

Aguinda v. ChevronTexaco
Coalition for the Defense of the Amazon
March 2005

EVIDENCE FROM THE JUDICIAL INSPECTIONS

Summary

Results from the inspections of the ChevronTexaco open-air toxic waste pits are the most important proof to date because they cut to the core of the factual dispute at trial. The plaintiffs claim the pits cause harm to the environment and human health, while ChevronTexaco insists they are safe. When Texaco left Ecuador in 1992, it had abandoned at least 600 open-air waste pits that contain toxic sludge and waters of formation. Separately, the company dumped more than 18 billion gallons of toxic production waters into various swamps rather than re-inject it into the ground, at a time when re-injection was the industry standard in the United States and in other countries.

Currently, the trial court in Ecuador is visiting roughly two sites per week (either pits or swamps) as part of an inspections process to gather evidence. At each site, technical experts for each side take soil and water samples under the supervision of the presiding judge. These samples are then sent to an independent laboratory for analysis, with the results then submitted to the court in the form of technical reports where they become part of the body of evidence. As of March 2005, eleven such reports had been submitted – six by ChevronTexaco, and five by the plaintiffs. Thus far, all 11 reports indicate that levels of toxic contamination exist at the sites inspected well above permissible Ecuadorian norms—sometimes at levels more than *1,000 times* these norms. Significantly, Ecuadorian norms are themselves considered far more lax to corporations than norms in the United States. For example, in Ecuador TPHs (toxic chemicals derived from petroleum) are permitted in water up to 1,000 parts per million (PPM), compared to an average of 100 PPM in the United States. Generally, the Ecuadorian norms allow pollution at approximately ten times the levels allowed in the United States. However, ChevronTexaco is currently in violation of these generous norms at each of the inspected sites for which reports have been produced.

ChevronTexaco's Sampling Methods

Experts for the plaintiffs have observed that ChevronTexaco's sampling methods reveal an underlying strategy intended to consciously avoid results that could reflect poorly on the company. During the inspections, the company's sampling experts mostly try to lift soil and water samples from particular locations where they believe there is little or no contamination, even though the general area is extensively contaminated. For example, ChevronTexaco experts often will choose a soil sample from the surface of a dirt-covered pit, when most of the contamination is a few feet underneath. Or, the company might take a water sample from the top of a hill near the pit rather than below the gradient. Samples were taken far from the natural gradient of the land to avoid toxic plumes that exist underground. As an indication of how extensive the contamination is, even with

these techniques the company's lab analyses are still turning up high levels of toxics in most of the samples taken.

The Law

The case relies primarily on two provisions that have been part of Ecuador's Civil Code since 1861. Article 2256 states simply that the party causing damage to another is legally obligated to repair it. Article 2260 allows for a "popular action" (where many victims can file a common lawsuit) to force the adoption of clean-up measures for those affected by negligent or bad practices. Under these provisions, the plaintiffs have to prove only that Texaco produced environmental contamination that caused or causes harm to the natural environment and/or human health. There is no legal requirement that the plaintiffs prove harm to the health of persons, although there is extensive data in the form of cancer rates and other indicia to support the proposition. As a remedy, the plaintiffs are seeking environmental clean-up only. They are not seeking personal damages because the Ecuadorian civil code prohibits it in the context of a "popular action" lawsuit (victims are free to sue on their own for personal damages, but few have the resources and no such lawsuits have been filed). The case is very much like a "Superfund" case in the U.S. in that the plaintiffs only must prove environmental contamination that is harmful. Once that is proven, the party that caused the harm is required to clean it up.

In addition to the laws cited above, the plaintiffs assert that Texaco is obligated to remedy the contamination because of its contractual obligations with the Ecuadorian government. Texaco agreed in its original contract with the Ecuadorian government to "protect the flora, fauna, and other natural resources..." and to use state of the art practices accepted by the petroleum industry. Texaco also violated other Ecuadorian statutes providing for the protection of the environment, and arguably the company also violated international law provisions providing for the protection of the environment, indigenous culture, and the right of people to be free from racial and ethnic discrimination. These various provisions provide additional legal bases to hold ChevronTexaco accountable at trial.

Results from the Judicial Inspections

The inspection reports are profiled in this section. The title of the report correspond to the names of the oil fields being inspected like Sacha and Shushufindi, and the number that follows corresponds to the number of an oil well in that field. Some of the inspection reports submitted by both sides are from the same site, as noted. Each of the chemicals mentioned below, such as TPHs or Chromium 6, are cancer-causing and have other harmful health effects (some cause damage to the central nervous system; others cause damage to organs, such as kidneys, and/or cause birth defects).

Highlights from the results for particular inspections are as follows:

Sacha-53: Built in 1974, this is a well site that ChevronTexaco often shows to journalists as a model of its remediation. The company covered the pits surrounding

this well with dirt without first removing the toxins; the sites appear harmless, as they are now covered with vegetation that hides the danger underneath. Results of these analyses from samples taken from two pits on this site are as follows:

- Total Petroleum Hydrocarbons (TPHs), which include hundreds of cancer-causing chemicals derived from petroleum that also can produce genetic defects, was found at *1005 times* the maximum levels permitted under Ecuadorian law;
- Chromium 6, a carcinogen Texaco used to perforate and unclog its wells, was found six times the maximum levels permitted;
- Cadmium and Phenol, both carcinogens, each were found at nine times the maximum levels permitted;
- Lead, which in addition to being a carcinogen impacts the central nervous system and can affect the memory when ingested even at small levels, was found at three times the levels permitted.
- ChevronTexaco's own results at SA-53 pits showed six samples contained TPHs at ten or more times the maximum allowed in Ecuador.
- One soil sample taken by ChevronTexaco showed levels of TPHs at 19.18 times the maximum allowable amount permitted by Ecuadorian law; another showed levels at 15.15 above permissible norms.
- A total of 22 samples taken by ChevronTexaco at the site indicated levels of toxins over Ecuadorian norms.

Sacha-94: Built in 1981, the pits surrounding this site also were “remediated” by Texaco. Yet during the inspection in September of 2004, water and soil samples from pits surrounding this well site found the following substances, all carcinogens, at various levels significantly higher than that permitted by Ecuadorian law:

- Nickel was found at 143 times the maximum levels permitted;
- TPHs were found at 72 times the maximum levels permitted;
- Lead was found at 29 times the maximum level permitted;
- Chromium was 6 found at seven times the maximum levels permitted;
- Copper was found at three times the maximum levels permitted;
- ChevronTexaco's work at the site produced seven samples that were higher than Ecuadorian norms for TPHs – including one sample more than seven times higher.
- The company also found six samples for cadmium that were higher than the maximum allowable limits under Ecuadorian law.

Shushufindi-48: This well was built by Texaco in 1974, and produced hundreds of thousands of barrels of oil and water of formation before being “remediated” by Texaco in the mid-1990s. The results of this inspection were as follows:

- Nickel, a carcinogen, was found in concentrations 75 times over the maximum allowable levels;

- Lead was found in concentrations 19 times over the maximum allowable levels;
- Chromium 6 was found at six times over the maximum allowable levels;
- TPHs were found at four times the maximum allowable levels;
- Copper was found at three times over the maximum allowable levels.

Separation Station, Sushufindi Southeast: This is the first of Texaco's 18 separation stations to be inspected, and the results were extremely negative for the company. At each separation station, Texaco separated the water of formation from the marketable crude and simply dumped sludge into a large wetlands area, sometimes at the rate of millions of gallons per week. Some of the results from this particular inspection were as follows:

- TPHs found in soil samples by the plaintiffs were over 15 times maximum levels permitted by Ecuadorian norms;
- Of the 40 samples taken by ChevronTexaco, nine were at least 29 times over the maximum levels allowed by Ecuadorian norms, and one was 138 times over the maximum levels;
- A total of 16 of the samples taken by ChevronTexaco at the site were over Ecuadorian norms for TPHs, Barium, Copper, and Polycyclic Aromatic Hydrocarbons (PAHs)

Sacha-10: The judicial inspections found that the waste pits next to this well, built by Texaco in 1971, contained high levels of toxins well over Ecuadorian norms. Significantly, these pits were subjected to Texaco's remediation in the mid 1990s. Highlights of results include:

- Lead at levels 265 times higher than maximum allowable levels under Ecuadorian law;
- TPHs at levels 30 times higher the maximum permissible levels;
- Chromium 6 was found 75 percent higher than the maximum;
- Barium was found six times higher than the maximum;
- ChevronTexaco's own analysis, taken just after the pit was supposedly remediated, indicate levels of lead, cadmium, and nickel each at least two times higher than the maximum allowable levels;
- ChevronTexaco's results from the judicial inspections show four samples of TPHs above Ecuadorian norms.

Sacha 21 and Sacha-6: Reports from sampling at these wells have been submitted only by ChevronTexaco as of the time of this writing. ChevronTexaco's reports at these sites found the following:

- At Sacha-21, the company found levels of TPHs at more than 38 times the maximum allowable levels permitted under Ecuadorian law, and a total of ten samples that showed TPHs over Ecuadorian norms;

- At Sacha-6, ChevronTexaco found six soil samples that were over maximum allowable norms for TPHs, including one sample that was more than four times higher;
- Also at Sacha-6, ChevronTexaco's report found 11 samples over maximum allowable norms for Cadmium;

Analysis

Decades of science indicate that toxic contamination from oil drilling at any level causes a wide variety of harm, including an increased risk of cancer, but small amounts of toxic contamination for some substances are allowed by regulatory bodies (some substances, such as benzene, are considered so toxic they are not allowed at any level in drinking water in the United States). Each country in the world has its own standards of what it permits, at what levels, and in what places. For example, standards generally are much more stringent for dumping in a delicate ecosystem such as the Amazon, where people live and depend on natural water sources for survival, than they would be in the middle of the desert of Nevada where few people live and none depend on natural water sources. For purposes of the case, the Ecuadorian legal norms for populated areas are applicable and are being used by the court. Ironically, these standards are considered far more generous to polluters than standards in the United States, but the inspections still indicate that ChevronTexaco is not in compliance even with these norms.

ChevronTexaco's Defense To The Sampling Results

Given that there is little ChevronTexaco can do to deny that its "remediated" waste pits contain dangerous levels of toxins, the company has reverted to the only defense it has left – that Ecuadorian norms do not apply in Ecuadorian courts in this trial. Although the notion that somehow Ecuadorian law does not apply in Ecuador might seem ridiculous, ChevronTexaco has consistently refused to compare its findings to Ecuadorian environmental norms when submitting its reports from the inspections to the court. This follows the company's initial strategy of denying the jurisdiction of the Ecuadorian courts over this matter, after having argued for nine years in federal court in the United States that the case should be tried in Ecuador. Instead the company says the amounts of contaminants it is finding at its pits cause no harm because they are within other "norms" for which the company usually provides no cite or source.

The company also selectively picks environmental norms from around the world that are the most favorable to its legal position, and then tries to "import" them to the court in Ecuador where they have no relevance or applicability. For example, one norm the company uses is for hazardous waste sites in Louisiana where there is no threat of groundwater contamination and there is a low population density -- conditions absent in the Ecuadorian Amazon. Given this extraordinary assertion that the courts of Ecuador must obey foreign law rather than its own law, the obvious must be stated: Louisiana law does not apply in Ecuador. The idea that ChevronTexaco's lawyers believe that these foreign norms apply in Ecuador shows a continuing disrespect for the sovereignty of that country. Just like when it chose to dump water of formation in the rainforest several

decades ago, ChevronTexaco still refuses to acknowledge that it is subject to the laws of Ecuador.

ChevronTexaco's Claim It Remediated

ChevronTexaco's larger defense is that it remediated the pits and therefore is not responsible for further clean-up. This defense is becoming increasingly difficult to sustain in light of the evidence from the judicial inspections. For years, local residents have claimed that Texaco's "clean-up" only involved shoving dirt over about 150 of the 627 toxic waste pits that the company left behind. Even these pits were not cleaned out first, so they are still causing contamination even if they look innocuous to the naked eye. Moreover, Texaco did not treat the polluted groundwater, swamps, or rivers – together a far more complicated and expensive task than just treating the pits. Finally, ChevronTexaco only "treated" about 25 percent of the pits – far lower than even their claimed responsibility of 37.5 percent of the pits, and far lower than the 100 percent that the plaintiffs claim is their responsibility as the designers and operators of the facilities.

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