

STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

In the Matter of Remedial                    )     Order Rescinding Enforcement Order  
Action by:                                    )       
ASARCO Incorporated                        )     No. 02TCPNR-3933

To: ASARCO Incorporated  
P.O. Box 1677  
Tacoma, Washington 98401

I.

Jurisdiction

This Order is issued pursuant to the authority of RCW 70.105D.050(1).

II.

Statement of Facts

1. On April 8, 2002 the Washington State Department of Ecology (Ecology) issued Enforcement Order No. 02TCPNR-3878 to ASARCO Incorporated (Asarco) related to the Everett Smelter Site in Everett, Washington. A statement of facts and determinations relevant to that Enforcement Order are presented on pages 1- 10 of the Order and are incorporated herein by reference.

2. Enforcement Order No. 02TCPNR-3878 contains a number of compliance dates that are either established or are to be calculated based on the presumed effective date of the Order (April 8, 2002). See, e.g., Enforcement Order No. 02TCPNR-3878, page 14.

3. Enforcement Order No. 02TCPNR-3878 was issued following the Washington State Supreme Court's March 21, 2002 decision in *ASARCO Incorporated v. Department of*

*Ecology. et al.*, No. 69406-1. In that decision, the Supreme Court held that a lawsuit filed by Asarco in July 1998, was not ripe and not justiciable. The Supreme Court vacated the Thurston County Superior Court order under appeal in the case, which held that retroactive liability under chapter 70.105D RCW, as applied to Asarco, is constitutional as it relates to a portion of the Everett Smelter Site and unconstitutional as it relates to another portion of the Site. The Court dismissed the case without prejudice to either party.

4. On April 9, 2002, one day after the issuance of Enforcement Order No. 02TCPNR-3878, Asarco timely filed a motion for partial reconsideration of the above-referenced Supreme Court decision. Asarco's motion delays finality of the Supreme Court decision until the Court acts upon the motion. RAP 12.5(2). As a result, the decision under appeal is still in force.

5. In the interest of clarity and efficiency, Ecology will rescind Enforcement Order No. 02TCPNR-3878 and reissue the Order in the future, with corrected compliance dates, when appropriate based upon the Supreme Court's pending action.

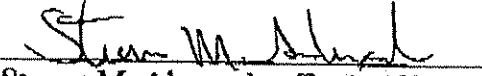
### III

#### Order

1. Enforcement Order No. 02TCPNR-3878, is rescinded by this Order.

This Order is not appealable to the Washington Pollution Control Hearings Board. This Order may be reviewed only as provided under RCW 70.105D.060.

Effective date of this Order: 4-17-02

  
Steven M. Alexander, Toxics Cleanup Program