



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

Northwest Regional Office • 3190 160th Avenue SE • Bellevue, Washington 98008-5452 • (425) 649-7000

August 27, 2004

RE: Everett Smelter Site – Conclusion of Public Comment Periods on Prospective Purchaser Consent Decrees between the Everett Housing Authority and the Washington State Department of Ecology and Washington State Attorney General's Office

Public comment was recently held on two Prospective Purchaser Consent Decrees between the Everett Housing Authority (EHA) and the Washington State Department of Ecology (Ecology) and Washington State Attorney General's Office (AGO). EHA plans to purchase portions of the Everett Smelter site known as the "Fenced Area" and the "Asarco Houses." The Consent Decrees are agreements between EHA and the state regarding the cleanup liability which EHA will assume upon purchase of the property. The agreements do not affect the liability of ASARCO, Inc. (Asarco) for the site; Asarco remains liable for the entire site as the former operator of the Everett Smelter.

This letter summarizes the comments received during the recent public comment periods on the consent decrees described above. A copy of the comments received, as well as additional site information, is available at the following locations:

- Everett Public Library, 2702 Hoyt Avenue, Everett
- WA Department of Ecology, 3190 160th Avenue SE, Bellevue, (425) 649-7190 (call for an appointment)
- Ecology's web site: [http://www.ecy.wa.gov/programs/tcp/sites/asarco/es\\_main.html](http://www.ecy.wa.gov/programs/tcp/sites/asarco/es_main.html)

Ecology has carefully considered each comment and will incorporate many of these ideas and concepts as the cleanup proceeds. No changes to the Prospective Purchaser Consent Decrees were necessary based on the comments received.

Comments ranged from concern and frustration at the slow pace of the cleanup process to support for the cleanup actions to be undertaken in the Fenced Area and adjacent residential area this summer. Many were happy to see this work finally occurring. Several comments were from citizens who wished to know when their properties would be cleaned up. There were also comments on various details of the cleanup actions and on the overall approach to cleanup taken under the state cleanup law.

**Slow pace of cleanup:** Ecology certainly shares this concern. The Everett Smelter site is a major site in which residential, commercial, and industrial land use occurs. Addressing such a site is time-consuming and expensive; both in deciding what cleanup actions are appropriate and how fast to implement the cleanup actions. The cleanup regulations, while having a good deal of flexibility in approach, also have some very specific constraints to achieve protective cleanups. These constraints, together with the



size of the site, the site's urban setting, and litigation initiated by Asarco against Ecology, have combined to make cleanup a slow process.

Ecology has taken some steps to address this issue. During the litigation commenced by Asarco in 1997, Ecology began cleaning up yards of occupied houses, starting with those in the most contaminated areas, as resources permitted. As of this date, Ecology has cleaned up 47 residential properties and has sampled soil at 10 additional properties. These 10 properties are awaiting cleanup. No resources are currently available to clean up these properties, though Ecology will continue to seek such resources after this summer's cleanup. Once these 10 properties are cleaned up, Ecology will consider how best to continue cleanup.

**Disposal of contaminated soil from the Everett Smelter site to the Tacoma Smelter site:** Ecology recognizes that cleanup actions are often not ideal from everyone's viewpoint. Asarco, the U.S. Environmental Protection Agency (EPA), the Town of Ruston, the City of Tacoma, and Ecology worked closely to develop cleanup plans that would be effective in protecting human health and the environment and also cost efficient. The Tacoma Smelter has much larger volumes of contaminated soil that is similar to the contaminated soil being sent from the Everett Smelter, and has hazardous waste containment facilities designed to receive these kinds of materials. This cleanup is being overseen by the EPA. The ability to combine cleanup actions at the two sites will result in more cleanup work being done sooner for less cost at both sites than would otherwise be possible. A consensus was achieved among many parties that, on balance, using the Tacoma Smelter facilities to contain the Everett Smelter material is a good plan.

**Oversight of the cleanup work:** The comments expressed concern that Ecology have, "... at least minimal field oversight..." during the work. Ecology does have oversight authority and visits the site regularly. Ecology has several interests in overseeing the work:

- To see that the work is progressing as agreed,
- To ensure that any actions which Ecology needs to take to ensure work progresses smoothly are done promptly,
- To review test data collected during the work to ensure that the material which is supposed to be removed is actually removed, and
- To certify that specific phases of the work have been completed.

Certifying completion of specific phases of the work is important for the timely transfer of the property from Asarco to EHA. This timely transfer of the properties in question is important in funding the cleanup. Phased certifications will be written to make clear what completed work is certified and what work is not yet completed. There will be no final certification until all work has been done and final grading is completed. The grading will include the addition of at least 2 feet of clean soil cover over the Fenced Area. Ecology will require submittal of complete records on all phases of work prior to issuing the relevant certifications. At the end of the project, a complete record of what has been done will be available for public review in Ecology's files.

**Duration of EHA's responsibility for the site:** The comments also expressed concern about the ongoing duration of EHA's responsibility for the site. Ecology's agreements with EHA specify that the cleanup actions described in the agreements are to be maintained and continued until EHA has received written notification by Ecology that the requirements of the Consent Decrees have been satisfactorily completed. The agreements also apply to and are binding on successive purchasers of the property. More simply put, EHA and any subsequent purchasers of the property must see that the 2 feet of clean soil over the remaining contamination is maintained in good condition. (Buildings and pavement are also considered effective barriers to contact.) If it is necessary to penetrate the clean soil for any reason, EHA and succeeding purchasers are responsible for properly handling the soil. Any succeeding purchasers will be notified of the property conditions and of these requirements prior to purchase. Succeeding purchasers will have the primary responsibility to see that these requirements are met.

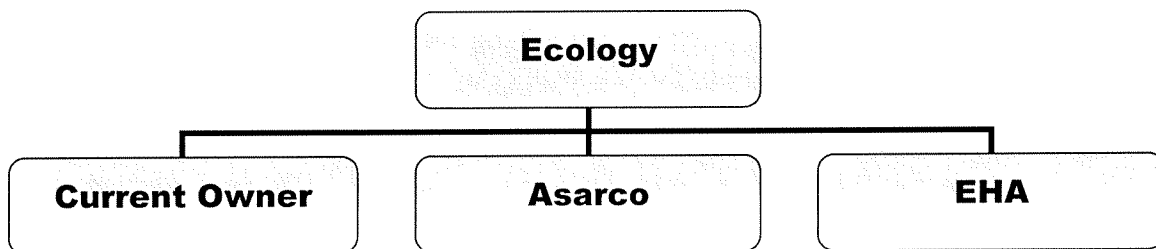
**Implementation of cleanup laws at the site:** The comments expressed concern about the way in which the cleanup laws are being implemented at this site. The concerns were expressed in a manner which indicated an overarching concern about not only this site, but the manner in which the cleanup laws are being implemented state-wide. Many questions were raised in four general areas of interest. The level of detail raised about cleanups in general under the Model Toxics Control Act is beyond the scope of this response letter, although citations to helpful resources on this point are provided below. This letter summarizes Ecology's approach for this particular site and the general areas of interest that contribute to decisions made for this site.

One area of interest was *whether the cleanup will result in property that is safe for people to live on*. The cleanup actions to be taken were developed to ensure that they met the requirements of the cleanup law. After ensuring the requirements of the cleanup law were met, the actions balanced community concerns and concerns about cost and the disruption of the cleanup actions themselves. The plans were developed over a lengthy period with a significant amount of public input. This included a nearly 1-year mediation, with weekly meetings, which involved Asarco, Ecology, the City of Everett, EHA, Snohomish County, the Snohomish Public Utility District, and the Snohomish County Health District. The Washington State Department of Health assisted Ecology in the development of the cleanup plans. For a detailed discussion of the basis of the cleanup actions, see the cleanup action plan referenced below (first bullet in the list of documents referenced). Ecology has determined that the selected cleanup actions are protective of human health and the environment.

Another area of interest was to determine *who would be liable for maintaining the integrity of the cleanup actions within the Fenced Area over the long term*. Once cleanup actions are complete, liability for maintaining the integrity of the cleanup actions will rest with the current owner. In case the current owner does not maintain the integrity of the cleanup actions, Ecology has the option of requiring either the EHA, as a prior owner, or Asarco to perform the needed actions to renew the integrity of the cleanup actions. In

practical terms, the current owner has the responsibility to see that the 2-foot clean soil cover (and buildings and pavement) remains intact. Ecology can require the current owner to take actions to repair the cover, and could require either EHA or Asarco to take such actions as well. As always, in the event of failure of all such entities in the chain, final responsibility to ensure that human health and the environment are protected resides with Ecology. A simple diagram of this chain of liability is given below. It indicates that Ecology retains ultimate responsibility for ensuring the integrity of the cleanup, and that Ecology may require the current owner, Asarco, or the EHA to perform the required actions, as appropriate. In the event that none of these organizations performs these required actions, Ecology may use state funds from a dedicated cleanup account to perform the necessary actions.

### **Responsibility for Integrity of Cleanup Actions**



Another area of interest was *the legality of providing remedial action grant funds to the Everett Housing Authority, a local government*. The availability of these funds is provided for in the Model Toxics Control Act, which is the statute which governs cleanup sites in Washington State (see RCW 70.105D.070(3)(a)(i)). The grant to the Everett Housing Authority is one of 17 such grants issued by Ecology in 2004. The remedial action grant program has been ongoing since the inception of the cleanup program in 1989 and will continue into the future. Once cleaned up, EHA plans to sell the property to a private developer at fair market value. Any excess funds from the sale will be used for public purposes. The funding is in accord with both the letter and the spirit of the law.

Several additional detailed points were raised in the comments. Some relevant points to be made regarding some of them are:

- Long-term monitoring will occur at the site to assess the performance of the cleanup actions. Inside the Fenced Area, EHA has specified monitoring requirements. All other monitoring is the responsibility of Asarco.

- One comment asked about the “motivation of the deal.” This cleanup is being conducted as a result of Ecology actions to address the most contaminated area of the site. The immediate Ecology action which has caused this cleanup to happen was the issuance of an Enforcement Order by Ecology to Asarco, requiring Asarco to remove the most contaminated soils from the Fenced Area. Since entering into an Agreed Judgment in superior court incorporating the requirements in the Enforcement Order, Asarco has worked hard to come up with a way to fund this cleanup work that complies with the Enforcement Order and achieves a great deal more cleanup sooner than would otherwise be the case.
- One comment noted that, after the initial public comment period, only “substantial” changes in Consent Decrees trigger additional opportunity to comment. The comment asked what constitutes a substantial change. This is a case-by-case determination made by Ecology and the AGO at any time a change to a Consent Decree is proposed. In general, a substantial change is one that affects the substance of the investigations or remedial actions performed at a cleanup site. Corrections of clerical errors or clarifications in the wording of a Consent Decree are not substantial changes. Changes to the extent of remedial actions required of any party to the Consent Decree – including monitoring requirements – would be substantial.
- One comment noted that the dispute resolution process in the Consent Decree relates only to the parties to the Decree and asked what avenue of redress is available to the public if they disagree with how party dispute resolutions have been resolved. In this case, the public may express their concerns to Ecology.
- One comment asked for an explanation of the “Covenant Not to Sue.” This provision of the Consent Decree provides that if the specified cleanup actions are taken and are demonstrated to be effective to achieve cleanup standards within a reasonable timeframe, Ecology will not require additional actions at a later time except in certain situations. For example, if factors arise which were unknown to Ecology at the time of entry of the Consent Decree and Ecology determines additional actions are necessary to protect human health or the environment, or if the site is later determined to present an imminent and substantial threat to human health or the environment.
- Some comments asked about continued implementation of institutional controls such as conducting another mailing of the 2001 site health advisory and continuation of a “barrel program” to accept contaminated soil excavated by homeowners in the area. These activities were being funded by Asarco, but Asarco has stopped this funding. Ecology may conduct another mailing of the health advisory in the near future. This document is currently available on the internet at <http://www.snohd.org/advis/smelter.pdf>, and a link is provided

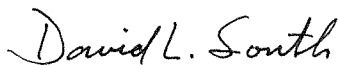
on Ecology's Everett Smelter site web page. Unfortunately, Ecology does not have the resources to conduct a barrel program at the present time.

For those interested in detailed consideration of how the Model Toxics Control Act has been applied at the Everett Smelter site and is being applied state-wide, please see the following:

- *Everett Smelter Site, Integrated Final Cleanup Action Plan and Final Environmental Impact Statement for the Upland Area*, December 1999. Four volumes. See particularly Volume II, Responsiveness Summary. This document is available in the information repositories for the site (see page 1), and is available on CD. A limited number of hard copies are available for no charge.
- *Concise Explanatory Statement for the Amendments to The Model Toxics Control Act Cleanup Regulation, Chapter 173-340 WAC*, February 12, 2001, Ecology Publication Number 01-09-043. 434 pages. Available on Ecology's web site at: <http://www.ecy.wa.gov/biblio/0109043.html>
- *Responsiveness Summary for the Amendments to the Model Toxics Control Act Cleanup Regulations, Chapter 173-340 WAC*, February 1991. 299 pages. Available on Ecology's web site at: <http://www.ecy.wa.gov/programs/tcp/regs/1991%20Responsiveness%20Summary.pdf>

Thank you for your continued interest in cleanup of the Everett Smelter site. Should you have any questions about this letter or the overall cleanup, please feel free to contact me at 425-649-7200 or [dsou461@ecy.wa.gov](mailto:dsou461@ecy.wa.gov).

Sincerely,



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