

**CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED
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MEMORANDUM

To: Laura Gordon
From: Erich Birch
Date: January 9, 2013
Re: Asarco Custodial Trust Funds and Asarco Smokestack

This memo is to respond to questions raised by the City of El Paso (“City”) related to the authority of the Custodial Trustee (“Trustee”) to use Texas Custodial Trust (“Trust”) funds for the purpose of preserving the tall Asarco smokestack (“stack”).

Questions & Short Answers :

1. Does the Trustee have the authority to convey at no cost, i.e., donate, the stack to another owner, e.g., the City or a non-profit organization formed for the purpose of preserving the stack?

Short answer:

The Trust does not appear to prohibit donation of the stack, if the donation will advance the objectives of the Trust. However, the proposed donation would be evaluated in light of other competing interests of the Trust, and requires approval of TCEQ and EPA.

2. Is it permissible to use Trust funds to repair and restore the stack, e.g., to put the stack in sound structural condition prior to conveying the stack to another owner?

Short answer:

The Trust does not appear to prohibit the use of Trust funds to repair or restore the stack, if these efforts will advance the objectives of the Trust. However, the proposed expenditures would be critically evaluated under at least three different levels of review.

3. Does the Trustee have the ability to lease the stack to a governmental body or non-profit organization for a nominal rate?

Short answer:

The Trust does not appear to prohibit leasing the stack to a governmental body or a non-profit organization at a nominal rate, if this advances the objectives of the Trust. However,

the proposed lease arrangement and rate would be evaluated in light of other competing interests of the Trust, and requires approval of TCEQ and EPA.

Brief Background:

Pursuant to a 2009 Consent Decree and Settlement Agreement¹ (“Consent Decree”) between the Environmental Protection Agency (“EPA”), the Texas Commission on Environmental Quality (“TCEQ”), and Asarco, LLC (“Asarco”), the property and assets associated with the Asarco El Paso smelter were placed into a Trust under the control of a Trustee. The Trust was created pursuant to the Consent Decree as the vehicle for holding the smelter assets and the \$52 million in cash contributed to the Trust for the purpose of remediating the contamination at the site. The Trust agreement states the purposes of the trust and provides direction to the Trustee on use of the Trust funds.

The Trust assets include the tall stack located on the Asarco site, which is a prominently visible and recognized structure in El Paso. Some believe the 828 foot tall stack should be preserved as an icon of El Paso history. However, repair and maintenance of the stack will cost money, and the question arises whether Trust funds can be used for this purpose. There is also the question of whether the Trustee can convey or lease the stack at no cost or at a nominal cost to another entity, e.g., the City or a non-profit organization founded to preserve the stacks.

Questions & Discussion:

1. Does the Trustee have the authority to convey at no cost, i.e., donate, the stack to another owner, e.g., the City or a non-profit organization formed for the purpose of preserving the stack?

Although the obvious and immediate objective of the Asarco Trust is to deal with contamination at the smelter site, the ultimate purpose of the Trust is to finally transfer ownership of the remediated property assets to others. Section IV, paragraph 11.b of the Consent Decree identifies the purpose of the Trust as:

The purpose of the Custodial Trust will be to own the EI Paso Designated Property and the Amarillo Designated Property, carry out administrative and property management functions related to such properties, conduct, manage, and/or fund implementation of future Environmental Actions with respect to such properties, *and ultimately to sell, transfer, or otherwise dispose of all or*

¹ Attached to this memo is a copy of the Consent Decree and Settlement Agreement Establishing a Custodial Trust for the Owned Smelter Site in El Paso, Texas and the Owned Zinc Smelter Site in Amarillo, Texas, executed March 19, 2009, which includes a copy of the Consent Decree and Texas Environmental Custodial Trust Agreement, aka Texas Custodial Trust. The copy of the Texas Custodial Trust upon which this memo is partially based is the copy attached to the Consent Decree. This copy of the Texas Custodial Trust is unsigned since it was prepared prior to the actual selection of the Trustee. Section IV, paragraph 11.c, of the Consent Decree requires that the executed Trust agreement be substantially in the form of this copy; however, a fully executed copy of the Trust should be reviewed to confirm that it is substantively the same as the Consent Decree copy.

part of such properties, *if possible*. With respect to the EI Paso Smelter Site, the purposes of this Texas Custodial Trust further include: 1) addressing contamination (including without limitation Hazardous Substances) on and in the structures, soils, surface water, and groundwater at such site; and 2) remediating such site to standards that are protective of human health and the environment with the oversight of the TCEQ. [*emphasis added*]

Under the above paragraph the Trustee is authorized to sell the properties, but he also has the authority to “transfer” or “otherwise dispose” of the properties. There does not appear to be a requirement that the Trustee receive value for the properties, and he may therefore donate a property where appropriate. However, the donation must also be considered in light of the fiduciary responsibilities to the beneficiaries of the Trust, as explained further below. In other words, the Trustee would have to be convinced that donating the stack is consistent with the purposes of the Trust and is in the best interest of the beneficiaries.

Interestingly, the Consent Decree states that its purpose is to sell, transfer, or otherwise dispose of property “if possible.” This clearly anticipates that it might not be possible to even give away certain of the smelter properties. This is more likely if the potential liability of owning a property or asset exceeds its value, e.g., due to residual contamination or long-term monitoring or maintenance requirements. The stack could be considered to fall into this category of property, since there will be long-term maintenance responsibilities and potential liability attached to ownership of the stack. As relayed in various news media reports, when asked about preserving the stack the Trustee has relayed his concerns about the cost and liability associated with the stack and said he would require that the Trust be indemnified by any new owner of the stack. The benefit to the Trust of donating the stack under this scenario could therefore be offset by the risks associated with having a perceived liability remaining on the property, even with an indemnification from a new owner.

Like the Consent Decree, the Trust also states that the ultimate goal is the eventual disposition of the Trust assets:

WHEREAS, in accordance with Article IV of the Settlement Agreement, the Texas Custodial Trust is established for the purposes of (a) owning the Designated Properties and carrying out administrative and property management functions related to the Designated Properties, (b) conducting, managing, and/or funding the implementation of future Environmental Actions with respect to the Designated Properties, and (c) *selling, transferring or otherwise disposing of the Designated Properties*; [*emphasis added*]

The Trust assets are identified in the Trust agreement as “Designated Properties,” and described in real property terms. However, the Trust also owns all fixtures, improvements, and equipment transferred to the Trust along with the property, e.g., the stack. If the Trustee transfers ownership of the stack, it is unknown whether the real property on which the stack is located would be included in the transfer. As noted below, the Trustee must obtain the approval of both TCEQ and EPA prior to sale or other disposition of the properties.

To summarize, the Trust does not appear to prohibit donation of the stack, if the donation will advance the objectives of the Trust. However, the proposed donation would be evaluated in light of other competing interests of the Trust, and requires approval of TCEQ and EPA.

2. Is it permissible to use Trust funds to repair and restore the stack, e.g., to put the stack in sound structural condition prior to conveying the stack to another owner?

Section IV, paragraph 12 of the Consent Decree requires the creation of a separate Trust account to provide payment of future Environmental Actions and real estate taxes, insurance, and other administrative costs of the Trust. The Consent Decree and the Trust define “Environmental Actions” as follows:

"Environmental Actions" shall mean any response, removal, investigation, remediation, reclamation, closure, post-closure, corrective actions, institutional controls, and operation and maintenance activities selected and approved by the TCEQ with respect to the Texas Designated Properties.

Whether or not the Trust funds can be used to restore or maintain the stacks will therefore first turn on whether these actions can be described as expenditures on an authorized Environmental Action at the Texas Designated Properties. Neither the Consent Decree nor the Trust define the terms used in the definition of Environmental Actions. Clearly many of the terms used, such as “removal,” “remediation,” etc., are defined in various environmental laws and/or have acquired usage as terms of art in the industry. However, these terms also have common every-day usages that are not so limited. The Trust does not appear to restrict the definition of these terms. Further, since the Trust is intended to dispose of all assets associated with the Asarco site any attempt to restrict the definitions of the above terms to strictly environmental usages might hinder the Trustee’s ability to use Trust funds to address and dispose of other Trust assets.

In addition to the instructions contained in the Trust itself, the Trustee would also be expected to adhere to the fiduciary duties generally required of trustees. A fiduciary relationship exists between a trustee and the trust beneficiary, and the trustee must not breach or violate this relationship. A trustee owes a trust beneficiary an unwavering duty of good faith, fair dealing, loyalty and fidelity over the trust's affairs and its corpus.² The Trustee should therefore be expected to exercise his discretion in using Trust funds for any particular proposed purpose as balanced against other competing potential uses of the funds, all the while keeping in mind the overall objectives of the Trust and the total funds available.

Finally, TCEQ and EPA, as the beneficiaries of the Trust, also have an oversight role in the use of Trust funds. Prior to the expenditure of funds the EPA must be consulted, whereas TCEQ must actually give its approval. The language in the Trust indicates that an action

² *Ames v. Ames*, 757 S.W.2d 468, 476 (Tex.App.—Beaumont 1988), *aff'd and modified*, 776 S.W.2d 154 (Tex.1989), *cert. denied*, 494 U.S. 1080, 110 S.Ct. 1809, 108 L.Ed.2d 939 (1990).

must be “selected and approved” by the TCEQ, suggesting an affirmative action on the part of TCEQ in deciding which proposed activities will actually be approved.

The decision on whether funds may be expended on stack restoration therefore requires at least three levels of review and could be described as a three step process. First, the expenditures must be for “any response, removal, investigation, remediation, reclamation, closure, post-closure, corrective actions, institutional controls, and operation and maintenance activities.” Second, the Trustee must evaluate whether the expenditures are an appropriate use of the Trust funds in light of his fiduciary duty to the Trust beneficiaries. Third, the proposed activity must be presented to TCEQ for approval, and, after consultation with EPA, TCEQ must then approve the activity.

The three step review process may be demonstrated by examining some of the proposed expenditures for the stack. The “Recasting the Smelter” website has information on the on-going remediation activities at the Asarco site, including information on the stack. The website includes an October 19, 2012 “condition assessment” report on the 828 foot tall stack prepared for the Save the Stacks Group by Industrial Access by Chimney Solutions. The report includes the following “recommendations for the maintenance and repair of the 828’ Concrete Stack:”

- Remove existing Cap and Structural Steel. Install New Custom Cap.
- Replace Sections of LPS that are Heavily corroded or broken.
- Tool Clean Ladder System. Replace & Repair Damaged Sections of the Ladder System and Anchor Points. Apply Tnemec Primer and 2 Coats of Tnemec Coating to Ladder System.
- Strip and Tool Clean Exterior Concrete WindScreen. Hydroblast Concrete Windscreen
- Inject Concrete Epoxy to Cracking and Spalling sections as needed. Apply Tnemec Primer and 2 Coats of Tnemec Coating to Concrete Windscreen,
- Tool Clean Personnel Platforms and Safety Rails. Apply Tnemec Primer and 2 Coats of Tnemec Coating to Steel Structures.
- Repair/Replace AWS Electrical Conduit and Wiring in Damaged areas of Corrosion
- Lower interior liner to level of outside wind screen.
- Prepare and Carbon fiber Wrap top 40’ of stack

Although there are clearly differing views about the need and/or adequacy of these proposed recommendations, this list nevertheless identifies expenses that might be submitted for payment by the Trust fund. Under the three step review, first the Trustee would need to determine if these activities are “response, removal, investigation, remediation, reclamation, closure, post-closure, corrective actions, institutional controls, and operation and maintenance activities.” Arguably, restoration of the stack could be in “response” to the contamination on the stack and “reclamation” of the stack could be a form of “remediation.” So the expenditures might be considered as allowable under the Trust.

In the second step the Trustee would evaluate whether the expenditure is an appropriate use of the Trust funds in light of his fiduciary duty to the Trust beneficiaries. Arguably, by restoring the stack the Trustee might then avoid the expense of demolition, removal, and

disposal of the stack. Also, if the stack is viewed as an icon of El Paso's history perhaps the value of the surrounding property might increase, therefore raising the value of the Asarco property and demanding a higher price and add value to the Trust. In addition, perhaps the remediated and restored stack could then be donated to another owner and maintenance of the stack would no longer be a burden of the Trust. However, the Trustee would need to balance this potential added value benefit against other issues that might adversely impact the Trust assets. The Trustee has already identified several potentially adverse issues through the news media, including concerns that the actual cost to repair the stacks may be higher than estimated, that the costs for long-term maintenance of the stacks may exceed available funds, and that the Trust would continue to represent a potential liability and indemnification would be required from any new owner. Further, the Trustee would need to evaluate whether the risks and potential liability of the stacks could have a negative impact on the surrounding property, causing a reduction in the value of the Asarco property resulting in a lower price and loss value to the Trust. The Trustee would therefore need to decide in the balance if restoration of the stacks would be a prudent use of Trust funds.

Finally, in the third step the proposed expenditures would need to be presented to TCEQ for approval and consultation with EPA. As the beneficiaries of the Trust, TCEQ and EPA would thus have to be convinced that restoring the stacks would be a prudent use of the Trust funds, and the TCEQ would need to affirmatively approve the restoration activity.

To summarize, the Trust does not appear to prohibit the use of Trust funds to repair or restore the stack, if these efforts will advance the objectives of the Trust. However, the proposed expenditures would be critically evaluated under at least three different levels of review.

3. Does the Trustee have the ability to lease the stack to a governmental body or non-profit organization for a nominal rate?

As noted above in response to the first question, the Trustee is authorized to sell, transfer, or otherwise dispose of the properties. In addition, the Consent Decree also specifically anticipates that leasing might be a desired option. Section IV, paragraph 17, of the Consent Decree provides the following:

The Custodial Trustee may at any time seek the approval of US EPA and the TCEQ for the *sale or lease or other disposition* of all or part of the Texas Designated Properties. In the event of any approved sale or lease or other disposition under this Paragraph, any net proceeds from the sale or lease or other disposition shall be paid to the Custodial Trust. [*emphasis added*]

As with the sale or other transfer of property, an agreement to lease any of the properties will require the approval of both TCEQ and the EPA. As beneficiaries of the trust, both of these regulatory agencies would have to be convinced that the stack should be leased to the City or a non-profit group.

As noted above, the Trustee has relayed his concerns about the cost and liability associated with the stack, and said he would require that the Trust be indemnified by any new owner of

the stack. The Trustee would likely have the same reservations about leasing the stack, and any benefit to the Trust could be offset by the risks associated with having a perceived liability remaining on the property, especially one still owned by the Trust.

To summarize, the Trust does not appear to prohibit leasing the stack to a governmental body or a non-profit organization at a nominal rate, if this advances the objectives of the Trust. However, the proposed lease arrangement would be evaluated in light of other competing interests of the Trust.

Notices to the City of El Paso

The Trust also contains deference to the City of El Paso prior to the expenditure of funds on Environmental Actions and on the transfer of Designated Properties. The City may propose its own plan regarding the disposition of the smelter site, and it may provide input on Environmental Actions to the Trustee, TCEQ or EPA. The City must be provided with 45 days notice prior to the proposed sale or disposition of any or all of the properties. There is no requirement for the Trustee, TCEQ or EPA to follow the City's input or accept its proposed plan.

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 8, 2013

The Honorable José R. Rodríguez
Texas Senate
P.O. Box 12068
Austin, Texas 78711

Re: ASARCO Smokestacks

Dear Senator Rodríguez:

Thank you for your letter of February 6, 2013, concerning the former ASARCO property. Commissioner Carlos Rubinstein asked that I respond to the questions in your letter on his behalf. Though we have also seen increasing interest in this matter, we hope to work through this divisive issue for the ultimate good of the site and the community. We have done our best to answer your questions below and would be happy to discuss any further issues related to the site.

As you are aware, there are two main documents pertinent to this issue: 1) the *Consent Decree and Settlement Agreement Establishing a Custodial Trust for the Owned Smelter Site in El Paso, Texas and the Owned Zinc Smelter Site in Amarillo, Texas* (Settlement Agreement); and 2) the *Environmental Custodial Trust Agreement* (Trust Agreement).

1) Does the ASARCO Property have to be sold?

The Settlement Agreement states that “. . . the Trustee shall use ordinary and prudent judgment in considering a proposal to sell the real estate associated with the El Paso Designated Property and may consider criteria other than sales price. Any sale by the Trustee shall however be for at least fair value.” (IV.12.i(2))

The Settlement Agreement also states that funds from the proceeds of the sale of the property remaining after trust expenses have been addressed go to “. . . Reorganized Debtors for the benefit of . . . the creditors of Debtors as provided in the plan of reorganization that is ultimately approved by the Bankruptcy Court . . .” (IV.12.i(2)). (*Note: This portion of the Settlement Agreement was added late in the negotiations between the parties in the bankruptcy case in the United States Bankruptcy Court for the Southern District of Texas, Corpus Christi Division.*)

The Trust Agreement repeats this exact language in Section 2.5. However, Section 2.13 of the Trust Agreement addresses the property disposition in a somewhat different manner:

The TCEQ or the United States, may at any time propose in writing to take ownership of any of the Designated Properties transferred to the Texas Custodial Trust or any part thereof. Any such proposed transfer and the terms thereof are subject to the consent of the TCEQ and the United States...The following is

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included in this Agreement at the sole request and direction of the TCEQ: Prior to the TCEQ or the United States taking ownership of any portion of the El Paso Smelter Site, the Custodial Trustee shall provide the City of El Paso the opportunity to propose its own plan regarding disposition of the El Paso Smelter Site to the Custodial Trustee, the TCEQ, and the United States, which may include private or public entities taking ownership and completing remediation of such Designated Property.

The Settlement Agreement does not have any language similar to the above. It's possible that creditors would try to argue that the language above (Para. 2.13) has to be read in conjunction with the sale language so they could benefit from any remaining proceeds. Per the Settlement Agreement, the bankruptcy court maintains jurisdiction over this matter "... for such further order, direction and relief as may be necessary or appropriate for the construction or interpretation of this Settlement Agreement ..."

The Trustee's powers are exercisable solely in a fiduciary capacity. While the Trust contemplates the sale, transfer or other disposition of property, this must be read in conjunction with ensuring that there are funds available to implement necessary Environmental Actions as well as pay real estate taxes, etc. The Trustee must carefully weigh the purpose of the Trust and related provisions for payment of proceeds when conducting, managing and/or funding implementation of future Environmental Actions on behalf of the beneficiaries.

2) What are the impediments to having the City of El Paso or another public entity acquire the property?

Both the Settlement Agreement and Trust Agreement establish that the exclusive purposes and functions of the Trust are to own the Trust properties, carry out administrative and property management functions related to those properties, conduct manage, and/or fund implementation of future "Environmental Actions" and ultimately sell, transfer or otherwise dispose of all or part of the properties, if possible. Both documents further specify that with regard to El Paso specifically, the purposes include 1) addressing contamination on and in the structures, soils, surface water, and groundwater; and 2) remediating the site to standards that are protective of human health and the environment with the oversight of TCEQ. Thus, first presumably, any acquisition of the property would have to be in line with the purposes of the Trust.

In keeping with that principle, one would want to ensure that there are sufficient funds to address remediation of the property prior to determining whether a transfer of the property at no or little cost is appropriate and allowed under the Trust documents. The Trustee has done a good job maximizing Trust assets and managing remediation costs, however, it is difficult to truly guarantee final remedial costs on a project of this size and scope at this point in the process.

Additionally, the Trustee has a duty to administer the Trust in keeping with the purposes of the Trust as well as the Settlement Agreement and Trust Agreement. The Trustee is acting in a fiduciary capacity and would likely interpret Trust documents in a conservative manner to ensure that he is fulfilling his obligations as Trustee.

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It is difficult to set forth an exhaustive list of impediments without the particulars of a certain transaction but other possible impediments are liability, of both the Trust and the acquiring entity, and any safety issues with regard to the stacks remaining. Finally, there seem to be interested community members on both sides of the stack issue that would voice their opinions.

3) Would the use of remediation funds for anything other than “traditional remediation” be prohibited? In other words, could remediation and maintenance of the smokestacks be considered “remediation” in this context?

The Trustee has a duty to administer the Trust in keeping with the purposes of the Trust as well as the Settlement Agreement and Trust Agreement. The Settlement Agreement states that the Trustee “...shall use the Custodial Trust Account to fund future Environmental Actions pursuant to CERCLA, RCRA, or environmental State statutes with respect to the El Paso Designated Property and the Amarillo Designated Property as well as to fund the administrative costs of the Custodial Trust that have been approved by the TCEQ after consultation with US EPA.”

Both documents further define “Environmental Actions” to mean “...any response, removal, investigation, remediation, reclamation, closure, post-closure, corrective actions, institutional controls, and operation and maintenance activities selected and approved by the TCEQ with respect to the Texas Designated Properties.”

Per both the Settlement Agreement and the Trust Agreement, the purpose of the Trust is to “... own the El Paso Designated Property and the Amarillo Designated Property, carry out administrative and property management functions related to such properties, conduct, manage, and/or fund implementation of future Environmental Actions with respect to such properties, and ultimately to sell, transfer, or otherwise dispose of all or part of such properties, if possible.”

Thus, remediating or maintaining the stacks would have to fit within the above descriptions to qualify as a legitimate expenditure of the Trust. It should be noted that in the agency’s Expert Report (April 2009) setting forth the description of costs to perform cleanup at the El Paso site, soil and groundwater/surface water were described as the media of concern and made up the largest percentage of the cost estimate. Demolition of the smokestacks was included in the 2009 cost estimate rather than remediation or maintenance. TCEQ’s understands that the stacks have not been assessed for possible remediation so the degree of cleanup is unknown at this time. The community has expressed concern over the years regarding burning of hazardous waste in the stacks while the facility was still operating. Accordingly, the issue of hazardous versus non-hazardous would be a potentially controversial element in determining the degree and associated costs of cleanup of the stacks if they were to remain.

4) Once remediation is complete, would the TCEQ be willing to work in conjunction with the EPA to transfer the property to the City or another public entity?

Both the Settlement Agreement and Trust Agreement require that any sale by the Trustee be for at least fair value, which is in keeping with the Trustee’s fiduciary duty. If the Trustee is unable to sell the property, certainly the TCEQ would work with the city of El Paso on options for potential transfer of the remaining available real estate.

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5) There are provisions in the Settlement Agreement and the Trust Agreement that allow the TCEQ and EPA to take possession of the property at any time, at the agency's discretion. If the City or another public entity is willing to acquire the property, is there any impediment to exercise of that discretion?

So long as the remediation is proceeding in a timely manner, it is unlikely that the agency would exercise this discretion. During the ASARCO bankruptcy, the environmental custodial trusts were seen as the most practical vehicles for addressing contamination in an efficient and comprehensive manner. We still believe that having a Trust overseeing the property and cleanup is very beneficial in that it focuses resources directly on remediation.

Additionally, the Trust Agreement does include the language referenced in the question above but the Settlement Agreement does not. It's possible that creditors would try to argue that the referenced transfer language (Para. 2.13) has to be read in conjunction with the sale language in both documents so they could benefit from any remaining proceeds.

Additionally, the impediments referenced in the answer to Question 2 above would need to be considered, especially any liability connected with the agency's possession of the property, however short term.

We hope this information is helpful and please do not hesitate to contact me if you would like to discuss the matter further. I may be reached at 512/239-3900.

Sincerely,



Zak Covar
Executive Director
Texas Commission on Environmental Quality