

Settlement Highlights Circuit Split on Environmental Prosecutions

By Amanda Bronstad

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The U.S. attorney's office in Montana agreed as part of a legal settlement on Jan. 20 to drop a criminal investigation into whether copper mining company Asarco LLC had illegally dumped sodium metal and zinc oxide at a former site in East Helena.

The investigation of Asarco, which has been going through Chapter 11 bankruptcy since 2005, followed on the heels of the government's failed environmental prosecution in Montana last year of chemical products company W.R. Grace & Co.

Asarco agreed to pay \$350,000 to resolve the government's civil claims, which were brought under the Resource Conservation and Recovery Act (RCRA).

The law imposes civil fines and felony penalties against companies that manage hazardous waste without proper environmental permits. Any employees involved may also be charged.

The government declined to bring criminal charges against Asarco.

In a letter to Lori Hanson, special agent in charge of the criminal investigation division of the U.S. Environmental Protection Agency in Denver, Assistant U.S. Attorney Mark Smith wrote that "it will be problematic to establish the elements of a crime beyond a reasonable doubt. As you know, the RCRA and its implementing regulations are quite complex. In this case, that complexity enhanced the difficulty of proving, based on the totality of the circumstances, that Asarco knew that the materials in question were wastes subject to RCRA."

Smith noted that under its reorganization plan, Asarco will pay more than \$100 million to clean up its former Montana site.

Gregory Evans, a partner in the Los Angeles office of New York's Milbank, Tweed, Hadley & McCloy who represents Asarco, said in an interview with *The National Law Journal* that the company mounted an effective legal defense. For example, the company argued that the chemicals were commercial products and therefore not subject to RCRA. Additionally, the company had already resolved a state enforcement action regarding the materials in question, and the propriety of a federal prosecution under those circumstances is unresolved.

Informed of Evans' assertions in the interview, U.S. Attorney Michael W. Cotter said in an e-mailed statement: "Many of the reasons given by Asarco for the government's decision to settle this case are not correct. Upon a complete review of all the facts and circumstances in this case, the settlement of the RCRA claims was the most appropriate resolution under the law."

The transcript below has been edited for clarity and length.

NLJ: How have federal investigations of environmental crimes changed over the years?

GE: Environmental prosecutors have become much more aggressive. There is a better understanding within the different prosecutor offices I've dealt with on the state and federal levels of environmental crimes. There has been a real improvement on the part of environmental prosecutors in their understanding of environmental laws and a significant enhancement in resources available to environmental prosecutors — resources



Milbank's Gregory Evans

that are needed to establish the presence of hazardous materials or other harmful conduct under environmental law.

NLJ: What is RCRA?

GE: It was passed by Congress in 1976 as part of this growing national effort to control the dangers of environmental pollution. RCRA has language in it that creates criminal liability for someone who violates it. The prosecutor has discretion to either pursue a criminal proceeding against a violator of RCRA or to pursue a civil remedy. I am aware based upon extensive representations of Fortune 500 companies accused of RCRA violations that in various federal and state prosecutor offices there is now a preference for pursuing criminal violations rather than civil resolutions. It's a law that is designed to ensure that if you are storing or moving hazardous material, you have a permit to do that so the public agencies charged with overseeing how that material is stored or handled or moved are informed of your company's practices. And if you store hazardous materials without a permit, it is assumed that you are doing so illegally. It provides that certain criminal acts committed knowingly shall be punished as a felony offense. There is also a penalty of

\$50,000 per day per incident that can be assessed by a judge and jury.

NLJ: Talk about the Asarco case.

GE: I represented the company and any of its employees who were accused of wrongdoing and engaged in negotiations with the U.S. attorney's office — specifically, chief of the criminal division and the U.S. attorney assigned to the case in Montana. That case has been going on for about two years. The U.S. attorney for Montana was arguing that Asarco had a facility they closed down where they abandoned two hazardous materials, sodium metal and zinc, which are materials that are regulated by federal environmental law. They were arguing that the company disposed of those materials and stored those materials without a permit required under RCRA. And they looked to evidence such as company maps that described that facility as abandoned. They looked at the duration of time the products had been left behind. They looked at the fact that the factory was shuttered. So they believed that RCRA had been violated — that the company

had abandoned the material, not gotten a permit, and that it should be indicted criminally.

NLJ: What do you think convinced the government to drop the criminal investigation?

GE: In this case, we provided evidence to the government that the two substances, the zinc and the sodium metal, were in fact sold. That's the best evidence that these materials were in fact commercial chemical products. If it's a commercial chemical product, it's not regulated by RCRA. Another thing was over-filing. There's a strong legal defense when the federal government comes in behind the state government with essentially the same claim. Asarco had resolved the claim by the Montana Department of Environmental Quality for the same alleged conduct. Although Montana never sought a criminal prosecution and never convened a grand jury, it was my view that the federal government's case was based on the same law and therefore constituted an over-filing.

There is a split in the circuits as to whether over-filing constitutes a defense in a RCRA enforcement action. In the 9th Circuit, it's uncertain. So that created more risk for the government and factored into their decision to abandon the prosecution.

NLJ: What about the \$100 million that Asarco already had agreed to pay in clean up costs?

GE: I argued the equities — the fact that the company had put aside money for an environmental trust for the state of Montana and that, while it wasn't directly related, it's something that the U.S. attorney should take into account.

NLJ: Do you think that the W.R. Grace case had an impact on the government's decision?

GE: While I never argued it, I think it may have had some impact on the U.S. attorney's decision to abandon the prosecution. It was a pretty big loss for the government. ■

Gregory Evans is a partner in Milbank's Litigation Department. He can be reached at gevans@milbank.com or 213-892-4488