 2012

BY ELECTRONIC MAIL
W. James Foland
Foland, Wickens, Eisfelder, Roper & Hoefer, PC
jfoland@fwpclaw.com
and
Gregory Evans
Integer Law Corporation
gevans@integerlegal.com
Counsel for Asarco

Re: Pending Litigation Regarding Tri-States Mining District Sites – *Asarco v. NL Industries, Inc., et al. Civil No. 11-0138 (W.D. Mo.)*

Dear Counsel:

The United States has reviewed many of the recent filings in the above-referenced litigation and we have significant concerns that the situation created by the filing of the complaint in the above referenced contribution litigation is at odds with the normal and proper implementation of CERCLA's liability scheme, or, at least, is significantly premature. As a result, we feel it is necessary for the United States to insure that all the parties recognize our concerns. I will not try to address in this letter all the legal, factual and policy issues raised by the filing of the complaint, but the United States feels compelled to identify some of our most significant concerns.

1. Any Contribution Claim Asarco May Have Against the PRPs is Subordinate to the Claims the United States has Against Those Same PRPs.

One of our primary concerns about the situation created by the filing of the complaint is that any claims Asarco may have against any of the other potentially responsible parties are subordinated to the claims of the United States. *See* 42 U.S.C. § 9613(f)(3)(C)("In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State.") Proceeding with that litigation without recognizing the subordination element of CERCLA could inhibit future settlements and therefore threaten the timely cleanup of the Tri-State Mining District Sites, which is the most important goal of CERCLA.

2. Any Future Settlement with a PRP Will Likely Extinguish Asarco's Claim.

Should the United States enter into settlements with the other potentially responsible parties ("PRPs"), the most likely result would be that the settling parties would receive a covenant not to sue at a specific site and hence, under CERCLA, that settling PRP would receive contribution protection from any claims by other PRPs at the site, including Asarco. As everyone is aware, the CERCLA liabilities associated with the Tri-States Mining District Sites are extremely large and the payments made by Asarco as a result of the settlements reached in the bankruptcy fall very far short of funding all the response costs and natural resource damages that the United States, various States and various Tribes will need to recover to be made whole.

As a result, the United States has in the past, and will in the future, be looking to the remaining PRPs to pay for that shortfall. The specific liabilities, costs and damages vary materially among the various sites that comprise the Tri-State Mining District Sites. This letter will not discuss all of the similarities and differences between the various sites, nor do we believe it is necessary to draw particular distinctions since the overarching situations at the Tri-State Mining District Sites share a core commonality: The United States intends to pursue future settlements with the remaining PRPs to insure the fullest possible recovery for the United States based on a fair and reasonable recovery from the PRPs. Should that happen, the PRPs would then, under CERCLA, have contribution protection against any claim Asarco pursues in the interim.

3. Any Payments to Asarco Made by a PRP will not Serve to Reduce that Party's Liability to the United States.

Just as it is important for us to emphasize to Asarco that - even after extensive and expensive contribution litigation - its claims are expected to be subordinated and lost in the future, we feel compelled to emphasize to the PRPs a fact we assume they already understand: The United States is not likely to consider any payments made by the PRPs to Asarco to pay for or settle this contribution claim in any future litigation wherein we seek a judgment for past and future response costs or natural resource damages, nor, when we discuss possible settlement of those claims. While the United States' claims against the PRPs are reduced by the amounts paid by Asarco, any payments by the PRPs to Asarco are irrelevant to the PRPs' liabilities to the United States.

4. The Fact that the Settlement with Asarco Arose from a Bankruptcy Must be Considered.

While early settlements can be encouraged when the remedy at a site - and its attendant costs - is fairly subject to determination, and/or when litigation is otherwise necessary or appropriate, the timing of the settlements that occurred with Asarco was not driven by normal CERCLA considerations. Instead, those settlements were driven by the fact that Asarco filed for bankruptcy - in significant part to discharge these specific liabilities – and bankruptcy required that these claims be established either by estimation or settlement. This sequence of events is not common under CERCLA and it is important that any related litigation spawned by the bankruptcy be conducted consistent with CERCLA's goal of prompt cleanup as reflected in

CERCLA's provision subordinating contribution claims to the primary claims of the Government.

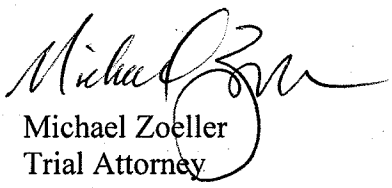
5. Continuing Active Contribution Litigation At This Time Appears Inconsistent with the Congressional Intent Behind CERCLA's Liability Scheme and May Lead to Significant Waste and Disruption.

It is sometimes true that contribution litigation among private parties that precedes settlement efforts by the United States can work to make the United States settlement efforts more efficient because the issue of the parties relative shares going forward is resolved and the only issue left is what must be agreed to satisfy the United States (and the respective State government). However, that does not appear to be the case with the Asarco litigation.

Here, requiring the remaining PRPs to litigate a contribution action brought by a reorganized company which resolved its liabilities for far less than was necessary to make the United States whole, does not advance a legitimate purpose and would, in fact, threaten to undermine cleanup. Future settlement discussions for cleanup would likely be made more difficult because the PRPs may be less willing to pay their full share of liability to the United States and the States if they have already paid some monies at the Site to Asarco. The problem is further complicated by the fact that if the PRPs are forced to pay Asarco any money at this early stage and later settle with the United States for their full fair share (or are found jointly and severally liable) they may have no way of recovering those earlier payments from Asarco since Asarco has contribution protection. That result would be unfair to the PRPs and inconsistent with the language and purpose of CERCLA.

We understand that any stay would have to be subject to the Court revisiting the stay in the future. We also understand that some of the final remedy decisions – and the final NRD assessment process -- will not be concluded for a number of years. Nonetheless, it is expected that the parties will know much more about site conditions after further work by the PRPs, the governments and the affected Tribes. In that same vein, we see no distinct prejudice to Asarco associated with a delay of the contribution case. If Asarco could identify that prejudice, it may be that the Defendants could address those concerns.

Sincerely,



Michael Zoeller
Trial Attorney

cc: Counsel of Record

U.S. Department of Justice

Environment and Natural Resources Division

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March 14, 2012

Gregory Evans
Integer Law Corporation
811 West 7th Street, 12th Floor
Los Angeles, CA 90017

Re: Pending Litigation Regarding Tri-State Mining District Sites
Asarco LLC v. NL Industries, Inc, et al., Case No. 3:11-cv-0138 (W.D. Mo.)

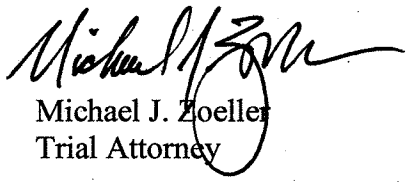
Dear Mr. Evans:

We have received your letter, dated March 8, 2012, which contains a number of statements and arguments with which we disagree. It is not necessary to address them here. As stated in our letter of March 5, our purpose in writing was to make sure that all the parties are aware of the United States' concerns and positions on the operation of CERCLA. In this goal, our letter seems to have met with some success. Among other things, your letter acknowledges our position that Asarco's claims are subordinate to those of the United States, and agrees that future settlements between the United States and parties that Asarco has sued could extend contribution protection to the settlers and extinguish Asarco's contribution claims. To clarify a point, the United States has not suggested that you cannot pursue a contribution action; however, its timing should be handled consistent with CERCLA's provisions subordinating contribution claims to those of the United States. *See* 42 U.S.C. § 9613(f)(3)(C).

We respond further to correct a fundamental mischaracterization of the bankruptcy settlement between Asarco and the United States by portraying it as a joint and several settlement that paid all of the United States' costs and damages. Waste from 150 years of zinc and lead mining and milling operations contaminated more than 12,500 acres of land and 130 miles of streams and creeks in the Tri-State Mining District. Shortly before the settlement, the United States estimated that its past and future costs for cleanup at only the subsites at which Asarco's predecessors operated would be over $260 million and that natural resource assessment and damages would exceed $400 million. As you know, the actual settlement was for far less – an allowed claim of $144 million for response costs and natural resource damages at the

Tri-State Mining District Sites. Although the United States received "full payment" of this allowed claim, it obviously did not recover "all costs" and damages.

Sincerely,



Michael J. Zoeller
Trial Attorney

cc: Counsel of Record

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March 8, 2012

Michael J. Zoeller
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P.O. Box 7611
Washington, DC 20044-7611

Re: *ASARCO LLC v. NL Industries, Inc., et al.*
Case No.: 3:11-cv-00138-RED (W.D. MO)

Dear Mr. Zoeller:

This letter is in response to your letter of March 5, 2012, regarding Asarco's contribution claims now pending against certain third-party defendants in the Western District of Missouri. ("ENRD Letter"). Your letter was immediately presented to the District Court for the Western District of Missouri as "supplemental briefing" by the PRP-defendants in support of defendants' misguided efforts to secure a stay in prejudice of Asarco's substantial rights to contribution conferred by CERCLA Section 113 and confirmed in *United States v. Atlantic Research.* The highest court in our country, the United States Supreme Court held:

> Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under §106 or §107(a). . . . Hence, a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution.

United States v. Atl. Research Corp., 127 S. Ct. 2331, 2338 (2007). The position you have taken is contrary to the Supreme Court's holding in *Atlantic Research* and the Congressional intent supporting CERCLA itself. This interjection by the United States into private litigation between PRPs is not supported in law or in any reasonable or fair recitation of the facts of the case and, unless withdrawn, may improperly influence the court in this case.

Background on the Asarco Reorganization

As you are aware, the United States pursued Asarco under a joint-and-several liability theory at every site in Asarco's bankruptcy. The United States repeatedly made clear that it sought from Asarco "all costs" for all sites under CERCLA, including Tri-States.[1] *See, e.g.*, In re ASARCO LLC, Case No. 05-21207, (S.D. Texas Bktcy Ct.), United States' General Background Brief, dated May 7, 2007 (Document No. 4657) at 17; In re Asarco LLC, Case No. 05-21207, (S.D. Texas Bktcy Ct.), United States' Motion For Determination That Environmental Claims of the Government Will be Estimated in Accordance With Applicable Non-Bankruptcy Law on Joint and Several Liability and Divisibility, dated June 1, 2007 (Document No. 4855, at 3-4). Your office made clear: "Most of the United States' claims are filed under CERCLA and seek joint and several liability. Under CERCLA, Debtors are jointly and severally liable to the Government unless they can prove divisibility of harm . . . . The United States believes that absent proof by Asarco that the harm at a Site is divisible, the Court should determine the amount of the United States' claim for joint and several liability." Asarco never had an opportunity to establish "proof" of divisibility; it could only argue its best basis for divisibility in settlement negotiations with the government, which point the United States never conceded.

As you are also aware, the United States actively encouraged Asarco to settle its environmental liabilities at estimates that were greatly in excess of reasonable expert estimates of Asarco's liabilities because the United States repeatedly assured Asarco that Asarco would have a right to pursue contribution claims. The United States also supported Asarco's Reorganization Plan that specifically reserves contribution claims now being pursued at Tri-States.

And contrary to the statements in your letter, both the courts and the United States have repeatedly recognized that Asarco made a "full payment" on these joint and several claims. The United States Bankruptcy Court for the Southern District of Texas found, after full briefing and argument by Asarco and the government, that the government had achieved "full satisfaction" of all "existing and future response costs" "under CERCLA and other applicable law" for Asarco's approximately $1.8 billion payment under Asarco's Bankruptcy Plan of Reorganization for its

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[1] Each of the Tri-States' Proofs of Claim brought by the United States were brought as joint and several claims. United States Proof of Claim 8375, *In re: ASARCO LLC, et al.*, Case No. 05-21207, Bankr. S.D. Tex., February 16, 2006 (United States' initial claim brought under CERCLA, 42 U.S.C. §§ 9601-9675); United States Proof of Claim No. 10745, *In re: ASARCO LLC, et al*., Case No. 05-21207, Bankr. S.D. Tex. July 31, 2006 (Claim is made on a joint and several basis for the entirety of costs and NRD at Tri-States: "ASARCO is liable to the United States for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss, *see* 42 U.S.C. § 9607 . . . at or near each of those Sites."); United States Proof of Claim No. 10746, *In re: ASARCO LLC, et al*., Case No. 05-21207, Bankr. S.D. Tex. July 31, 2006 (claim is made on a joint and several basis for the entirety of response costs and NRD at Tri-States).

environmental liabilities, including the over $440 million allocated to the Tri-States, SEMO, and Omaha settlements. The court explicitly stated:

> Pursuant to the settlement agreements, the Governmental Movants received allowed claims in full satisfaction of their existing and future response costs . . . . Because all of the response costs incurred by the Governmental Movants were allocable to and related to the underlying environmental sites, all of these response costs were fully resolved and satisfied.

And as you know, the Department of Justice described Asarco's $1.8 billion environmental settlement as exceeding a "full payment" plan:

> This was a result no one expected when Asarco went into bankruptcy, said Associate Attorney General Tom Perrelli. This gives us full payment plus interest for allowed claims. Taxpayers got more than a dollar back for every dollar they asked for…. This demonstrates that just because a company goes into bankruptcy doesn't mean it will avoid its responsibilities. Asarco Pays 1.79 Billion to Fix Sites, *The New York Times,* December 11, 2009.

Given the United States' prior recognition that Asarco has made a "full payment" on joint and several claims, and given that this settlement was acknowledged by the government as representing "more than a dollar back for every dollar [taxpayers] asked for," I hope that you will appreciate that Asarco must take very seriously the letter you have published as an effort to undermine Asarco's right to bring well-founded contribution claims. The content of your letter is particularly troubling and contrary to CERCLA's fundamental pro-settlement policies. Previously the government has offered its support to parties like Asarco that step forward to meet their responsibilities to human health and the environment. It is not the policy of the Department of Justice to prejudice the Congressional granted right of settling parties to seek contribution in favor of non-settlors. Unfortunately, your letter may have that impact. We ask you to please take immediate steps to request that it not be made a part of the record in the above-captioned case.

Subrogation of Claims

You have raised a concern that the rights of the United States are superior to any settled parties' rights to contribution. Asarco has nowhere in its contribution claims in Tri-States argued to the contrary. But obviously there is no conflict, nor do you identify one, between a contribution claim between PRPs and any enforcement action of the United States. Asarco only seeks contribution for a fair and reasonable share of its own settlement – it does not stand in the place of the United States. In fact, as you acknowledge in your letter, it is common and routine for parties to pursue contribution based on a settlement with the United States against non-settling parties.

Contribution Protection

You have noted that a future settlement with other PRPs may extinguish Asarco's claim. "Should the United States enter into settlements with the other potentially responsible parties ("PRPs"), the most likely result would be that the settling parties would receive a covenant not to sue at a specific site and hence, under CERCLA, that settling PRP would receive contribution protection from any claims by other PRPs at the site, including Asarco." ENRD Letter at 2. This may happen. Yet, all courts in the United States recognize the rights of a settling party to challenge the fairness of any settlement in the United States District Court. If the settlement does not allocate responsibility fairly among PRPs, this may be litigated before contribution protection may be awarded. The substantive and procedural fairness of any settlement that may be reached will be reviewed by the United States District Court and Asarco will, by right, have an opportunity to challenge such a settlement, particularly if it affords contribution protection that may be asserted against Asarco.

Extinguishment of Asarco's Contribution Claim

You note that future costs in future settlements might extinguish Asarco's claim. Mathematically, this is a possibility. It is possible that the government will spend more on cleanup and natural resource damage restoration such that Asarco's very large settlement will be relatively diminished to the point that it could not be seen as paying beyond its fair share. Recall that the Asarco "share" based on multiple expert analyses offered as evidence is approximately 1/10th of Asarco's settlement. In this scenario, if total remediation costs begin to exceed several billion dollars, then there would be nothing in the Asarco settlement to be allocated among any other PRPs. But this would exceed even the highest government estimates in Asarco's bankruptcy. It is not realistic to state that EPA's claims will extinguish Asarco's contribution claim.

You may also wish to give further consideration to the fact that Congress plainly contemplated that contribution claims could be brought on liquidated future claims, just as your letter acknowledges. This is no different than litigation in court rooms all across the country every day when future claims are determined by a court.

Consideration of PRP Settlements

You state: "The United States is not likely to consider any payments made by the PRPs to Asarco to pay for or settle this contribution claim in any future litigation wherein we seek a judgment for past and future response costs or natural resource damages, nor, when we discuss possible settlement of those claims." Again, Asarco has made no claim to the contrary. However, this is wholly irrelevant to Asarco's claim, which only seeks contribution for a fair and reasonable share of its own settlement. This is not a reason to deny Asarco its right to contribution granted by Congress. 42 U.S.C. § 9613 (f)(2)("[A PRP] settlement does not

discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.”).

Bankruptcy Context for Asarco Settlement

Your fourth concern is that the Asarco settlements arose in bankruptcy. Asarco has not hidden or disputed this fact; it is plain on its Complaint. Asarco’s settlement is judicially approved. Moreover, the United States has already recognized that Asarco did not go into bankruptcy to avoid its responsibilities to human health and the environment. Referring to the Asarco Bankruptcy during a press conference called by the United States Department of Justice, one of the highest ranking officials at ENRD authorized to speak on behalf of the United States stated: “This demonstrates that just because a company goes into bankruptcy doesn’t mean it will avoid its responsibilities.” Asarco Pays 1.79 Billion to Fix Sites, *The New York Times*, December 11, 2009). The United States has also recognized that Asarco’s full payment plan exceeded what the United States hoped to achieve, even on joint-and-several claims: “This gives us full payment plus interest for allowed claims. Taxpayers got more than a dollar back for every dollar they asked for….” *Id*.

Working to Make Settlement More Efficient

You state that contribution claims should only be allowed if such claims “can work to make the United States settlement efforts more efficient.” ENRD Letter at 3. There is no authority for this statement. There is nothing in CERCLA (nor do you cite any authority) that it is the responsibility of settling PRPs to increase the “efficiency” of the United States’ settlement efforts with non-settling PRPs through contribution actions. Just because this is sometimes an effect does not make it a requirement. And nothing in Asarco’s contribution action, which only seeks an equitable allocation of Asarco’s settlement, threatens to “undermine” any cleanup efforts. The United States is free to pursue cleanup at Tri-States according to regulation and there is nothing about Asarco’s contribution claim that will make the Agency’s cleanup inefficient. If anything, Asarco’s voluntary settlement has enabled more responsive efforts, should they be pursued.

Asarco’s Contribution Protection

Your concern that Asarco has contribution protection now is difficult to understand. You state that it would “be unfair to the PRPs and inconsistent with the language and purpose of CERCLA” “if the PRPs are forced to pay Asarco any money at this early stage and later settle with the United States for their full fair share (or are found jointly and severally liable),” because the PRPs would be able to “recover [] those earlier payments from Asarco since Asarco has contribution protection.” This is not inconsistent with CERCLA but precisely the scheme that CERCLA enacted – settling parties are encouraged to settle both because they receive contribution rights and contribution protections. There is always a risk that companies that do

not step forward to address their responsibilities to help protect human health and the environment through settlement with the United States may end up "holding the bag" as the last deep pocket left for joint and several liability. But this is not contrary to CERCLA.

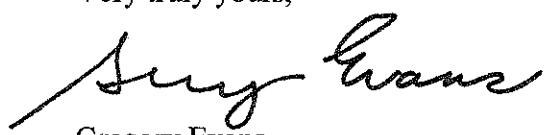
Prejudice to Asarco

We cannot agree with your statement that there is no "distinct prejudice to Asarco associated with a delay of the contribution case." ENRD Letter at 3. This is, of course, directly contradicted by your first concern that the PRP-defendants may at some future time have contribution protection from Asarco – Asarco has a cause of action today that in the future it may not have. This also ignores your own acknowledgement that final remedy decisions and final NRD assessments "will not be concluded for a number of years." *Id*. Asarco has a present right, recognized by Congress and the Supreme Court, to pursue contribution. It will be prejudiced in this right by being required to wait "a number of years" to exercise that right. As you well know, these number of years could easily extend to decades. It is for this reason that a PRP is explicitly permitted to obtain a money judgment in a contribution action before remediation is complete; otherwise, "a non-settler could avoid payment to the PRP that did settle for many years, if not decades." *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 27 (1st Cir. 2004) (upholding contribution judgment based on district court's estimate of response costs). Forcing Asarco to wait to recover this money until a date in the far future is a harm in and of itself. *See In re MCorp Fin.*, 160 B.R. 941, 952-953 (S.D. Tex. 1993) (noting that "[a] dollar tomorrow does not equal a dollar today" and discussing the importance of the time-value of money); *see also Robert C. Herd & Co. v. Krawill Mach. Corp.*, 256 F.2d 946, 953 (4th Cir. 1958) ("An award two years after an injury occurs is certainly not the equivalent of an award made at the time of the injury[.]") (internal quotation omitted). This is precisely why courts rarely grant requests for stays of an indefinite duration. *See, e.g.*, *King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1172 (11th Cir. 2007) ("We have repeatedly held that a stay order which is 'immoderate' and involves a 'protracted and indefinite period' of delay is impermissible."); *CTI-Container Leasing Corp. v. Uiterwyk*, 685 F.2d 1284, 1288 (11th Cir. 1982) (reversing a stay order, reasoning: "It is difficult to accurately predict the time that CTI will be forced to stand aside if it is required to await . . . [what] can safely be described as an indefinite period of time. We cannot uphold such an indefinite or immoderate stay . . . ."); *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982) ("The district court has a general discretionary power to stay proceedings before it in the control of its docket and in the interests of justice. *Nevertheless, stay orders will be reversed when they are found to be immoderate of an indefinite duration.*") (emphasis added); *Hines v. D'Artois*, 531 F.2d 726, 733 (5th Cir. 1976) (opining that a stay that was "indefinite in duration, but in all probability [would] remain in effect at least eighteen months, and might last for as long as five years" was "sufficient for us to scrutinize the reasons for [the stay] very closely"); *McSurely v. McClellan*, 426 F.2d 664, 671 (D.C. Cir. 1970) (stating that a district court's discretion to grant a stay "may be abused by a stay of indefinite duration in the absence of a pressing need") (citation omitted).

Delay in and of itself is prejudice. Witnesses' memories fade and evidence becomes harder to obtain the more time that passes. The time-value of money is significant. As you can appreciate, your assertion that there is no "distinct prejudice to Asarco associated with a delay of the contribution case," ENRD Letter at 3, is not supported by law.

We sincerely hope that you will carefully consider the cases and policies cited in this letter and, at minimum, request that all parties withdraw efforts to use it to gain an advantage over Asarco in this case. EPA is not a party to this case and it should not have taken steps to protect its interests by proxy. If the Agency wishes to make its position known, like any other litigant, it should seek leave of court and intervene. We ask that you issue a letter to all counsel asking that they refrain from referencing your letter in any court proceeding in this case. While that action may not mitigate all of the harm your correspondence may cause, at least it will correct the record as much as possible under the circumstances. Thank you very much for your consideration.

Very truly yours,



Gregory Evans

cc: All Counsel of Record