

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE:

ASARCO LLC, *et al.*,

DEBTOR.

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CASE NO. 05-21207
CHAPTER 11

(Jointly Administered)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S
RESPONSE TO PUBLIC COMMENTS
REGARDING 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

Comes now the Texas Commission on Environmental Quality ("TCEQ") by and through the Texas Attorney General's Office and respectfully files the attached Response to Public Comments.

TCEQ states as follows:

1. On March 19, 2009, the Debtor filed 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. (Doc. No. 10567). (the "Texas Custodial Trust Settlement Agreement").

2. The Texas Custodial Trust Settlement Agreement is one of the settlements for which Debtors seek approval in the Motion Under Bankruptcy Rule 9019 for Order Approving Settlement of Environmental Claims. (Doc. No. 10534). (the "Environmental 9019 Motion").

3. Pursuant to paragraph 36 of the Texas Custodial Trust Settlement Agreement, notice of the proposed settlement was filed in the Federal Register and the Texas Register. The notice filed

was filed in the Texas Register on April 3, 2009 and provided a 30-day public comment period for comments about the proposed settlement to be submitted to the Texas Attorney General's Office. The public comment period closed on Sunday, May 3, 2009 although the Texas Attorney General's Office agreed to accept comments received on Monday, May 4, 2009.

4. The Texas Attorney General's Office received four written comments to the proposed settlement:¹ one from Texas State Senator Eliot Shapleigh, one from El Paso County Commissioner Veronica Escobar, one from the City of El Paso, and one from two members of the faculty at Evergreen State College. Copies of these comments are attached as Exhibits 1, 2, 3 and 4 respectively.

5. In addition, the Texas Attorney General's Office received copies of two comments sent to the Department of Justice: one from United States Congressman Silvestre Reyes and one from the Lone Star Chapter of the Sierra Club. Copies of these comments are attached as Exhibit 5 and 6 respectively.

6. The Texas Attorney General's Office was also made aware of two different form letters which were sent to the Department of Justice in large quantities— one from members of the Sierra Club and the other from members of an El Paso based community organization called Get the Lead Out. (*see* www.gettheleadout.net). Copies of those form letters are attached as Exhibits 7 and 8 respectively.

7. Pursuant to paragraph 36 of the of the Texas Custodial Trust Settlement Agreement,

¹TCEQ has also been provided by the Department of Justice ("DOJ") copies of the public comments received by DOJ (upon information and belief, more than 1,200 comments in total). While DOJ will be responding to those comments, many of the issues raised in the public comments received by DOJ are identical to the issues raised in the comments received by the Texas Attorney General and are addressed by TCEQ in the attached Response.

TCEQ has prepared the a Response (copy attached as Exhibit A) to the public comments attached as Exhibits 1-8.

Respectfully submitted,

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ATTORNEYS FOR THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Certificate of Service

I certify that on May 14, 2009, a true and correct copy of the foregoing Response was served on all parties who receive notice via the Court's Electronic Filing System and was sent via electronic mail to all parties of the Official Environmental Service List effective April 24, 2009.

/s/ Hal F. Morris
Assistant Attorney General

Response to Comments
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
In re ASARCO, LLC, et al, Case 05-21207

The Texas Attorney General's Office (TAGO) received three written comments on this matter from the following: State Senator Eliot Shapleigh, El Paso County Commissioner Veronica Escobar, and a joint letter from Anne Fischel, Ph.D and Lin Nelson, Ph.D. of Evergreen State College. Additionally, the City of El Paso requested that the TAGO consider the City's filing entitled "Response to Motion Under Bankruptcy Rule 9019 for Order Approving Settlement of Environmental Claims" as a public comment on the settlement. The TAGO was also copied on a letter sent to the Department of Justice (DOJ) from the Lone Star Chapter of the Sierra Club as well as forwarded a letter sent to DOJ from United States Congressman Silvestre Reyes. The TAGO was also made aware of two different form letters that were sent to DOJ in large quantities – one from members of Sierra Club and the other from members of Get the Lead Out. In the summary of comments below and related responses, the Texas Commission on Environmental Quality (TCEQ) attempts to address the issues raised in the various letters described above.¹ The TCEQ thanks all the commentors for taking the time to share their views on the settlement. If the settlement is approved by the bankruptcy court and the trust is fully funded, the TCEQ plans to coordinate a meeting between the custodial trustee and local community leaders to continue the dialog about the remediation that has started with these comments and that the agency hopes will continue throughout the remedial process.

1. Cost Estimate of \$52 Million

Several comments received by the TAGO stated that the \$52 million cost estimate for remediation of the ASARCO facility is not sufficient. The TCEQ disagrees with this comment. TCEQ staff has considerable experience in the remediation of contaminated sites and carefully examined each component included in the cost estimate. After TCEQ personnel calculated the \$52 million cost estimate, the TCEQ even hired an independent expert, who confirmed that the figure is within the reasonable range to address the contamination at the facility. The TCEQ has an expert report from both the independent expert (Mr. Ben Costello with Nationwide Environmental Services, Inc.) and an in-house TCEQ expert (Mr. Jim Sher) to support the \$52 million cost estimate. Additionally, as a contingency on the cost estimate, any sale proceeds from the disposition of the ASARCO property may be used for the remediation of the facility in the event that the \$52 million is insufficient.

Several comments also stated that the remediation of the facility is actually closer to \$250 million and that this number was put forth at one point by the U.S. Environmental Protection Agency (EPA). The TCEQ has never seen a written report or heard technical details to support this cost figure. Additionally, the TCEQ has previously asked EPA where this figure originated and employees at EPA associated with the facility have been unable to determine its origin or validity.

¹ The TCEQ is addressing the issues raised in these letters with the exception of two issues that seemed to be specifically directed towards the Department of Justice and the U.S. Environmental Protection Agency: 1) the Bush vs. Obama administrations; and 2) contamination in New Mexico and Mexico.

The TCEQ does concur with comments that state that different approaches to cleanup at the facility may cost more. For example, cleanup to a residential land use is expected to cost over \$600 million dollars. However, under TCEQ remediation rules, ASARCO would not have been required to cleanup to a level appropriate for residential use.

2. Future Land Use

Several comments received by the TAGO expressed a concern that the fully remediated property would be limited to a commercial/industrial land use. Under TCEQ remediation rules at 30 Texas Administrative Code Chapter 350 (Texas Risk Reduction Program Rules), the land use for the remediation of a site is determined by looking at the current land use for the property. Since the ASARCO facility is currently being used in a commercial/industrial manner, the future land use for the remediation is also commercial/industrial.

3. Property Included in \$52 Million Estimate

Several comments received by the TAGO stated that the full ASARCO facility was not included in the cost estimate and only 100 acres would be addressed in the cleanup. Property both east and west of I-10 is included in the cost estimate. The site consists of approximately 422 acres - 242 acres east of I-10 and 180 acres west of I-10. All of this was included in the cost estimate with the exception of approximately 55 acres on the southern portion of the 242 acre parcel east of I-10. This 55-acre portion may have elevated levels of lead and arsenic. The cost to address any contamination in this area is estimated to be under \$1 million and may be covered by proceeds from the sale or lease of other portions of the property.

4. Groundwater Remediation

Several comments received by the TAGO expressed concern that the elements in the cost estimate covering groundwater are not comprehensive enough to fully remediate the groundwater. While TCEQ's first priority is containment of the contaminated groundwater plume to keep it from migrating beyond the ASARCO boundary, the second very important priority is to restore the aquifer so that groundwater meets state and federal drinking water standards. Groundwater and surface water monitoring will be required to ensure that drinking water sources are protected while restoration of the aquifer is ongoing. Costs estimates to meet both of these priorities are included in the \$52 million cost estimate. The cost of the groundwater remediation at \$21.9 million comprises the largest portion of the \$52 million cost estimate. In arriving at this figure, TCEQ staff drew on many years of experience in dealing with groundwater at other sites in Texas, including the treatment of metals in groundwater at a state Superfund site.

5. Additional Investigation

At least two comments received by the TAGO requested additional sampling and analysis at the ASARCO facility for a broad range of chemicals. When the remediation is close to being implemented, there will be additional assessment as to whether more sampling is necessary. However, the remedial components upon which the \$52 million cost estimate is based will also

address other chemicals in addition to the lead, arsenic, and cadmium. For example, TCEQ included an additional 59.5 acres of asphalt paving in the estimate to prevent direct contact with contaminants and mitigate contaminated dust particles from blowing offsite as well as prevent contaminated storm water runoff. It is common in remediation that some contaminants are “drivers” in the remedial process; meaning, if the remedy is structured to address these contaminants, other contaminants are also addressed in the process.

6. Rocky Mountain Arsenal/Encycle Waste

Several comments received by the TAGO stated that the settlement didn’t specifically cover ASARCO’s illegal disposal of the hazardous wastes from the Encycle facility and requested that TCEQ obtain more detailed information on ASARCO’s handling of this waste. After inquiries to ASARCO, the TCEQ understands that information relevant to ASARCO’s handling of this waste is in the documents that ASARCO will transfer to the custodial trustee per the settlement agreement when both the settlement and ASARCO’s bankruptcy confirmation plan are approved.

A thorough discussion of the Encycle waste issue as it relates to waste from Rocky Mountain Arsenal is contained in Appendices I and II of the November 2007 GAO Report on Hazardous Waste. The report states that Encycle would test waste coming into the facility to ensure that it met acceptance criteria, which did not allow radioactive material, explosive material, or dioxins. Specifically in regard to Rocky Mountain Arsenal, the report states that the waste received by Encycle from this facility had a low hazard level and was a liquid residue containing dissolved salts and residual metals. The organic compounds in the liquid had been destroyed by previous incineration as part of the waste treatment and disposal process. Additionally, the report states that EPA officials commented that if ASARCO had obtained the proper permits and followed applicable RCRA regulations, the company could have legally conducted the smelting of the materials it received from Encycle.

At least one comment stated that Encycle appeared to have received waste from the Rocky Flats nuclear weapons facility. The TCEQ has no evidence of Encycle receiving waste from this facility and believes there is confusion between Rocky Mountain Arsenal and Rocky Flats. As noted above, Encycle did receive waste from Rocky Mountain Arsenal, which is a chemical weapons facility rather than a nuclear weapons facility.

7. Demolition

Many comments received by the TAGO requested that the smokestacks on the ASARCO property be taken down as soon as possible. The TCEQ anticipates that the demolition of buildings on the site will be one of the first activities pursued by the custodial trustee in implementing the remediation.

Additionally, at least one comment stated that care needs to be taken during demolition activities to ensure that contaminants do not migrate beyond the ASARCO property. The TCEQ agrees. As part of the requirements for on-site remedial activities, the TCEQ will require the trustee to implement dust control measures. The dust control plan will be required to address high wind

conditions. Depending on the site activities and the effectiveness of the dust control measures, perimeter air monitoring may also be needed.

8. Separate Amarillo & El Paso Funds

Several comments received by the TAGO asked that the funds for El Paso and Amarillo be listed separately and maintained in separate accounts. Of the \$52,080,000 set forth in the settlement agreement, \$52 million is designated to address the El Paso facility while the \$80,000 is for maintenance of the Amarillo property, which has already been remediated. While these funds will not be held in separate accounts, they will be tracked separately to maintain the division between the two sites.

9. Health Assessments

Several comments received by the TAGO requested that funds be made available for former employees of ASARCO to undergo continuing health assessments. The health of former ASARCO employees is not an issue within TCEQ's legal jurisdiction. Consequently, TCEQ did not file a claim in the bankruptcy proceedings related to funds for health assessments. Some comments also requested that funds be made available for citizens living in the El Paso region to undergo health assessments. Health assessments on individual citizens are not within the scope of activities that TCEQ performs as the environmental agency of the State of Texas.

10. Proceeds from Brownsville Suit

Many comments received by the TAGO mentioned U.S. District Court Judge Andrew Hanen's recent ruling granting the debtor, ASARCO LLC, what is estimated to be approximately \$6 billion in damages. The comments also stated that due to this judgment, the debtor's estate now has ample funds to pay for a full cleanup. This judgment is presently on appeal and is expected to take several years to adjudicate. As mentioned previously, the TCEQ estimates that it will cost \$52 million to address contamination at the facility, with the proceeds from the sale or lease of the property built in as a contingency factor. Under applicable bankruptcy law, creditors are not allowed to be paid above the value of their claim. Additional money in the bankruptcy estate does not change the value of TCEQ's claim. It should be noted that, unlike many other settlements in the bankruptcy, the \$52 million is anticipated to be paid out at 100% due to the fact that it is treated as an administrative expense priority claim. In order for a plan of reorganization to be confirmed by the bankruptcy court, the bankruptcy code requires, among other things, that such plan provide for administrative expense priority claims to be paid in full on the effective date of the confirmed plan.

11. Ionate Fertilizer

Several comments received by the TAGO raised the issue of a fertilizer that was produced using slag obtained from ASARCO. The concern is that this fertilizer may have contaminated El Paso yards when applied by the homeowners. The TCEQ has looked closely at this issue and determined that it would be difficult to prove ASARCO's liability for the application of this useful product that was presumably applied as it was intended.

12. Texas Risk Reduction Program (TRRP) Rules

At least one comment received by the TAGO stated that the TRRP rules have weak industrial cleanup standards. Additionally, the comment stated that a stakeholder cleanup panel should be created with input from the public and the EPA to address, in part, the fear that ASARCO would run the process. The TRRP rules provide a consistent corrective action process across a variety of program areas and are directed toward the protection of human health and the environment. The rules were created with a large amount of stakeholder input and incorporate elements of federal remediation standards. For example, the federally established drinking water standards referred to as the Maximum Contaminant Levels (MCLs) are the same as the Protective Concentration Levels (PCLs) for the groundwater under the TRRP rules. Additionally, TCEQ staff checked residential cleanup standards for arsenic and lead at other ASARCO sites in Washington, Nebraska, Colorado and Montana and found that the TRRP standards for the same contaminants are in line with other states. For example, the range for the lead cleanup level for residential removals at ASARCO-related sites in these states is 400 parts per million (ppm) to 1200 ppm. The level of 500 ppm for lead has been used for residential removals in the El Paso area.

The comment also stated that a stakeholder cleanup panel should be created with input from the public and the EPA to address, in part, the fear that ASARCO would run the process. If the settlement is approved by the bankruptcy court and the ASARCO bankruptcy plan is confirmed, ASARCO will not be taking part in the cleanup process. Under the terms of the settlement, ASARCO shall have no further interest in the remediation or disposition of the smelter property with the exception of a remainder interest in the proceeds from any sale of the property. The cleanup will be implemented by a custodial trustee, who seeks approval on cleanup plans from TCEQ (who consults with EPA). However, as mentioned previously, if the settlement is approved and the trust fully funded, the TCEQ plans to coordinate a meeting between the custodial trustee and El Paso community leaders to continue dialog related to the remediation.

13. El Paso County Metals Survey Site's Hazardous Waste Dump

One comment received by the TAGO requested a comprehensive sampling and analysis of the El Paso County Metals Survey Site's hazardous waste dump. The off-site residential removals that were conducted with the oversight of EPA are referred to as the El Paso County Metals Survey Site. As of April 1, 2009, 3,738 properties have been tested for lead and arsenic. Of the samples taken on these properties, a full target analyte list metals analysis was conducted on a portion of the surface and 6-inch depth samples. Remediation was performed on 1,060 properties. Some 461 property owners did not allow EPA access for sampling. Additionally, approximately 70 properties do require remediation but EPA was unable to obtain permission from the property owners to proceed with the remediation of these properties. The TCEQ understands that the off-site residential remediation is nearing completion. However, EPA has reserved certain funds in case owners of properties where access or remediation was previously refused come forward and request EPA assistance.

In terms of the reference in the comment to a hazardous waste dump of this same name where ASARCO dumped hazardous industrial waste from the smelter, the TCEQ is unsure whether this

generally refers to the area surrounding the facility where contamination was discovered and addressed as described above or the area on ASARCO property east of I-10 (across the highway from the facility) where ASARCO stored waste. If the latter, ASARCO has already removed a large portion of the waste from this area and deposited it in repository cell #3. The TCEQ's cost estimate contemplates that another 20,000 cubic yards of material will be removed from this area and placed in the not-yet-constructed repository cell #4. Confirmation sampling to ensure that all the waste of concern in this area has been removed is also included in the \$52 million cost estimate.

14. Trustee Selection

One comment received by the TAGO concerned the custodial trustee selection process. The City of El Paso requests that significant consideration be given to its input in the selection of the appropriate trustee. The TCEQ welcomes the City into the trustee selection process in an observational role. For example, the City may sit through telephonic interviews conducted with the trustee candidates. The TCEQ has posted a Request for Information concerning the custodial trustee position that closes on May 21, 2009. The TCEQ made sure that candidates for this position that were suggested by the City were made aware of the posting. After the posting closes, the TCEQ will coordinate with the City on plans going forward regarding this matter.

15. Funding the Trust Prior to the Effective Date

One comment received by the TAGO concerned the timing of when the custodial trust is funded. The City of El Paso urged funding of the trust upon approval of the settlement and prior to the effective date of the bankruptcy confirmation plan. The TCEQ has no opposition to this approach should ASARCO be willing to fund all or part of the trust prior to the effective date of the bankruptcy plan.