



# The Senate of the State of Texas

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Senator Eliot Shapleigh  
District 29

February 24, 2009

MAIN DISTRICT OFFICE:  
800 Wyoming Ave., Suite A  
El Paso, Texas 79902  
915/544-1990  
Fax: 915/544-1998

EASTSIDE DISTRICT OFFICE:  
1801 N. Zaragosa, Suite C  
El Paso, Texas 79936  
915/857-4800  
Fax: 915/857-4854

CAPITOL OFFICE:  
P.O. Box 12068  
Austin, Texas 78711  
512/463-0129  
Fax: 512/463-0218  
Dial 711 For Relay Calls  
e-mail: eliot.shapleigh@senate.state.tx.us

Mr. Mark Vickery  
Executive Director  
Texas Commission on Environmental Quality, MC 109  
Post Office Box 13087  
Austin, Texas 78711

VIA UNITED STATES MAIL

Re: Reimbursement for Costs Associated with ASARCO Air Permit

Dear Mr. Vickery:

I write to ask whether the Texas Commission on Environmental Quality (TCEQ) will pay the City of El Paso back for litigation costs associated with TCEQ's faulty interpretation of the law surrounding ASARCO's attempts to restart their El Paso smelter.

As you know, ASARCO recently announced that they were ceasing all efforts to restart its El Paso smelter. In response, TCEQ's Richard Hyde released a February 9, 2009 letter voiding all relevant air permits. This ended an almost seven year process that began on March 28, 2002 with TCEQ's receipt of ASARCO's renewal application for air quality permit number 20345.

It turns out, however, that TCEQ had ignored an essential step in the process: the applicability of Prevention of Significant Deterioration review. As a February 3, 2009 letter from the Environmental Protection Agency (EPA) to TCEQ points out:

*Our review of the Report confirms our initial conclusion that, after lengthy shutdown of over nine years, the plant has been "permanently shutdown" according to the U.S. Environmental Protection Agency (EPA) interpretation of the Clean Air Act (CAA) and is a new source for purposes of Prevention of Significant Deterioration (PSD) review, subject to PSD requirements of the federally-approved Texas State Implementation Plan (Texas SIP).*



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In short, the EPA affirmed that facilities such as ASARCO may not resume operations under "grandfathered" status. The key component of the EPA's determination was that the facility's readiness to resume operations was clearly not maintained for many years, thus negating the notion of a temporary shutdown.

This conclusion flies in the face of statements by TCEQ officials. For example, in the Executive Director's (ED) July 27, 2007 *Response to Comments*, the ED argues that "federal permitting review and whether reactivation of the plant would require [PSD] review is a separate permitting action and is not an issue for renewal." Further, TCEQ sent a letter on July 24, 2008 to the EPA responding to the EPA's concerns about ASARCO's air permit and the applicability of PSD review. Again, TCEQ incorrectly held that a PSD applicability determination was not possible at that time and that "the renewal of state permit 20345 authorizes continued operation of the plant." The February 3, 2009 EPA letter quoted above ruled that TCEQ's interpretation was incorrect.

Thus, but for the erroneous conclusions reached by TCEQ, the City of El Paso might not have expended \$1.4 million in litigation costs. Instead, the applicability of PSD review would have sent the permitting process on an entirely separate course. Why should the taxpayers of my community be forced to pay for your agency's incorrect interpretation of the law?

I look forward to your written response within ten days.

Very truly yours,



Eliot Shapleigh

ES/de

CC: The Honorable John Cook