



For Immediate Release

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## COURT URGED TO UPHOLD DECISION VOIDING RETROACTIVE "SUPERFUND" LAW (*Washington Dep't of Ecology v. Asarco, Inc.*)

The Washington Legal Foundation (WLF) filed a brief yesterday with the Supreme Court of the State of Washington urging it to uphold a landmark trial court ruling that struck down on constitutional grounds a cleanup remediation order against Asarco, Inc. The order was issued under Washington's Model Toxics Control Act (MTCA) against Asarco for emissions from a smelting plant that was shut down over 80 years ago. Because the MTCA is modeled after the federal Superfund law, the Comprehensive, Environmental Response Compensation and Liability Act (CERCLA), a decision upholding the trial court could have enormous ramifications nationwide.

In *Washington Dep't of Ecology v. Asarco, Inc.*, the state agency notified Asarco that the levels of arsenic and lead in soil on and surrounding the location where its smelting facility once operated exceeded new levels set by the MTCA in 1988. Remediation costs greater than \$78 million are being assessed on the basis of strict, joint and several liability, even though Asarco's emissions constituted only 30 percent of amount to be remediated. The agency set the cleanup target level to be 20 parts per million (ppm) for arsenic which is the natural background level. The current EPA-approved level for arsenic in *drinking* water is 50 ppm, over two and half times the level of Washington's standards for dirt.

County health officials tested residents living near the long-abandoned site but found no elevated levels of arsenic or lead. There have never been any complaints against the company from its operations or emissions either during its operations from 1904 to 1912, or afterwards. The alleged "risk" of injury was a truly hypothetical one that Asarco could not have foreseen decades ago. Accordingly, the trial court voided the offsite remediation order on the grounds that applying it to Asarco retroactively violated the Due Process and the Takings Clauses of the U.S. Constitution as interpreted by the U.S. Supreme Court in its recent decision in *Eastern Enterprises v. Apfel*. A hearing in this precedent-setting case is scheduled for May 31, 2001.

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