



December 5, 2012

PROJECT NO: 09-131
VIA E-MAIL

Mr. Geoffrey Wright
President
Save the Stacks Group
2112 Murchison
El Paso, Texas 79930

RE: Response to Your November 30, 2012 Email

Dear Mr. Wright:

I received your e-mail dated November 30, 2012 and have addressed the points you made below. Additionally, I would like to take this opportunity to address some comments that were made at the November 27, 2012 City Council meeting.

It appears that one of the largest misunderstandings is on what items the Trust can spend money. Please note that legally the Trust can only spend money on those items specifically designated in the Trust Agreement or the Settlement Agreement as ordered by the Bankruptcy Court and that there is no discretion to spend money on retrofitting/refurbishing/preserving the stacks or to give the Site to the City of El Paso. And if there is any left over money remaining after the Trust sells the assets (including the real property) it will belong to the creditors of ASARCO and not the TCEQ or the EPA (per Section 2.2.1 of the Settlement Agreement). We have summarized these points in detail in a letter to the Mayor (see attached).

The responses to the points in your November 30, 2012 e-mail are below:

- 1) If indeed you do want to sell the former smelter site there are several aspects to consider in order to make it commercially feasible, principally access. It has no viable access as it is surrounded by railroad tracks and TXDOT rights-of-way. The City can be a valuable resource in dealing with both these entities to gain access to your property. Without viable access we*

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cannot see how you can expect to sell your property to commercial interests. Another issue is environmental remediation. Leaving the chimney in place is in no way detrimental to your remediation efforts. The ongoing environmental issues continue to be an impediment to any type of sale.

Trust Response:

1. We understand the access issue, it is common to most former ASARCO sites and each has had to develop access pathways as part of the renovation of the Site. We have our team currently working with TXDOT to improve access.
2. We also expect to work with the City of El Paso, since we have been remediating the site in such a manner to be able to help the City achieve its own redevelopment vision for the area established by Dover Kohl. It is also important to note here that Dover Kohl does not believe that that realizing the redevelopment vision is feasible with the stacks remaining on site.
3. The stacks are very much a factor in the marketability of the site. As we have stated before, all entities expressing interest in the site have said that the stack makes the site undesirable; especially if there is no money to structurally renovate and repair it, no money for long term maintenance and care, no money to protect it by acquiring insurance, and no entity to provide indemnifications to them. They would be assuming all the costs for each of these items, which will prevent any opportunity the Trust has to sell the Site.
4. Leaving the stacks up, without our criteria for funding the liability and renovation issues being met, is extremely detrimental to moving forward with the remediation of the site, since we cannot proceed with the installation of the protective cover over the main plant site until the fate of the stacks is known. Bringing the stacks down removes a critical bottleneck from the remediation schedule.
5. The site presently poses a risk to human health and the environment – the Trust exists to mitigate that risk and bring the site back into productive use. By carefully husbanding the \$52MM originally put in the Trust, and effectively recovering another \$18MM+ in site assets, the Trust is in a good position to mitigate the risks and leave the site ready for reuse and redevelopment as set out in the City's redevelopment plans. This has been done at several former ASARCO sites and numerous Brownfield sites across the country. There is no reason it cannot happen here.

2. Having the large stack in place will certainly speed up your environmental remediation process. By leaving it in place, you will not have to topple it, grind it up to extract the reinforcing bar, transport it to its burial site.

Trust Response:

As stated above, leaving the stack up in a limbo state is definitely a critical bottleneck to the remediation schedule and will cost the Trust additional monies earmarked for remediation efforts.

3. Each of the chimney experts we talked to (at least 4) said it would be less expensive to keep the chimney in place than to remove it.

Trust Response:

Your own structural engineering experts stated at the November 27th City Council meeting that there is a structural stability issue due to circumferential bending, and their very quickly done cost estimate for mitigating the problem was between \$1.5MM and \$2.5MM. Our chimney expert has been involved in the mitigation of a similar problem on a 600-foot tall stack; the actual cost for that retrofit was over \$5MM. There will also be operational and maintenance costs (your own estimates are about \$4MM), plus costs to realize the rendering of the stack memorial Mr. Ardovino showed at the City Council meeting (no cost estimate was given). Using your own numbers, the cost for leaving the stack up are between \$5.5 to \$6.5MM plus, at a minimum. The cost of demolishing the stacks is about \$1.4MM.

4. It would reduce the necessity to shut down Interstate 10, Paisano, the rail lines, etc. all of which will be necessary in order to knock it down.

Trust Response:

We recognize that it will require a brief shut down of the Interstate and Paisano. Our plan is to schedule the demolition over a weekend morning to cause minimal disruption. Before the Save the Stacks Group approached us, we had identified several Federal, State and local agencies with whom we would have to coordinate. We had already discussed the issue with TXDOT and IBWC. The demolition will be a large, integrated effort – fortunately, the Trust has an excellent and an experienced team in place to deal with any issues.

The code issues that your consultant identified concerning circumferential bending are clearly not an emergency. By the International Existing Building Code (IEBC), currently in force in El Paso, no structural remediation is required at all. This requirement was put into place long after the stack was put into service. It has been in place nearly 50 years without so much as a single structural crack. There is no evidence that this theoretical failure mode is an actual problem.

Trust Response:

We do not agree. Please refer to Attachment 2 - Additional Materials Regarding the Stability of the Stack.

We hope you will follow the wishes of the City of El Paso and meet with city officials this next week to consider a way forward that will preserve this outstanding engineering marvel.

Trust Response:

The Trustee has always been available to meet with El Paso's elected leaders and will continue to be during the source of this project.

Lastly, because a proposal for saving the stacks, meeting the important criteria that the Trust set forth last year, was not submitted to the Trust, the Trust is resuming the planning for the stacks' demolition.

Regards,

A handwritten signature in black ink that reads "Roberto E. Puga". The signature is fluid and cursive, with the first name being the most prominent.

Roberto Puga, P.G.
Trustee

cc: The Honorable John Cook, Mayor of El Paso
El Paso City Council
Caroline Sweeney, TCEQ
Carlos Sanchez, US EPA
Mary Koks, Trust Counsel

Attachments:

Attachment 1 - 12-4-14 Letter to the Mayor in Response to November 26, 2012 City Council meeting regarding the stacks on the former ASARCO main smelter site in El Paso, Texas

Attachment 2 - Additional Materials Regarding the Stability of the Stack



December 4, 2012

PROJECT NO: 09-131
VIA MAIL

The Honorable John Cook
Mayor of the City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901

Re: November 27, 2012 City Council meeting regarding the stacks on the former ASARCO main smelter site in El Paso, Texas

Dear Mayor Cook:

The Trustee, in the interest of clarity in future discussions regarding the Trust and the Trust's assets, would like to address several arguments and comments that were made during the El Paso City Council ("Council") meeting last Tuesday, November 27, 2012, about the stacks on the former ASARCO main smelter site in El Paso, Texas ("Site").

1. There were several arguments made during the meeting that the Trustee has the "discretion" to (i) spend money on retrofitting/refurbishing/preserving the stacks and (ii) give the Site, or a portion thereof, to the City of El Paso. These arguments are simply not true for the following reasons:

The Trustee's actions are subject to that certain Environmental Custodial Trust Agreement (Texas Custodial Trust), dated December 2009 (the "Trust Agreement"), and, by reference therein, 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, dated March 20, 2009 (the "Settlement Agreement").

Section 2.2.1 of the Trust Agreement sets forth the **exclusive** purposes and functions of the Trust which are to own the former Asarco properties, 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, **all as provided in the Settlement Agreement**, with no objective or authority to engage in any trade

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or business.” Section 2.2.1 goes on to state that the purpose of the Trust includes “addressing contamination...on and in the structures, soils, surface water, and groundwater at such site”.

In the meeting, and on other occasions, proponents of the save the stacks cause have emphasized the words “*sell, transfer, or otherwise dispose of*” and “*addressing contamination on and in the structures*” to support their argument that the Trustee has the “discretion” to use Trust money to retrofit/refurbish/preserve or otherwise address the structural integrity of the stacks, to set aside money for the ongoing maintenance of the stacks, and to give the land around the stacks to the City of El Paso or some other governmental entity for free or some nominal value. The issue with this argument is that it overlooks the words “exclusive” and “all as provided in the Settlement Agreement” in Section 2.2.1, Section 2.4.1, Section 2.5 of the Trust Agreement (Section 12.i. of the Settlement Agreement).

Section 2.2.1 of the Trust Agreement sets forth the “*exclusive*” purposes and functions of the Trust. This section does not include any term or provision for retrofitting/refurbishing/preserving or otherwise addressing the structural integrity of the stacks or any other structure at the Site.

Section 2.4.1 of the Trust Agreement sets forth the obligation of the Trustee to fund future “Environmental Actions”, which term does not include the retrofitting/refurbishing/preserving or otherwise addressing the structural integrity of the stacks or any other structure at the Site. Environmental Actions include site contamination characterization, remedy planning, remedy execution, operation, maintenance & monitoring of remedial systems, and public outreach.

Section 2.5 of the Trust Agreement (Section 12(i) of the Settlement Agreement) essentially establishes a waterfall for how Trust money will be distributed after completing the remediation of the former ASARCO properties. As you may already know, as part of the Settlement Agreement approved by the Bankruptcy Court, ASARCO agreed to deed the former ASARCO properties in El Paso and Amarillo to the Trust and contribute \$52,080,000 in cash to the Trust to pay for the Environmental Actions and administrative costs of the Trust. In the event the Environmental Actions and administrative costs of the Trust exceed the \$52,080,000, the Trustee can use the sale proceeds of the assets (including the real property) of the Trust to cover any such excess costs. Any remaining proceeds from the sale of Trust assets (including the real property) are to be distributed pursuant to Section 2.5 of the Trust Agreement (See Section 11.b of the Settlement Agreement).

Section 2.5 of the Trust Agreement is divided into two scenarios. Scenario 1 contemplates that the cost of the Environmental Actions and administrative costs of the Trust for the former ASARCO property in El Paso will be less than \$52,080,000, in which event the remaining \$52,080,000 can be used on other properties designated by the TCEQ. Scenario 2 contemplates that the entire \$52,080,000 is used for the former ASARCO property in El Paso, in which event, pursuant to Section 11.b. of the Settlement Agreement, the proceeds from the sale of Trust assets (including the real property) can be used to cover the excess costs and if any sales proceeds are left, then such proceeds are to be distributed to the creditors of ASARCO as provided in the plan of reorganization approved by the Bankruptcy Court.

Section 12.i(2) of 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 [properties] and may consider criteria other than sales price”, but goes on to state that “any sale by the Trustee shall however be for **at least fair market value.**” (emphasis added).

In summary, it is clear from Section 2.2.1 that the purposes and functions of the Trust are limited and do not include retrofitting/refurbishing/preserving or otherwise addressing the structural integrity of the stacks or any other structure at the Site (i.e. the powerhouse). Furthermore, there is nothing in Section 2.4.1 that permits the Trustee to fund Trust money to retrofit/refurbish/preserve or otherwise address the structural integrity of the stacks or any other structure at the Site. Lastly, and probably most importantly, the total cost for the Environmental Actions and administrative costs of the Trust are estimated to be well in excess of the \$52,080,000 originally provided by ASARCO (current estimates are \$69,000,000), thus any Trust money remaining after the Trustee sells the assets (including the real property) will belong to the creditors of ASARCO and not the TCEQ or the EPA. Thus not only is the Trustee obligated pursuant to Section 12.i(2) to use ordinary and prudent judgment when selling the real property at fair market value, the parties that will challenge the Trustee as to whether he met this obligation under the Trust Agreement are the creditors of ASARCO, not the TCEQ or EPA. Thus giving or selling the real property for a nominal value to the City of El Paso or any other entity resulting in a sale that is less than fair market value will result in a claim by the creditors of ASARCO for a breach of the Trust Agreement by the Trustee.

For the reasons stated herein, it is the Trustee’s opinion that neither the TCEQ nor the EPA can require the Trustee to spend Trust money retrofitting/refurbishing/preserving or otherwise addressing the structural integrity of the stacks or any other structure at the Site (i.e. the powerhouse) nor can they require the Trustee to sell the real property for less than what the Trustee believes is fair market value.

This is the very reason why the Trustee indicated to the Save the Stacks Group (STSG) over one year ago that in order to save the stacks, they would have to comply with the criteria the Trustee set out to allow the stacks to stay up – first and foremost of which was to pay for any retrofit/refurbishment costs required to address any structural issues with the stacks. In addition, the STSG needed to find an entity with the financial wherewithal to own/maintain the stacks into the future, indemnify the Trust, the Trustee, and any future purchasers of the real property surrounding the stacks against liability and property damage, and obtain and carry insurance to cover personal injury, death, and property damage in order to allow the Trustee to market and sell the property. Without these basic requirements, the Trustee would not be acting in a reasonable and prudent manner to maximize the marketability and value of the real property for sale.

2. There were allegations made at the meeting accusing the Trustee of personally benefiting if the Trustee was successful in maximizing the value of the Trust assets (including the real property). These allegations are baseless and false. The Trustee is paid an hourly rate for his services and does not get bonuses based on the amount he gets for the Trust assets (including the real property).

3. There were several allegations made at the meeting accusing the Trustee of personally benefiting if the Trustee was successful in maximizing the amount of money collected for the Trust since it would go to other TCEQ/EPA projects which the Trustee is involved. As noted in 1 above, any Trust money remaining from the sale of Trust assets (including the real property) after the remediation in El Paso is complete goes to the creditors of ASARCO as provided in the plan of reorganization approved by the Bankruptcy Court. Further, the Trustee does not have any connection to the TCEQ/EPA projects mentioned in the Trust Agreement.

Sincerely,

A handwritten signature in black ink, appearing to read "Roberto E. Puga". The signature is fluid and cursive, with the first name being the most prominent.

Roberto Puga, P.G.
Trustee

cc: El Paso City Council Members
Ms. Joyce Wilson, El Paso City Manager
Ms. Sylvia Firth, El Paso City Attorney
Senator Jose Rodriguez
State Representative Marisa Marquez
State Representative-elect Joseph Moody

Caroline Sweeney, TCEQ
Carlos Sanchez, US EPA

Attachment 2

Additional Materials Regarding the Stability of the Stack

- 1) Section V of Industrial Access report does in fact make reference to cracking and states “*External cracking and spalling of the concrete shell was found in the upper 30’ at TOS.*” There is no discussion contained in either Industrial Access’ report or HKN’s report as to the possible cause or significance of the reported cracking.
- 2) Section VIII of Industrial Access report recommends “*Prepare and Carbon fiber Wrap top 40’ of stack*”. There is no discussion contained within Industrial Access’ report or HKN’s report stating the reason for this recommendation.
- 3) HKN’s report does not address ACI 307-08 requirements for circumferential bending.
- 4) Mr. Wright’s determination that the code issues concerning circumferential bending are “*clearly not an emergency*” does not have any bearing on the fact that our calculations indicate that the structure possesses as little as 27% of the current code required strength in the circumferential direction. Furthermore, lack of strength in the circumferential direction can result in catastrophic failure. The fact that the IEBC may require no structural remediation does not in any way remove the potential hazard associated with insufficient circumferential capacity.
- 5) The code issues concerning circumferential bending are clearly referenced in ACI 307-08. All opinions aside, the Trust originally stated that the STS Committee needs to demonstrate that the chimney meets the strength requirements of ACI 307-08. HKN’s report does not meet this requirement.
- 6) The ability of a circular concrete chimney to resist axial bending is predicated on two basic points. The first point is that the structure contains sufficient strength in the axial direction to resist design wind and seismic loads. The second point is that the structure contains sufficient strength in the circumferential direction to maintain its circumferential continuity and behave as a homogenous circular element. When the structure lacks sufficient circumferential capacity it becomes vulnerable to vertical cracking, which can void the basic design premise that the structure behaves as a homogenous circular element. This is precisely the scenario that occurred in 1992 to the chimney at Florida Power and Light. Note that the Florida chimney was originally designed and constructed in 1959 and that prior to the 1992 wind event there was no documented evidence that the chimney contained any structural deficiencies other than the fact that it had only a single curtain of reinforcing steel similar to that of the ASARCO chimney.
- 7) The lone fact that the ASARCO chimney contains only one face of circumferential reinforcement over approximately the upper 600 feet is not an absolute reason to claim the structure is not safe. There are many existing concrete chimneys designed with single face reinforcing steel that are performing satisfactorily. The reason for their satisfactory performance can best be explained as follows:
 - a) Most structures, including chimneys, never see a maximum design wind or

seismic event during their lifetime.

b) Many older chimneys designed with single face reinforcement do possess a meaningful amount of circumferential bending capacity simply based on their geometry and the size, spacing and yield strength of the circumferential reinforcement used in the design.

8) The specific concerns regarding circumferential bending of the ASARCO chimney are based on the following:

a) The ASARCO chimney is a tall structure whose failure could result in severe damage to existing and future structures located within a radius of 850 feet or more of the chimney.

b) The relatively large diameter of the ASARCO chimney makes it more susceptible to circumferential wind loading since the larger the diameter of the chimney, the larger the induced circumferential bending moment.

c) The size of the existing circumferential reinforcing bars throughout the upper 360 feet of the chimney is only 3/8 inch diameter.

d) The yield strength of the existing circumferential reinforcing bars is only 40 ksi, whereas current code requires the use of reinforcing steel with minimum yield strength of 60 ksi.

e) Our structural investigation demonstrates that the existing circumferential capacity of the ASARCO chimney is as low as 27%, and only as high as 42% of the current code required strength throughout the upper 600 feet of the structure. Based on all of the above, it is our opinion that the structure does not come reasonably close to satisfying any building code intended to protect life and property resulting from a design wind event