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State of Neglect: Companies comfortable working Texas' environmental quality system

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For the weak and the vulnerable, Texas has long been an especially hard place. Year after year, national surveys place the state at or near the bottom in such categories as assistance to poor children and the malnourished, treatment of the mentally ill and care of the disabled. This story is part of The Dallas Morning News' 'State of Neglect' series examining how the state determines whom it protects and whom it excludes – and how special interests and their lobbyists strongly influence the writing of laws and the workings of state government.

After the Texas Commission on Environmental Quality approved one of the most controversial permits in its history, its chairman assured Texans that only science and the law decided the vote.

"I am confident in the decision made today because, like all decisions, it was based on the legal requirements set forth by state and federal statutes," Buddy Garcia said in a statement last February about Asarco's copper smelter in El Paso.

What Garcia didn't mention were his three private meetings with an Asarco lobbyist at which, by the lobbyist's account, the topic was Asarco's pending permit. Asarco's opponents say those meetings may have violated the state's administrative procedures law. The company's lawyers say the meetings were legal.

The significance of the Asarco case goes far beyond Smelertown or La Esmelda, old names for long-abandoned neighborhoods that grew up near the towering facility. The fight offers an unprecedented inside look at how corporate influence in Austin can overshadow public interest – an issue that has touched virtually every Texan through thousands of hometown fights over air pollution, water quality or toxic waste.

Other tactics that Tucson-based Asarco and its Texas team brought to the fight didn't raise legal questions and are used frequently by permit seekers and opponents. Still, they were of a kind almost always hidden from public view.

They included scores of meetings with top TCEQ managers and lawyers and a seeming groundswell of grassroots support that was, in fact, concocted by the company.

Asarco also benefited from a state law engineered decades ago to do exactly what it did in this case: prevent the state from denying a permit renewal. That law has stayed on the books through rotations of governors, legislators, regulators and even the names of Texas' environmental agencies.

The official process looks bloodless and sanitized, stripped of insider influence and based solely on evidence and legal orders that seem objective as stone.

Reality, however, is less tidy. Asarco shows in graphic, almost minute-by-minute detail how a politically well-connected corporation can get what it wants.

And it all became public only because of a worldwide crash in the price of copper.

10,000 letters

In March 2007, the pressure was on.

Asarco might have been a simple air permit renewal which, under a Texas law that has served corporate interests and muzzled community protests for decades, should have been virtually automatic, few questions asked.

But this was different. Permit renewals don't typically fill a storeroom with legal documents and thousands upon thousands of letters, some personal and heartfelt, but most of them mass-produced.

Asarco, bankrupt after a global copper slump and a bitter fight with a Mexican corporate raider, sought protection in 2005 in U.S. Bankruptcy Court in Corpus Christi. It faced as much as \$25 billion in environmental and asbestos claims, a legacy from a century of operations at 96 sites across the West, including El Paso. Asarco's managers and creditors needed to put something positive on the balance sheet – such as an operating copper smelter.

Since 2002, the company had sought permission to restart the El Paso smelter, even as it worked on a Superfund cleanup of more than 1,000 offsite properties the smelter had contaminated.

Opponents, including the city, had put up a stiff fight to keep the smelter closed. They didn't want the 7,000 tons of pollution – including nearly eight tons of lead – that the reopened smelter would be allowed to emit each year.

So in early 2007, Asarco brought in Texas superlawyer Pam Giblin, a 30-year veteran and former top state clean-air agency attorney who billed \$675 an hour. A partner in Houston-based Baker Botts, she headed its environmental division in Austin, representing Texas' giant oil, chemical, power and manufacturing industries.

Baker Botts was handling other issues for Asarco, including a messy public feud with billionaire Carlos Slim's Grupo Mexico, which had been trying to control Asarco since 1999.

Besides its lawyers, Baker Botts also employed lobbyists. Its political action committee rained money on Texas politicians – nearly \$1.6 million from 2000 through the 2008 elections, including \$105,500 to Lt. Gov. David Dewhurst and \$110,000 to Gov. Rick Perry.

Still, the El Paso permit posed a problem. The smelter was shut down and in dubious shape. In a federal case, the Environmental Protection Agency assumes that a plant mothballed for two or more years has enough cracks, leaks and rust to require a whole new permit and lots of questions – not just a renewal of

its old permit.

By 2007, Asarco had been dark for eight years.

But this was a state permit. Asarco needed only to persuade the Texas Commission on Environmental Quality.

It was in that context that Giblin had to consider the elevation of Buddy Garcia.

Just shy of 40 in March 2007, Garcia was a relative unknown who had been an aide to his family friend and hometown mentor, state Sen. Eddie Lucio Jr., D-Brownsville, and held a raft of jobs under Perry.

In spring 2007, the governor handed him one of Texas' most powerful posts, and he became one of three full-time commissioners on the TCEQ. He was not a lawyer, engineer or rancher – he had a political science degree from Southwest Texas State University, now Texas State – but if confirmed, he might cast the deciding vote.

On March 7, 2007, around a table pulled into the middle of the dark-paneled Senate chamber during a recess, Garcia got his first public grilling on Asarco. It came from Sen. Eliot Shapleigh, D-El Paso, a nominations committee member, lawyer and determined enemy of Asarco's plan.

Shapleigh read the TCEQ's mission statement and then detailed Asarco's history: pollution, bankruptcy, local opposition, legal questions over its permit, a 1998 EPA memo on hazardous-waste burning in the smelter and demands for a criminal investigation.

In such a case, Shapleigh asked, "What is your responsibility? What laws are you supposed to follow, and how do you interpret that?"

"With regard to the merits of this or any other case, I can't prejudge," Garcia replied. "I have to base my decision on any official hearing record."

Among the few watching in the chamber was Giblin. She was there "to determine issues to be faced by Asarco before [the] agency," her billing time sheet reads.

Attorney time sheets are typically confidential. Baker Botts' bills in Asarco's bankruptcy – totaling more than \$12 million for Asarco work around the country – are in public bankruptcy files.

Also public are the bills that the city of El Paso's law firm, Birch, Becker & Moorman, sent the city, although they are rarely as detailed as the bills that Baker Botts submitted to Asarco. Each firm used a heavy black marker to mask some details from disclosure.

Giblin declined to discuss the Asarco case in detail, but she told *The Dallas Morning News* that Asarco prevailed on the merits of its case.

"Asarco earned the privilege of having its permit renewed because the commission followed the science and the law," she said. "This 'no-increase' [in emissions] permit renewal was among the most rigorously reviewed renewal applications in the commission's history. The company takes its environmental responsibilities imposed by this permit very seriously."

As Garcia's hearing concluded, Senate approval looked like a lock, based in part on pledges like this: Garcia said his door would always be open – "unless precluded by law."

The next week, he got his confirmation.

Jobs and health

The original El Paso smelter – Asarco evolved from American Smelting & Refining Co. – opened in 1887. For more than a century, successive generations worked there.

The smelter also contaminated the air, soil and water of El Paso, southwestern New Mexico and northern Mexico, raining lead on neighborhoods where thousands of people lived. As far back as 1970, when the city sued the company to force emissions cuts, Asarco was to many a national symbol of pollution, lax government oversight and environmental injustice.

It also played a role in the first federal lead standard before the smelter switched to copper, a more lucrative product. More than 1,000 nearby homes are in a federal Superfund cleanup.

Asarco's history turned its permit request into a fight over jobs and health. The city put up nearly \$1 million in legal, lobbying and public relations costs to oppose the permit.

Two state administrative law judges recommended denying the permit in 2005, concluding that Asarco had not proved the smelter would not pollute the air or that its compliance record justified a renewal. The judges cited five enforcement cases from 1994 through 1999, including state-federal complaints in 1999 that the smelter had improperly burned hazardous waste. That case brought a \$5.5 million civil fine and, in 2001, an additional \$1.5 million penalty for noncompliance with the 1999 order.

Glenn Shankle, then TCEQ's executive director, disagreed with the judges. Instead of rejecting Asarco's permit, he favored having Asarco do more studies to inform his recommendations, due May 1, 2007. The commissioners agreed.

In the six weeks leading to that due date, Asarco's team in Austin worked the system the way advocates and opponents of permits frequently do. Giblin met or spoke nine times with Shankle, his aides or agency lawyers. "Conferences with TCEQ personnel regarding information necessary for issuance of TCEQ report on El Paso permit," reads a billing entry for April 19, 2007. Another Baker Botts lawyer met with a TCEQ lawyer the day before Shankle released his report.

The report endorsed a five-year renewal, with a handful of conditions that Asarco immediately accepted. "Asarco LLC is pleased with the results of the rigorous investigation conducted by the executive director," company lawyer Doug McAllister said in a statement issued the day of the report.

Shapleigh said he was "very disappointed." The city later described the Shankle report in legal filings as a joint product of regulators and the regulated.

The report's release began a new round of Asarco meetings, some with Shankle, some with other TCEQ staff, as the public submitted comments and the executive director prepared his response – 10 meetings from May 1 through July 27, including one with Asarco president Joseph Lapinsky.

On July 27, 2007, the agency's executive director reaffirmed his support for the permit.

The stage was almost set. However, no important vote could take place. The commission was down one member and a chairman.

Commissioner Larry Soward was a lawyer with 30 years in state government, including 12 years with

the Texas Water Commission, a TCEQ predecessor, rising to executive director. By August 2007, he had been a TCEQ commissioner for four years; Garcia, five months. But Soward was also a critic of the agency's industry-friendly permit rules. On Aug. 21, Perry named Garcia chairman.

The governor still had one slot to fill. Tristan A. Castañeda III, a non-lawyer lobbyist employed by Baker Botts, worked on that problem on Oct. 16.

"Prepared for and participated in a meeting with TCEQ commissioner's office regarding vacancies and perceptions of Asarco permit," Castañeda's time sheet reads. "Reported to P. [Pam] Giblin." Baker Botts charged Asarco \$275 an hour for his services.

Castañeda was not registered as a lobbyist for Asarco while he worked on behalf of the company in 2007 and early 2008, according to the Texas Ethics Commission. Castañeda told *The News* that his work did not amount to lobbying but "simply involved fact-gathering." He registered as a lobbyist for Asarco after the commission vote.

Between Oct. 9, 2007, and Feb. 12, 2008 – the day before the commission vote – Castañeda met with TCEQ officials 17 times. Topics included scheduling the vote, public reactions to the smelter reopening, air monitoring and the commissioners' thinking.

Most meetings were with commissioners' executive assistants – a legal and common practice in a contested case. All sides do it; attorneys for El Paso, opposing the permit, sought meetings with all three executive assistants and got two, said the city's chief attorney on Asarco, Erich Birch.

But Castañeda also met with a TCEQ commissioner on Nov. 19, Dec. 3 and Jan. 21, each time reporting back to Giblin. Topics included opponents' arguments, Asarco's public relations and scheduling the permit vote. His Dec. 3 time sheet identifies Garcia as the commissioner in the meeting. Each of the other two meetings involved an unnamed commissioner, but *The News* determined that all three meetings were with Garcia.

Birch said the city's lawyers did not discuss Asarco with any commissioner. He said they visited new commissioner Bryan W. Shaw, an agricultural engineering professor from Texas A&M, whom Perry appointed Nov. 1, to introduce themselves but did not discuss the pending case.

Texas and federal law and centuries-old practice prohibit *ex parte* communications on any substantive matter between one side in a contested case and the final decision-maker unless all sides are notified and invited. Otherwise, legal experts say, the integrity of the process is compromised and public trust undermined.

In legal filings, Baker Botts has maintained that the meetings were proper. The firm insists that the contested case – and with it the ban on *ex parte* communications – had ended in 2006, when the commissioners sent the permit back to Shankle for more research. Attorneys for Asarco's opponents dismiss that argument. (*See Private Meetings story.*)

Garcia and executive assistant Daniel Womack declined to discuss the meetings, citing pending lawsuits seeking to overturn the permit. However, Garcia defended his integrity in office.

"I don't think there's anything that flies in the face of our emphasis on transparency or my emphasis on 'follow the law,'" he said.

Soward declined to discuss the case, citing the litigation. Speaking generally, however, he told *The News*

he had never met *ex parte* with a party in any contested case.

"No. I'm a lawyer," Soward said. "I know what the law is. I'm obligated both as a lawyer and as a commissioner to abide by that."

Manufactured support

The Asarco case also offers a textbook study in manufacturing community support. The common term is "Astroturf" – it looks like grassroots, but it's artificial.

While both sides publicly insisted that only the formal record should influence the vote, they also churned out opinion polls, economic impact studies and partisan brochures.

Letters protesting the permit flooded the TCEQ.

"We the people of El Paso are totally against the passing of permit #20345, allowing Asarco to reopen and further poisoning our community," read one form letter, submitted by the hundreds.

Many form letters supported Asarco. "It has been hurtful listening to the vocal minority tell false stories to the media and to our community about Asarco," one said. "Thank you for staying focused on the law and the science."

Some letters affected a homemade touch. "I have had many relatives work for Asarco and often hear great stories about the fantastic pay, benefits and how they treat their employees so good," said one. Scores of people sent that letter as their own.

On June 14, 2007, Baker Botts lawyer Brian Faulkner spent four hours "draft[ing] comments for non-Asarco organizations to submit to TCEQ" in support of the permit. He also edited newspaper guest columns and wrote letters for friendly legislators to send the TCEQ.

A search by *The News* through the 19 boxes of TCEQ Asarco files in Austin did not turn up letters from legislators other than Shapleigh, the company's nemesis.

Faulkner also researched whether the company could prevent opponents from using the smelter's image – the 848-foot smokestack says "ASARCO" in vertical letters visible for miles – in their materials. He consulted Baker Botts lawyers on copyright and intellectual property law. The idea apparently fizzled.

Faulkner told *The News* that he was "educating legislators on the issues" and "helping our clients protect their reputation when misinformation is being used by their opponents."

El Paso public relations consultant Teresa Montoya also took part in strategy meetings, wrote newsletters in which former employees begged for jobs and lined up local supporters. She billed \$200 an hour.

A charade?

Garcia gaveled the commission to order Feb. 13, 2008. The meeting room in a North Austin office complex was packed.

Giblin presented the case for approval that had been crafted over months, with graphics by a Dallas architectural firm.

Most in the room were opponents. One was Shapleigh. Another was Ron Curry, New Mexico's environmental secretary.

Curry told Garcia, whom he had never met, that he and New Mexico Gov. Bill Richardson opposed the permit because Asarco would pollute their state.

Curry also said the renewal violated federal law. Only a new permit with much tougher requirements would do; if the plant were a mile farther northwest – that is, in New Mexico – it would not get a permit. He later repeated that assertion to *The News* and to the EPA.

Less than two hours after the meeting began, following a short break, Garcia read a proposed order approving the permit with the conditions that Shankle had drafted and Asarco had accepted. Among them: Asarco had to report on the smelter's physical condition by July 1, 2008.

At Shapleigh's request, the order also boosted air monitoring requirements.

From the dais, Soward said the Texas Clean Air Act forced him to vote for the permit. The law gives the commission virtually no authority to deny a permit renewal. If the applicant meets the commission's technical requirements and isn't asking to increase emissions over the old permit, Soward said, the commission must say yes.

That provision, among the Texas Clean Air Act's most potent pro-industry provisions, has been in force for more than three decades, remaining through numerous legislative rewrites of the law. Texas industries say the law simply streamlines the process. Their critics say it shuts the public out of crucial decisions.

Asarco's opponents said Asarco was asking to increase emissions, because for eight years the smelter had released no pollution and would now be authorized to emit 7,000 tons a year. They also said the commission was wrong in claiming it had no power to refuse the permit. The commission rejected those arguments 3-0.

Since then, New Mexico and other opponents have asked the EPA to negate the permit under federal law. The EPA says it is studying the matter.

El Paso and the Sierra Club have asked the TCEQ to reconsider the decision and have sued the agency in Travis County District Court to overturn the decision. They cited, among other factors, Garcia's meetings with Asarco's lobbyist. No trial date is set.

Shapleigh has sought TCEQ records of the lobbyist meetings. The TCEQ has refused to comply despite two rulings by the Texas Attorney General's office that state law explicitly prohibits any agency from withholding records a legislator requests. In court filings, the TCEQ said the attorney general's orders were legally incorrect.

The TCEQ, which as a state agency is represented by the attorney general, has sued that office to block enforcement of the rulings, effectively making the attorney general sue himself.

Last summer, Asarco complied with one of the TCEQ's conditions, reporting on the plant's condition. It confirmed that many key components of the pollution controls no longer functioned. Some were damaged and corroded. Some couldn't be used but might have some value as assets; others were "only good for scrap value."

Asarco also released details of a recovery plan in which Indian copper company Sterlite agreed to pay \$2.6 billion for most of Asarco's U.S. assets – but not the El Paso smelter. Analysts following Asarco's international financial saga surmised that Sterlite assessed it as worthless. Asarco said if no buyer emerged, it would put the smelter in a trust with the task of completing the Superfund cleanup. The cleanup cost: \$52 million.

In October, however, Sterlite said that its purchase was off unless Asarco agreed to a big price cut, a result of the global credit crunch. Meanwhile, Asarco and Grupo Mexico, the mining concern that owns Asarco's equity and is battling Asarco's management in U.S. Bankruptcy Court for control of its assets, are in mediation over the company's future.

Soward, the TCEQ commissioner, said he later saw Curry, New Mexico's environmental secretary, and again expressed frustration at having his hands tied by what he called an industry-backed law. Soward told *The News* he will work during the Legislature's session – his last before leaving office – to educate lawmakers about the law's negative effects.

Curry told *The News* that his experience in Texas convinced him that the vote was decided in advance.

"And that was disturbing to me," he said. "That effort down there was nothing but a charade."

Third in a four-week series

About this story

To piece together the story of Asarco and its lobbying efforts, *The Dallas Morning News* scoured thousands of pages of lawyers' bills filed in U.S. bankruptcy court; six years' worth of legal and administrative filings; environmental enforcement records spanning more than a decade; state lobbying and campaign finance reports; tens of thousands of pages of public comments and other documents that fill 19 crates at the Texas Commission on Environmental Quality. The newspaper also reviewed notes, videos and transcripts of official proceedings and conducted dozens of interviews with state officials, lawyers for both sides, Asarco's supporters and opponents, legal scholars and other experts.

Asarco's meetings and the law

One issue raised in the fight over the permit renewal for Asarco's copper smelter in El Paso concerns three meetings that a lobbyist for Asarco's law firm held with Buddy Garcia, chairman of the Texas Commission on Environmental Quality, before the commission voted on the permit in February 2008. Although Garcia is named in only one of the law firms bills describing the meetings, *The Dallas Morning News* determined that he was the commissioner mentioned in all three meetings.

Baker Botts' legal bills

11/19/2007 T.A. Castaneda Jr. 4.00 [hours] Preparation and participation in a meeting with TCEQ Commissioner and Legislative Assistant; discussed setting of permit hearing, air quality monitoring and reaction to plant re-opening; reported to Giblin.

12/03/07 T.A. Castaneda Jr. 2.00 Preparation and participation in an event for the Senate Hispanic Caucus; discussed TCEQ agenda for ASARCO permit with Chairman Garcia and EA [sic] Womack; reported to P. [Pam] Giblin.

1/21/08 T.A. Castaneda Jr. 4.00 Preparation and participation in a meeting with TCEQ Commissioner and Legislative Assistant; discussed permit hearing, recent filings by the City of El Paso concerning [Asarco's] bankruptcy, response briefs from the parties and reaction to plant re-opening; reported to P. Giblin and B. [Brian] Faulkner."

The law

"Unless required for the disposition of an ex parte matter authorized by law, a member or employee of a state agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not directly or indirectly communicate in connection with an issue of fact or law with a state agency, person, party, or a representative of those entities, except on notice and opportunity for each party to participate."

–*Texas Administrative Procedures Act*

"Unless required for the disposition of an ex parte matter authorized by law, during the pendency of a contested case either at SOAH [the State Office of Administrative Hearings] or before the commission, no party, person, or their representatives shall communicate directly or indirectly with any commissioner or the judge concerning any issue of fact or law relative to the pending case, except on notice and opportunity for all parties to participate."

–*Texas Commission on Environmental Quality rules*

The parties

"Based on an initial review of these documents, there is at least the appearance of impropriety."

–*City of El Paso legal filing*

"There is nothing impermissible about the nature of the applicant's contacts with the commission."

–*Asarco legal filing*

Independent legal experts

"I think it casts serious doubt on the integrity of the entire TCEQ process. It certainly doesn't speak well of Texas justice. ... It goes to the whole notion of fair play and justice – the whole notion of due process."

–*Thomas O. McGarity, the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law, University of Texas School of Law*

"You want the agencies to be making the decisions based on the record and not on some conversation that somebody has with a lobbyist or a politician. In the same way that off-the-record conversations undermine our belief in the judicial system, they undermine our faith in the administrative structure of the state."

–*Elizabeth G. Thornburg, professor, Southern Methodist University Dedman School of Law*

Top contributors to lawmakers

The House Committee on Environmental Regulation and the Senate Natural Resources Committee have legislative oversight of Texas environmental laws, such as the one under which Asarco received its permit renewal.

House

Members of the House committee have collected at least \$13 million in contributions from 2000 through July 30, 2008. Top contributors to those members, based on reports to the Texas Ethics Commission, include:

1	Texas Democratic Party	\$276,557
2	Texas Association of Realtors	\$272,830
3	Bob and/or Doyleene Perry (Houston-based homebuilder, owner of Perry Homes, and his wife)	\$236,250
4	Texans for Lawsuit Reform (business-backed political action committee advocating limits on civil lawsuit awards)	\$207,990
5	SBC/AT&T/Bell PACs	\$170,184
6	Molly and/or Frank Homer (retired owners of a Sonic franchise and parents of Rep. Mark Homer, D-Paris, a former committee member)	\$153,300
7	HillCo Partners (Austin-based lobbying firm)	\$116,495
8	Stars over Texas PAC (former House Speaker Tom Craddick's political action committee)	\$115,000
9	Texas Dental PAC	\$83,674
10	Wholesale Beer Distributors of Texas	\$70,914

Senate

Members of the Senate committee have collected more than \$46.8 million in contributions from 2000 through July 30, 2008. Top contributors to those members, based on reports to the Texas Ethics Commission, include:

1	Texans for Lawsuit Reform (business-backed political action committee advocating limits on civil lawsuit awards)	\$2.3 million
2	Bob and/or Doyleene Perry (Houston-based homebuilder, owner of Perry Homes, and his wife)	\$1.1 million
3	Texas Association of Realtors	\$1 million
4	Friends of Frank Madla (Former San Antonio senator who died in 2006)	\$971,400
5	Todd Staples campaign accounts (Texas Agriculture Commissioner, former state representative and senator)	\$755,041
6	Texas Medical Association	\$558,069
7	Associated Republicans of Texas (committee to fund Republican candidates for local and state office)	\$536,899
8	Texas Association of Mortgage Attorneys	\$392,000
9	Republican Party of Texas	\$378,701
10	Texas Dental Association	\$320,285

SOURCE: Texas Ethics Commission

Research and analysis: Ryan McNeill