



The Senate of the State of Texas

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Senator Eliot Shapleigh
District 29

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The Honorable Henry Waxman
Chair, U.S. House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

VIA UNITED STATES MAIL

Re: ASARCO in El Paso

Dear Chairman Waxman:

My name is Eliot Shapleigh, and I represent El Paso, Texas in the Texas Senate. I write to request your and your committee's assistance in investigating an atrocity committed upon my community by the company ASARCO: the illegal burning of hazardous waste into El Paso's airshed.

Like all Americans, Texans want to leave a cleaner, healthier state for their children and grandchildren to enjoy. Despite this, Texas' air and water are amongst some of the dirtiest in the nation. Texas is first in the nation in air pollution emissions, the amount of cancer-causing carcinogens released into the air, and the amount of carbon dioxide emissions. It's second in the amount of hazardous waste generated and seventh in the amount of carcinogens released into the water. We have a governor and environmental agency that prides itself in opposing increased air standards that would save both lives and money, thus you can understand why we feel forced to turn to you for assistance.

Much of the blame for Texas' record lies with the state's environmental agency, the Texas Commission on Environmental Quality (TCEQ), which has been captured and corrupted by polluters—especially in the permitting process. Polluters have been able to work the system so well that their needs and goals are addressed far in advance of the average Texan's. Nowhere is this more clear than our experience with El Paso's ASARCO smelter.

For over a century, ASARCO's El Paso smelter released thousands of tons of contaminants into the bi-national airshed of El Paso and Ciudad Juarez. 120 years of pollution and environmental degradation has left our community with soil full of arsenic, lead, cadmium, mercury, and other heavy metals. Years of ASARCO's arsenic have created a 233 million cubic foot plume of toxic water in aquifers right near the Rio Grande. The actual smelter site is even covered with a shell of slag an astounding 75 feet thick.

With that as site's history, in 2002, ASARCO began the application process at TCEQ to have their air permit renewed. Since the permit would have allowed ASARCO to emit annually over 7,000



tons of pollutants, the affected communities united behind the goal of never again having the company poison their air, water, and soil. During the process, TCEQ commissioners referred the matter to two administrative law judges who conducted a ten day hearing in El Paso. After careful consideration, both judges found that ASARCO had failed to meet their burden of proof and recommended denial of the permit renewal. Yet despite public outcry and against the recommendations of the administrative law judges, TCEQ's executive director supported the permit's issuance.

On February 13, 2008, the TCEQ commissioners voted 3-0 to grant ASARCO the controversial operating permit. The decision followed six years of litigation, a contested case hearing, and well-publicized opposition from organizations and governments in Texas, New Mexico, and Chihuahua, Mexico. On February 14 and 18, 2008, our office submitted two public information requests to TCEQ, requesting various communications between TCEQ commissioners, ASARCO, and ASARCO's legal representatives, including personal cell phone and email records that relate to the transaction of official business. The requests were made under the "legislative purpose" statute, which allows legislators to gain access to otherwise confidential information provided that it is for a legislative use.

TCEQ immediately began fighting our request, delivering an 18-page brief to the Office of the Texas Attorney General (OAG) arguing that the records are confidential and should not be made available to our office. Citing executive privilege and a violation of separation of powers, TCEQ argues that the statute is unconstitutional—that legislators and the public they represent have no right to documents in the possession of agencies created by that very same legislature. As such, they are effectively arguing that the imposition of one statute—the legislative purpose exception—makes it harder to follow a second statute—their air permitting responsibilities—and thus it is the court's responsibility to remove that burden. The OAG disagreed, ruling that we are entitled, by state law, to the agency's records.

It soon became clear what TCEQ was attempting to hide. A few months after our request, billing records from ASARCO's law firm, Baker Botts LLP, became public in ASARCO's bankruptcy and showed repeated illegal ex parte communications between the firm and TCEQ staff and commissioners. The ex parte communications occurred prior to and leading up to the ASARCO permitting decision in February. In other words, ASARCO had an inside track to the commissioners without affording the same opportunity to the other parties to the contested permit.

After the OAG ruled against the agency, TCEQ filed suit in Travis County, which also ruled against TCEQ and in our favor. TCEQ appealed this decision, resulting in oral arguments that took place before the 3rd Court of Appeals just last month. This legal battle continues to show that TCEQ's attempts to hide evidence of ex parte communications is standard operating procedure for an agency that values supporting polluters over protecting the public.

TCEQ's mission statement is "to protect our state's human and natural resources consistent with sustainable economic development. Our goal is clean air, clean water, and the safe management of waste." But they have lost sight of those values. By arguing executive privilege, the agency aims to conceal the network of influence and contacts that make money off of the ability to pollute. The public's interest, however, has been piqued, resulting in calls to release the records and public outcry over the state's air permitting process.

What makes this situation entirely untenable is the fact that there are contaminants that the community still cannot identify. A smoking gun memo obtained via an open records request shows that 5,000 tons of hazardous waste, including 300 tons of residues from the Rocky Mountain Arsenal, were illegally burned by the smelter. What exactly was burned—be it nerve gas or other chemical weapons—has never been disclosed to our community.

Indeed, according to the memo included for your review, "this activity, plain and simple, was illegal treatment and disposal of hazardous waste ... Encycle's [the ASARCO subsidiary that shipped the waste to El Paso] own business records provide compelling evidence of sham recycling." Yet since this formerly-confidential memo became public in 2006, there has been no criminal accountability for those to blame. This sends an extremely poor message to polluters, especially with today's emphasis on environmental responsibility.

With this in mind, I respectfully request that you assist us in pushing the federal government to investigate and prosecute those at ASARCO whom are responsible for illegally burning hazardous waste into my community. Additionally, we ask you to hold an investigative field hearing in El Paso to help bring these facts to light.

We greatly appreciate your past record on environmental protection and hope and trust that you will assist our community in our time of need. We would be happy to provide any further information that you may require. Should you have any questions, please contact my chief of staff Eduardo Hagert at 1-800-544-1990 or eduardo.hagert@senate.state.tx.us.

Very truly yours,



Eliot Shapleigh

ES/de

CC: Dr. Al Armendariz, EPA Region 6 Administrator

Enclosed: Ralph Blumenthal, "Copper Plant Illegally Burned Hazardous Waste, E.P.A. Says," *The New York Times*, October 11, 2006.
"EPA Response to Encycle/Asarco Settlement Agreement," U.S. Department of Justice, Environment and Natural Resources Division, Michael D. Goodstein, July 31, 1998.