



# The Senate of the State of Texas

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**Senator Eliot Shapleigh**  
District 29

June 12, 2009

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Mr. Gregg Cox  
Director, Special Prosecution Division  
Travis County District Attorney's Office  
P.O. Box 1748  
Austin, TX 78767

VIA UNITED STATES MAIL

Re: Potential Violation of Texas Open Meetings Act

Dear Mr. Cox:

Per this letter, I request that the Travis County District Attorney's Office conduct an investigation into potential criminal violations stemming from *ex parte* communications between one or more Texas Commission on Environmental Quality (TCEQ) commissioners and representatives of a permittee, ASARCO Inc., regarding a pending air permit renewal. I believe these potential criminal violations are but a few examples of an ongoing pattern by an agency that has been captured and corrupted by the very polluters it is supposed to police.

As background, ASARCO operated a lead and copper smelter in the middle of El Paso for over a century.<sup>1</sup> After shuttering the smelter in 1999, the company put my community through a seven year air permit renewal battle that only ended when ASARCO announced in February 2009 that it was ending all attempts to reopen the smelter. The *ex parte* meetings at issue stem from the company's efforts to renew air quality permit no. 20345 with TCEQ.

After TCEQ commissioners voted to approve the permit on a 3-0 vote in February 2008, the City of El Paso filed a motion for rehearing, requesting the commissioners to reopen specific issues related to the permit renewal's issuance.<sup>2</sup> The City supplemented their motion less than

<sup>1</sup> Senator Eliot Shapleigh, *ASARCO in El Paso*, September 2008. Enclosed.

<sup>2</sup> *Application of ASARCO Incorporated for Renewal of Air Quality Permit No. 20345*, Protestant's, The City of El Paso's, Motion for Rehearing, TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-0593, April 16, 2008.



eight days later.<sup>3</sup> In the supplement, the City described information that suggested ASARCO and its representatives had been engaging in *ex parte* communications.<sup>4</sup> The supplement contained billing records from ASARCO's law firm, Baker Botts, showing that ASARCO representatives repeatedly met with TCEQ commissioner(s) and staff with regard to the air permit proceeding while the matter was pending before the Commission.<sup>5</sup> These billing records were made publically available when Baker Botts filed them as a fee application with the Corpus Christi bankruptcy court in which ASARCO's bankruptcy is pending.

Specifically, the billing records contained three entries that merit further scrutiny:

11/19/2007	T A Castaneda Jr.	4.00	Preparation and participation in a meeting with TCEQ Commissioner and Legislative Assistant; discussed setting of permit hearing, air quality monitoring and reaction to plan re-opening; reported to Giblin.
12/03/2007	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 Womack; reported to Giblin.
01/21/2008	T A Castaneda Jr.	4.00	Preparation and participation in a meeting with TCEQ Commissioner and Legislative Assistant; discussed permit hearing, recent filing by the City of El Paso concerning bankruptcy, response briefs from the parties and reactions to plant re-opening; reported to P. Giblin and B. Faulker. <sup>6</sup>

Section 551.143(a) of the Texas Government Code provides that "[a] member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent [Chapter 551] by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter."<sup>7</sup> When the Texas Legislature passed the Open Meetings Act, it specifically made the Act applicable to state agencies, as a "governmental body" includes boards, commissions, departments, committees, or agencies of the executive or legislative branches that are directed by one or more appointed or elected members.<sup>8</sup> Section 551.143(b) provides that an offense under subsection (a) is a misdemeanor punishable by a fine and/or confinement in the county jail.<sup>9</sup>

<sup>3</sup> *Application of ASARCO Incorporated for Renewal of Air Quality Permit No. 20345*, Protestant's, The City of El Paso's, Supplement to Motion for Rehearing, TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-0593, April 24, 2008. Enclosed.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See Selected Pages of Cover Sheet to Eighth Interim Fee Application of Baker Botts L.L.P., *In re: ASARCO LLC*, et al., Document 7420, Case No. 05-21207 (S.D. Tex. Bankr Ct. Apr. 15, 2008), including Document 7420-9 at page 57 of 71 (time entries for Nov. 19, 2007), Document 7420-10 at page 30 of 79 (time entries for Dec. 3, 2007), and Document 7420-11 at page 61 of 79 (time entries for Jan. 19-21, 2008). Enclosed.

<sup>7</sup> TEX. GOV'T CODE § 551.143(a).

<sup>8</sup> *Id.* at § 551.001(3)(A).

<sup>9</sup> *Id.* at § 551.143(b).

Finally, I believe these meetings are representative of an agency that has become wholly captured and corrupted by polluters. Earlier this legislative session, I and other Senators requested that Governor Perry create an agency-wide review to analyze, streamline, and improve TCEQ functions to enforce state and federal law.<sup>10</sup> In addition to what has been discussed previously, chief among my concerns is the fact that TCEQ leadership denies problems with its air permitting programs. Despite voluminous evidence from EPA to the contrary (see EPA letter and attachments to Senator Watson), TCEQ management disputes there are any deficiencies with Texas' air permitting programs. TCEQ does not intend to consider or discuss changes to its program until such time as EPA takes formal action to disapprove Texas' State Implementation Plan submittals and start sanction clocks. Such a confrontational approach may prove harmful to the state.

Additionally, only six months after stepping down as TCEQ's Executive Director, Glenn Shankle is now serving as a lobbyist for Waste Control Specialists (WCS), a company he sided with over the objections of TCEQ staff.<sup>11</sup> While serving as Executive Director, Shankle overruled career staff that concluded WCS's radioactive waste dump permits could not legally be granted, stating that it was "highly likely" that radioactive waste would leak into area groundwater. Shankle ignored their concerns and recommended that the permits be approved. As a result, three staff quit in protest. This quid pro quo relationship between industry and TCEQ serves to destroy any public faith in the environmental permitting process.

This close relationship was also made evident during the 2005 explosion at BP's Texas City refinery that killed 15 people and harmed many more. Some of those injured the blast argued that BP violated the state's revolving door law when it hired Ruben Herrera, an air quality engineer formerly with TCEQ, and placed him in the position of promoting the exact same air quality permit that he had worked on as a state regulator.<sup>12</sup> According to email records, Herrera began talking to BP about a job while he was processing its application for a permit at the TCEQ and offered advice to BP engineers and consultants about how to file the application. Eleven days after starting work for BP, Herrera began negotiations for the company on the permit with his former employer, TCEQ. Texas' health and safety laws call for the automatic denial of an air quality permit if the company involved hires the state regulator who had been handling the permit application.<sup>13</sup> During a lawsuit that stemmed from the blast, attorneys for those injured stressed evidence that BP told TCEQ that equipment involved in the blast sent flammable hydrocarbons to a flare when they were actually sent directly into the air. The U.S. Chemical Safety and Hazard Investigation Board concluded the explosion occurred because those fumes were ignited. A flare would have avoided or minimized the explosion according to the Board.

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<sup>10</sup> April 29, 2009 letter from Senators Eliot Shapleigh, Rodney Ellis, and Wendy Davis to Governor Rick Perry.

<sup>11</sup> Forrest Wilder, "Good to Glow," *Texas Observer*, April 4, 2008.

<sup>12</sup> See R.G. Ratcliffe, "First state regulator, then BP's advocate," *Houston Chronicle*, November 25, 2007. See Kristen Hays, "Texas City Blast; BP engineer: facts hedged to make unit appear safer," *Houston Chronicle*, December 12, 2007. See Brad Hem, "Engineer tells court he took BP's word on hydrocarbons," *Houston Chronicle*, June 17, 2008.

<sup>13</sup> TEX. GOV'T CODE § 572.054.

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I believe these facts represent a pattern of misconduct in an agency that time and time again looks out for the best interests of the very polluters it is supposed to regulate. These occurrences epitomize the value that polluting companies should win, not communities; that profits be maximized, not the public good; that special interests are valued, not the fiduciary obligations of an agency acting to enforce state and federal law.

Here's how that pattern works:

- Ex parte meetings between TCEQ Commissioner(s) and representatives of a company with a highly-contested case still pending before the Commission;
- Denial of deficiencies in Texas' air permitting process, despite repeated evidence to the contrary from the EPA;
- Overruling of professional staff by an executive director who later leaves to lobby for the very same business that was benefited by his controversial decision; and
- Industry siphoning off professional staff to assist them with air permits that the staff previously worked on while employed at TCEQ.

Again, I ask you to initiate an investigation into a potential violation of the Texas Open Meetings Act and any other violations of criminal law that may arise. Should you need additional information, please contact David Edmonson in my Austin office at 512-463-0129 or [david.edmonson@senate.state.tx.us](mailto:david.edmonson@senate.state.tx.us). I look forward to your response.

Very truly yours,



Eliot Shapleigh

ES/de

Enclosed: Senator Eliot Shapleigh, *ASARCO in El Paso*, September 2008.  
Selected Pages of Cover Sheet to Eighth Interim Fee Application of Baker Botts L.L.P., *In re: ASARCO LLC*, et al., Document 7420, Case No. 05-21207 (S.D. Tex. Bankr Ct. Apr. 15, 2008).  
Transcript of remarks between Senator Eliot Shapleigh and Commissioner Bryan Shaw, April 15, 2009.  
Randy Lee Loftis, "State of Neglect: Companies comfortable working Texas' environmental quality system." *Dallas Morning News*. January 17, 2009.  
Letter from Senator Eliot Shapleigh to TCEQ Public Information Officer, February 14, 2008.  
Letter from Senator Eliot Shapleigh to TCEQ Public Information Officer, February 18, 2008.

CC: The Honorable David Escamilla, Travis County Attorney  
The Honorable Jaime Esparza, El Paso District Attorney  
The Honorable Jose Rodriguez, El Paso County Attorney