

US Calls Off Asarco Criminal Enviro Probe

By **Mike Cherney**

Law360, New York (January 22, 2010) -- Federal prosecutors have dropped their criminal investigation into whether Asarco LLC violated the Resource Conservation and Recovery Act by storing hazardous materials without the proper environmental permits at a former facility in East Helena, Mont.

William W. Mercer, the U.S. attorney for the District of Montana, wrote in a letter dated Wednesday that the government had decided not to indict the company on criminal charges, saying it would be problematic to establish that a crime had been committed beyond reasonable doubt.

Mercer's letter also noted that Asarco had agreed to pay a civil penalty in connection with the alleged RCRA violations, and that criminal charges would be inappropriate in light of the agreement. Gregory Evans, an attorney for Asarco, said the \$350,000 payment would cover the government's investigation costs.

"The RCRA and its implementing regulations are quite complex," Mercer wrote. "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."

Asarco had argued that a criminal conviction would be unfair given that the company, which emerged from bankruptcy last month, agreed to set aside \$100 million for remediation at the East Helena site as part of its reorganization plan. More than \$60 million was set aside to clean up other Montana sites.

Evans hailed the U.S. attorney's decision, saying an admission or conviction of criminal liability would have been a "black mark" on the company's record just as it wraps up a lengthy bankruptcy proceeding.

In a letter to the U.S. attorney's office, the company pointed out a conviction could have potentially debarred the firm as a contractor to the federal and state governments. It also opposed a proposed criminal settlement drafted by the U.S. Attorney's Office that would have required an admission of guilt and a \$1 million criminal fine, Evans said.

"A highly regulated industry like mining and smelting has to live with its reputation, and to visit upon the company an admission of environmental crime as serious as those crimes alleged to have been committed in East Helena is a terrible disservice to a company like Asarco," he said.

A spokeswoman for the U.S. Attorney's Office declined to comment on the investigation.

The government's investigation involved zinc oxide dust that was associated with a zinc fuming plant and sodium metal stored in a stationary rail car located inside a sodium handling building, according to the U.S. attorney's letter.

The company contended those materials were exempt from RCRA regulations because they were commercial chemical products, not waste. The government said the sodium metal was so deteriorated that it could not be sold, but the company noted a third-party inspector found it to be in excellent shape.

The government also contended the zinc oxide dust was shipped and sold as hazardous waste according to company records. But Asarco noted it had resisted pressure to describe the zinc as hazardous waste prior to an agreement with Montana authorities regarding the cleanup of the site.

Finally, Asarco contended the federal government's action would be a duplicate of prior enforcement proceedings against Asarco at East Helena by state authorities.

"We believe a very strong legal defense exists to the government's claim of RCRA violations because that action would be brought after similar state actions," Evans wrote in the letter to the U.S. Attorney's Office on Dec. 9. "Overfiling is not permitted in various circuits in the country."

Asarco was represented in this matter by Milbank Tweed Hadley & McCloy LLP.

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