

**GN4-01709**

**ASARCO INCORPORATED**

**Plaintiff,**

**v.**

**TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**Defendant.**

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

**IN THE DISTRICT COURT**

**TRAVIS COUNTY, TEXAS**

**261<sup>st</sup> JUDICIAL DISTRICT**

**AMICUS CURIAE BRIEF OF THE  
LATINA/O LAW STUDENTS ASSOCIATION AT  
THE UNIVERSITY OF WISCONSIN LAW SCHOOL**

Gerardo Alcazar  
Emanuel Anthony Martínez  
William E. Rosales  
Lolita Velazquez-Aguilu  
University of Wisconsin Law School  
Latina/o Law Students Association  
975 Bascom Mall  
Madison, WI 53706  
(608) 262-2240  
(608) 819-1120

Steve Ortega  
*Counsel for Amicus Curiae*  
521 Texas Avenue  
El Paso, Texas 79901  
(915) 241-2673

**TABLE OF CONTENTS**

	PAGE
I. TABLE OF AUTHORITIES.....	iv
II. INTEREST OF <i>AMICUS CURIAE</i> .....	1
III. STATEMENT OF FACTS.....	2
A. El Paso is a predominantly Hispanic and low-income community.....	2
B. The Commission received public comments that raise questions of fact regarding ASARCO’s role in the environmental contamination and creation of negative health impacts in the El Paso community.....	3

C. The Commission timely received additional public comments that raise questions of fact and law unanswered by TCEQ’s Executive Director regarding the rights and protections afforded to the communities affected by ASARCO’s operations.....	5
D. In response to public notice, the Commission received five timely hearing requests from Ben Andrews & Linda Kittle, Bob Geyer, Gilbert & Lina Trillo, Texas Senator Eliot Shapleigh, and Harless R. Benthul on behalf of the City of El Paso.....	6
E. On April 28, 2004, TCEQ determined that based on the information it had available it may call in the public interest a fact-finding hearing on ASARCO’s air permit renewal application.....	7
<b>IV. ARGUMENT.....</b>	<b>9</b>
A. The plain meaning of Texas Water Code section 5.102(b) and Texas Health & Safety Code section 382.029 grant TCEQ the authority to call and hold fact-finding hearings.....	9
1. The general powers and duties of the Commission to control Texas’ air quality support its plenary power to call a hearing.....	10
2. Water Code § 5.556(f) affirms the Commission’s authority to call a hearing if it determines that it is in the public interest.....	11
B. The Commission’s duty to protect the public interest and the public health statutorily applies to the issuance and renewal of preconstruction permits.....	12
1. A permit renewal is more than a formality.....	14
C. Texas Health & Safety Code section 382.056(p) preempts section 382.056 (g) and (o), thereby granting the Commission the authority to call a contested case hearing on air Permit No. 20345.....	15
D. In the alternative, if Texas Health and Safety Code section 382.056(p) does not preempt section 382.056(g) & (o) it would be federally preempted by Title V of the FCAA.....	17
1. Subsections (g) & (o) do not meet the minimal elements required by the FCAA.....	17
2. Where § 382.056(p) falls short, federal law will preempt.....	18
E. A decision to limit TCEQ’s ability to hold a hearing on a no-increase air permit renewal will implicate Title VI.....	20

1. TCEQ as a recipient of EPA funds serves an important administrative role in providing a viable mechanism presently that can address, respond and provide access to participatory involvement of El Paso’s minority and low-income community.....	23
a. The Administrative Record indicates that there are Title VI concerns that are implicated by the ability of TCEQ to hold or not hold a public hearing on ASARCO’s renewal for their permit.....	24
b. Title VI is implicated by the undeniable demographics of El Paso and Census Tract 14 which includes ASARCO’s facility and the surrounding community.....	25
<b>V. CONCLUSION.....</b>	<b>25</b>

## I. TABLE OF AUTHORITIES

	<u>Page #</u>
<b><u>UNITED STATES SUPREME COURT CASES</u></b>	
<i>Alexander v. Sandoval</i> 532 U.S. 275 (2001) .....	23
<i>Burlington Truck Lines, Inc. v. United States</i> 371 U.S. 156 (1962) .....	12
<i>City of Richmond v. J. A. Croson Co.</i> 488 U.S. 469 (1989) .....	2
<i>Gonzaga v. Doe</i> 536 U.S. 273 (2002) .....	23
<i>Hines v. Davidowitz</i> 312 U.S. 52 (1941) .....	18
<b><u>UNITED STATES CIRCUIT COURT CASES</u></b>	
<i>Greater Boston Television Corp. v. FCC</i> 444 F.2d 841, 851 (D.C. Cir. 1971) .....	12
<i>South Camden Citizens in Action v. New Jersey Department of Environmental Protection</i> 274 F.3d 771 (3d Cir. 2001) .....	23
<i>United States v. Esquivel</i> 88 F.3d 722 (9th Cir. 1996) .....	23
<b><u>TEXAS COURT CASES</u></b>	
<i>Citizens Bank of Bryan v. First State Bank</i> 580 S.W.2d 344 (Tex. 1979) .....	11
<i>Texas v. Assoc. Metals &amp; Minerals Corp.</i> 635 S.W.2d 407, 409 (Tex. 1982) .....	11
<i>Alton McDaniel v. Texas Natural Res. Conservation Comm'n</i> 982 S.W.2d 650 (Tex. App. 1998) .....	11, 12
<i>Hooten v. Enriguez</i> 863 S.W.2d 522, 530 n.11 (Tex. App. 1993) .....	2

<i>Kettlewell v. Hot-Mix, Inc.</i> 566 S.W.2d 663 (Tex. App. 1978) .....	11
---	----

<i>Sexton v. Mount Olive Cemetery Ass'n</i> 720 S.W.2d 129 at 137-39 (Tex. App. 1986) .....	12
--	----

**STATUTES AND RULES**

78 Stat. 252, as amended, 42 U.S.C. § 2000d <i>et seq.</i> .....	20
--	----

42 U.S.C.

§ 2000d .....	20, 21
§ 7470(1) .....	18
§ 7470(5) .....	18, 19
§ 7401(a)(1-4) .....	16
§ 7661a (b) .....	16
§ 7661a (b)(5)(A) .....	16, 17, 20
§ 7661a (i) .....	16

Code of Federal Regulations

28 CFR § 42.104(b)(2) .....	21
49 CFR § 7.10 .....	22
49 CFR § 7.30 .....	22

Exec. Order No. 12,898

§ 1-101 .....	21
§ 1-103 .....	22
§ 1-104 .....	21
§ 2-2 .....	21
§ 3-3 .....	21

Tex. Admin. Code

§ 39.603(d) .....	3
§ 55.152(a)(2) .....	3
§ 80.6(d) .....	9

Tex. Gov't Code

§ 2001.058 .....	10
§ 311.011(a) .....	9
§ 311.021(5) .....	15

Tex. Health & Safety Code

§ 382.002(a) .....	10
§ 382.011(a)(1)-(3) .....	10

§ 382.011(b) .....	10
§ 382.011(c) .....	10
§ 382.029 .....	9
§ 382.0514(3)(a) .....	16
§ 382.0514(3)(b) .....	16
§ 382.0518(b)(2) .....	13, 14
§ 382.055(d) .....	13
§ 382.055(e) .....	14, 17
§ 382.056(g) .....	18
§ 382.056(n) .....	11
§ 382.056(o) .....	18
§ 382.056(p) .....	15, 17
Tex. Water Code	
§ 5.102(b) .....	9
§ 5.130 .....	14
§ 5.556 .....	11
§ 5.556(f) .....	11
Tex. Rules of Evidence 2.01(b) .....	2

**Miscellaneous**

Constitution of the National Latina/Latino Law Student Association Art. II: Mission Statement, available at <a href="http://www.nllsa.org/constitution.htm">http://www.nllsa.org/constitution.htm</a> (last visited Jan. 23, 2004) .....	1
Constitution of the University of Wisconsin Latino/a Law Students Association, available at <a href="http://students.law.wisc.edu/lisa/constitution.htm">http://students.law.wisc.edu/lisa/constitution.htm</a> (last visited Jan. 23, 2004) .....	1
Council on Environmental Quality, <i>Guidance Under the National Environmental Policy Act</i> , app. A, (Dec. 1997) .....	21
Defendant Texas Commission on Environmental Quality’s Brief on the Merits 2-4, No. GN4-01709 (261st Jud. Dist. Travis Cty. Texas filed Jan. 10, 2005) .....	2
Initial Brief for Plaintiffs at <i>ASARCO Incorp. v. TCEQ</i> No. GN4-01709 (261 <sup>st</sup> Jud. Dist. Travis Cty. Texas, filed Nov. 10, 2004) .....	13, 14
RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 189 (2d ed. 1999) .....	9
Timothy L. Williamson, <i>A Review of Major Provisions: Fitting Title V into the Clean Air Act: Implementing the New Operating Permit Program</i> , 21 <i>Envtl. L.</i> 2085, 2098 (1991) .....	15
U.S. Census Bureau, Census 2000 Summary File 3, Matrices H1, H7, H20, H23, H24, H30, H34, H38, H40, H43, H44, H48, H51, H62, H63, H69, H74, H76, H90, H91, and	

H94 .....	3
U.S. Census Bureau, Census 2000 Summary File 4, Matrices PCT142, PCT144, PCT147, PCT150, PCT151, PCT152, and PCT153 .....	3
U.S. Census Bureau, Census 2000 Summary File 4, Matrices PCT157, PCT158, PCT160, PCT161, PCT162, PCT163, and PCT164 .....	3, 25
U.S. Census Bureau, Census 2000 Summary File 4, Matrices PCT88, PCT89, PCT90, PCT121, PCT123, PCT124, PCT125, PCT126, and PCT127 .....	2, 25
U.S. Census Bureau, Census 2000 Summary File 4, Matrices PCT94, PCT98, PCT99, PCT100, PCT101, PCT103, PCT107, PCT108, PCT109, PCT110, PCT122, PCT123, PCT128, PCT130, PCT132, and PCT133 .....	2
U.S. Commission on Civil Rights, Not In My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice, 2 (Oct. 2003) .....	21, 22
US Census 2000: American Factfinder at <a href="http://factfinder.census.gov">http://factfinder.census.gov</a> .....	2,3, 25

## II. INTEREST OF *AMICUS CURIAE*

The Latina/o Law Students Association (“LLSA”) at the University of Wisconsin Law School (“UW”) respectfully files this Amicus Curiae brief in support of the Texas Commission on Environmental Quality’s (“Commission”) authority to refer the American Smelting and Refining Company’s (“ASARCO”) application for renewal of air Permit No. 20345 to the State Office of Administrative Hearings (“SOAH”) for a contested case hearing.

LLSA is a non-partisan organization consisting of 125 past and present students at the University of Wisconsin Law School. Among those members, seventeen current students are from El Paso. In addition to promoting the academic success of its members, LLSA’s mission is “pursuing justice for the legal rights, concerns and issues of Latinas/os.”<sup>1</sup> The University of Wisconsin LLSA organization is also a chapter of the National Latina/Latino Law Student Association that is committed to “combating all forms of prejudice, including discrimination based on color, race, religion, sex, national origin, age, sexual orientation, disability, gender identity, and veteran status.”<sup>2</sup>

LLSA is interested in this matter because ASARCO is located in El Paso, Texas, a predominantly Hispanic and low-income community. At least seventeen current members of LLSA are from El Paso and have family within the city. Whether the low-income and minority residents of El Paso are given an opportunity for meaningful participation in ASARCO’s contested case hearing has a direct bearing on the legal rights afforded to our community.

---

<sup>1</sup> Constitution of the University of Wisconsin Latino/a Law Students Association, *available at* <http://students.law.wisc.edu/llsa/constitution.htm> (last visited Jan. 23, 2004).

<sup>2</sup> Constitution of the National Latina/Latino Law Student Association Art. II: Mission Statement, *available at* <http://www.nllsa.org/constitution.htm> (last visited Jan. 23, 2004).

### III. STATEMENT OF FACTS

The Amicus Curiae adopts and incorporates the Statement of Facts set forth in the Defendant Texas Commission on Environmental Quality's Brief on the Merits<sup>3</sup>, with the following additions:

**A. El Paso is a predominantly Hispanic and low-income community.**

ASARCO is located within Census Tract 14 in El Paso, Texas.<sup>4</sup> While Hispanics in Texas make up 32% of the total population statewide<sup>5</sup>, Hispanics are the majority racial group both in Census Tract 14 and El Paso County, with a population of 1,683 (77.5% of population) and 531,654 (78.2% of the population), respectively.<sup>6</sup> Non-Hispanic Whites comprise 14 percent of the population of Census Tract 14 and 17 percent of El Paso County.<sup>7</sup>

El Paso is also a low-income community. The median household income in Census Tract 14 is \$16,827.<sup>8</sup> This median household income is far lower than El Paso County's \$31,051 and Texas' \$39,927.<sup>9</sup> Moreover, according to the 2000 Census, the per capita income for Census Tract 14 is \$9,744,<sup>10</sup> compared to El Paso County's \$13,421 and Texas' \$19,617.<sup>11</sup>

---

<sup>3</sup> See Defendant Texas Commission on Environmental Quality's Brief on the Merits 2-4, No. GN4-01709 (261st Jud. Dist. Travis Cty. Texas filed Jan. 10, 2005).

<sup>4</sup> See generally US Census 2000: American Factfinder at <http://factfinder.census.gov>. Pursuant to Texas Rules of Evidence Rule 201(b), the Amicus Curiae respectfully requests the Court take judicial notice of the Census 2000 information in this section. See e.g., *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 506 (1989) (judicial notice that the vast majority of the minority population in Richmond, Virginia is black); see also *United States v. Esquivel*, 88 F.3d 722, 727 (9th Cir. 1996) (taking judicial notice of census data submitted by the government); *Hooten v. Enrriquez*, 863 S.W.2d 522, 530 n.11 (Tex. App. El Paso 1993) (judicial notice of the El Paso County population taken).

<sup>5</sup> US Census 2000: American Factfinder at <http://factfinder.census.gov>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See U.S. Census Bureau, Census 2000 Summary File 4, Matrices PCT88, PCT89, PCT90, PCT121, PCT123, PCT124, PCT125, PCT126, and PCT127.

<sup>9</sup> US Census 2000: American Factfinder at <http://factfinder.census.gov>.

<sup>10</sup> U.S. Census Bureau, Census 2000 Summary File 4, Matrices PCT94, PCT98, PCT99, PCT100, PCT101, PCT103, PCT107, PCT108, PCT109, PCT110, PCT122, PCT123, PCT128, PCT130, PCT132, and PCT133.

<sup>11</sup> US Census 2000: American Factfinder at <http://factfinder.census.gov>.

The area within the vicinity of ASARCO is predominantly impoverished. The percentage of families living below the poverty line in Census Tract 14 is 23.2.<sup>12</sup> El Paso County's percentage of families living below the poverty line is 20.5% and the statewide level is 12%.<sup>13</sup> Furthermore, on an individual level, Census Tract 14 indicates that 35.3% of individuals<sup>14</sup> live below the poverty line, compared to 23.8% in El Paso County and 15.4% in Texas.<sup>15</sup> Finally, the median house value for Census Tract 14 is \$38,800.<sup>16</sup> This amount is roughly half the level observed in El Paso County of approximately \$70,000 and of Texas' \$82,500.<sup>17</sup>

**B. The Commission received public comments that raise questions of fact regarding ASARCO's role in the environmental contamination and creation of negative health impacts in the El Paso community.**

On May 15, 2002, ASARCO published an Air Permit Renewal Notice in the *El Paso Times*<sup>18</sup>, and as required, in an alternative language publication.<sup>19</sup> The notice states that the deadline to submit public comments is fifteen days after the newspaper publishes the notice.<sup>20</sup> According to the Commission's Executive Director, the Office of the Chief Clerk received eight comment letters from the following individuals before the deadline: Harless R. Benthul on behalf of the City of El Paso, Adele Siegel, Gilbert and Lina Trillo, Diego Fernandez, Molly Rosien,

---

<sup>12</sup> See U.S. Census Bureau, Census 2000 Summary File 4, Matrices PCT157, PCT158, PCT160, PCT161, PCT162, PCT163, and PCT164.

<sup>13</sup> US Census 2000: American Factfinder at <http://factfinder.census.gov>

<sup>14</sup> U.S. Census Bureau, Census 2000 Summary File 4, Matrices PCT142, PCT144, PCT147, PCT150, PCT151, PCT152, and PCT153.

<sup>15</sup> US Census 2000: American Factfinder at <http://factfinder.census.gov>

<sup>16</sup> U.S. Census Bureau, Census 2000 Summary File 3, Matrices H1, H7, H20, H23, H24, H30, H34, H38, H40, H43, H44, H48, H51, H62, H63, H69, H74, H76, H90, H91, and H94.

<sup>17</sup> US Census 2000: American Factfinder at <http://factfinder.census.gov>

<sup>18</sup> Administrative Record (A.R.) Item No. 4.

<sup>19</sup> See 30 Tex. Admin. Code § 39.603(d) (2004).

<sup>20</sup> See A.R. Item No. 4. See 30 Tex. Admin. Code § 55.152(a)(2) (2004).

Bob Geyer, Ben Andrews & Linda Kittle, and Laurence Gibson on behalf of the El Paso Regional Group of the Sierra Club.<sup>21</sup>

Specifically, the City of El Paso submitted a comment raising concerns regarding an ongoing Environmental Protection Agency (“EPA”) investigation indicating ASARCO as a “Potentially Responsible Party” with regard to lead and arsenic contamination to a “residential area along San Marcos Street[,] approximately one-half mile north of the ASARCO facility.”<sup>22</sup> The City of El Paso points out that ASARCO is operating under an Agreed Order to identify and remediate on-site lead contamination.<sup>23</sup> The City argues that in all likelihood the lead and arsenic contamination is attributable to ASARCO’s historic emissions.<sup>24</sup> Moreover, the City takes notice that the EPA notified ASARCO on October 30, 2002 indicating that it considers ASARCO (and another company engaged in processing slag from the ASARCO facility) a potentially responsible party for high lead and arsenic levels in a residential area north of the ASARCO facility.<sup>25</sup>

The El Paso community also has raised concerns. Bob Geyer, an employee in El Paso’s County Planning Department, raises the concern that ASARCO contaminated a 200-mile area with lead and arsenic in King County, Washington, and is the same company applying to operate a similar facility in El Paso. Mr. Geyer notes that El Paso only encompasses a 249 square-mile area.<sup>26</sup> Furthermore, Ben Andrews & Linda Kittle raise the concern that high levels of lead have been found in children who live in the vicinity of Mesita Elementary School on El Paso’s Westside.<sup>27</sup> Mr. Andrews and Ms. Kittle observe that a Multiple Sclerosis Cluster was

---

<sup>21</sup> See A.R. Item No. 5.

<sup>22</sup> A. R. No. 3 (Comment from Harless R. Benthul on behalf of the City of El Paso dated May 30, 2002).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (Comment from Bob Geyer dated May 29, 2002).

<sup>26</sup> *Id.*

<sup>27</sup> See A.R. Item No. 3 (Comment from Ben Andrews & Linda Kittle).

discovered in the same area.<sup>28</sup> Although, Mr. Andrews and Ms. Kittle recognize the historical role ASARCO has played in El Paso’s economic development, they place a high premium on the health of El Paso’s community and adamantly requested a contested hearing so that their community would not be “deprived of the opportunity to voice” their concerns.<sup>29</sup>

In response to Public Comment, the Executive Director concedes that “[t]he TCEQ recognizes that there has been significant historical health issues in neighborhoods in the general vicinity of ASARCO in El Paso.”<sup>30</sup> The Executive Director also concedes that “[t]he amount and severity of the area of contamination attributable to ASARCO in the El Paso area has not yet been determined.”<sup>31</sup>

No factual determinations have been made by TCEQ regarding these particular environmental concerns relating to air pollution originating from the ASARCO facility.<sup>32</sup> It is the Executive Director’s position that “[t]he review of the renewal application is limited and does not require a new review of impacts of air admissions.”<sup>33</sup> The administrative record reflects that the ASARCO plant has been idle since 1999 and ASARCO relies on air modeling performed at the time the permit was given in 1992.<sup>34</sup>

**C. The Commission timely received additional public comments that raise questions of fact and law unanswered by TCEQ’s Executive Director regarding the rights and protections afforded to the communities affected by ASARCO’s operations.**

Venita Vasquez raises a concern that the people living in the communities adversely affected by ASARCO are being deprived of due process of law guaranteed by the Fifth and

---

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> A.R. Item No. 5.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> A.R. Item No. 5.

<sup>34</sup> A.R. Item No. 23.

Fourteenth Amendments.<sup>35</sup> Additionally, Ms. Vasquez states that a denial of ASARCO's hearing may demonstrate environmental discrimination on the part of TCEQ.<sup>36</sup> Patricia Juarez, in her comment submitted on May 31, 2002 states that "public participation and stakeholder input" should be conducted in consideration of Executive Order 12,898.<sup>37</sup> Furthermore, Ms. Juarez advances the notion that public participation should be taken in light of "Environmental Justice Principles."<sup>38</sup>

TCEQ's Executive Director did not address the above concerns in her Response to Public Comment.<sup>39</sup>

**D. In response to public notice, the Commission received five timely hearing requests from Ben Andrews & Linda Kittle, Bob Geyer, Gilbert & Lina Trillo, Texas Senator Eliot Shapleigh, and Harless R. Benthul on behalf of the City of El Paso.**

TCEQ received five timely hearing requests from the following individuals: Ben Andrews & Linda Kittle, Bob Geyer, Gilbert & Lina Trillo, Senator Eliot Shapleigh, and Harless R. Benthul on behalf of the City of El Paso.<sup>40</sup> The Office of Public Interest Council ("OPIC") in Response for Request for Hearing by these individuals found that "there is no right to hearing on [ASARCO's application for renewal] and accordingly, ...[did not] recommend to the Commission that it find that the requesters are entitled to a hearing."<sup>41</sup> The Executive Director in

---

<sup>35</sup> See A.R. Item No. 3 (Comment from Venita Vasquez dated May 28, 2002). Ms. Vasquez's comment was stamped marked by TCEQ on May 31, 2002. Ben Andrews & Linda Kittle's Comment was stamped marked by TCEQ on June 3, 2002. See A.R. Item No. 3. While the comment by Mr. Andrews and Ms. Kittle is considered timely by the Executive Director, Ms. Vasquez's letter stamped marked by TCEQ is omitted from the Executive Director's Response to Public Comment without explanation. See A.R. Item No. 5.

<sup>36</sup> A.R. Item No. 3 (Comment from Venita Vasquez dated May 28, 2002).

<sup>37</sup> A.R. Item No. 3 (Comment from Patricia M. Juarez dated May 28, 2002 and stamped marked May 31, 2002).

<sup>38</sup> *Id.*

<sup>39</sup> See A.R. Item No. 5.

<sup>40</sup> A. R. Item No. 10.

<sup>41</sup> A. R. Item No. 11.

her Response to Hearing Requests also recommended “that the commission deny the hearing requests as a matter of law.”<sup>42</sup>

**E. On April 28, 2004, the Commission determined that based on the information it had available it may call in the public interest a fact-finding hearing on ASARCO’s air permit renewal application.**

On April 28, 2004, TCEQ’s Commissioners voted two-to-one to refer ASARCO’s air Permit No. 20345 to SOAH for a contested case hearing under its plenary power pursuant to “Chapter 5 of the Water Code.”<sup>43</sup> At the meeting, Texas State Senator Eliot Shapleigh presented TCEQ Commissioners with information showing that unresolved and unanswered questions of fact remain relating to the renewal of the ASARCO permit and requested on behalf of his constituents that a contested case hearing be held in El Paso.<sup>44</sup> First, Senator Shapleigh provided a historical context for his concerns relating to the ASARCO permit.<sup>45</sup> He stated that ASARCO has been in operation for 100 years in El Paso and explained:

In 1971, the Health Department, Texas Department of Health in league with the City of El Paso did a study that showed in the three years previous, ASARCO emitted 1,500 tons of lead, arsenic, and other contaminants. Over the course of 100 years there is a very distinct pattern that these lead contaminations, arsenic contaminations have done in this city.<sup>46</sup>

Senator Shapleigh also provided the Commission with a slide-show presentation that included two EPA maps showing high levels of lead and arsenic contamination in the area surrounding the ASARCO facility.<sup>47</sup> As result of this contamination, Senator Shapleigh added that ASARCO has approximately \$80 million in cleanup and remediation liabilities pending.<sup>48</sup>

---

<sup>42</sup> A. R. Item No. 10.

<sup>43</sup> A.R. Item No. 31.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

Senator Shapleigh stated that Centers for Disease Control and Prevention (“CDC”) has conducted studies revealing that “children with lead levels above 10 milligrams have demonstrated neurological and permanent brain injury, including learning disabilities, decreased growth, hyperactivity, impaired hearing, [and] antisocial or delinquent behavior.”<sup>49</sup>

Based on the record of information provided by the Commission’s staff and the unanswered questions of fact posed by public comments and Senator Shapleigh, the TCEQ commissioners voted to refer the following two questions to SOAH in the interest of the public health and safety:

- A. “Whether the operation of the El Paso Primary Copper Smelter under the terms of the proposed permit will cause or contribute to a condition of air pollution; and
- B. Whether the Applicant’s compliance history for the last five years of operation of the El Paso Primary Copper Smelter warrant the renewal of Air Quality Permit No. 20345.”<sup>50</sup>

Commissioner R.B. “Ralph” Marquez cast the sole vote against the referral because he questioned whether the referral was an efficient use of TCEQ’s resources.<sup>51</sup>

---

<sup>49</sup> *Id.*

<sup>50</sup> A.R. Item No. 19.

<sup>51</sup> A. R. Item No. 31.

## IV. ARGUMENT

### A. **The plain meaning of Texas Water Code section 5.102(b) and Texas Health & Safety Code section 382.029 grant TCEQ the authority to call and hold fact-finding hearings.**

Section 5.102(b) of the Texas Water Code and section 382.029 of the Health & Safety Code unambiguously provide the commission with plenary power to call a hearing.<sup>52</sup> The power to “call” a hearing extends to the Commission as an actor within the statute. Texas’ Code Construction Act requires that “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.”<sup>53</sup> The power to “call” a hearing, as is commonly understood, denotes the ability to act with authority.<sup>54</sup> Specifically, dictionary meanings of the term “call” include the power to “to convoke; convene,” “to announce authoritatively; proclaim, ” or “to bring under consideration or discussion.”<sup>55</sup> None of these definitions imply the inability of an actor to exercise an inherent power to “call.”<sup>56</sup>

Furthermore, the Water Code and the Health and Safety Code explicitly authorize the Commission to “make findings of fact.”<sup>57</sup> The Commission rules prescribe administrative procedures for developing “proposed findings of fact and conclusions of law”<sup>58</sup> and the Texas Administrative Procedure Act provides clear standards for making decisions based on a factual

---

<sup>52</sup> Water Code § 5.102(b) (2004) (stating “The commission may call and hold hearings, receive evidence at hearings, administer oaths, issue subpoenas to compel attendance of witnesses and the production of papers and documents, and make findings of fact and decision with respect to its jurisdiction under this code and other laws and rules, orders, permits, licenses, certificates, and other actions adopted, issued, or taken by the commission”). Tex. Water Code § 5.102(b) (2004); Health & Safety Code § 382.029 reads: “The commission may call and hold hearings, administer oaths, receive evidence at a hearing, issue subpoenas to compel the attendance of witnesses and the production of papers and documents related to a hearing, and make findings of fact and decisions relating to administering this chapter or the rules, orders, or other actions of the commission. Tex. Health & Safety Code § 382.029 (2004).

<sup>53</sup> Tex. Gov’t Code § 311.011(a) (2003-04).

<sup>54</sup> RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 189 (2<sup>nd</sup> ed. 1999).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Tex. Health & Safety Code § 382.029; Tex. Water Code § 5.102(b).

<sup>58</sup> See 30 Tex. Admin. Code § 80.6(d) (2003-04).

record.<sup>59</sup> Within the context of the Water Code and the Health and Safety Code, the authority to call a hearing and make findings of fact inheres to the Commission's duty to adjudicate decisions based on a factual record. Arguments claiming that this authority does not exist are in derogation of the plain meaning of the aforementioned statutes and render the text of the statutes meaningless.

1. The general powers and duties of the Commission to control Texas' air quality support its plenary power to call a hearing.

TCEQ's powers are broad in scope to effectuate its public purpose. Specifically, the Health and Safety Code section 382.011 explicitly authorizes the general powers and duties of TCEQ. Those powers and duties include (1) administering the Health and Safety Code; (2) establishing the level of quality to be maintained by the state's air; and (3) controlling the quality of the state's air.<sup>60</sup> Furthermore, the statute states that the commissions "shall seek to accomplish the purposes of this chapter through the control of air contaminants by all practical and economically feasible methods."<sup>61</sup> The purpose of the Health & Safety Code and the policy of the state are to "safeguard the state's air resources from pollution or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility."<sup>62</sup>

The Health & Safety Code further provides the Commission with the "powers necessary or convenient to carry out its responsibilities."<sup>63</sup> These necessary and convenient powers

---

<sup>59</sup> See Tex. Gov't Code § 2001.058. (2003-04).

<sup>60</sup> Tex. Health & Safety Code § 382.011(a)(1)-(3).

<sup>61</sup> Tex. Health & Safety Code § 382.011(b).

<sup>62</sup> Tex. Health & Safety Code § 382.002(a).

<sup>63</sup> Tex. Health & Safety Code § 382.011(c).

include the sole authority to grant or deny construction permits and to set emission ceilings;<sup>64</sup> the power to regulate the disposal of sewage sludge without implementing a permitting process;<sup>65</sup> and the power to delegate its licensing powers and duties to the executive director.<sup>66</sup>

2. Water Code § 5.556(f) affirms TCEQ's authority to call a hearing if it determines that it is in the public interest.

Health and Safety Code section 382.056(n) requires that the “commission shall...hold a public hearing in accordance with the procedures provided in Section 5.556 and 5.557, Water Code.”<sup>67</sup> Water Code section 5.556 establishes which individuals may request a contested case hearing and what issues may be addressed within that hearing, if it is granted by the commission.<sup>68</sup> Subsection (f) also states, “[t]his section does not preclude the commission from holding a hearing if it determines that the public interest warrants doing so.”<sup>69</sup> Subsection (f) is an explicit affirmation of the commission’s general powers and duties under Health & Safety Code section 382.011 to protect the public health, general welfare, and physical property of the state. Even *without* a single request for a contested case hearing, TCEQ may call a fact-finding hearing on its own authority, if it is determined to be in the public interest.

Finally, in order to ascertain the legislative intent with regard to the authority granted to TCEQ, the Court must look to the statute as a whole.<sup>70</sup> Although agencies may only exercise those powers that are specifically given to them by statute, “agencies also have implied powers to do that which is necessary to carry out the specific power expressly and specifically granted

---

<sup>64</sup> *Texas v. Assoc. Metals & Minerals Corp.*, 635 S.W.2d 407, 409 (Tex. 1982) (citation omitted)

<sup>65</sup> *Alton McDaniel v. Texas Natural Res. Conservation Comm'n*, 982 S.W.2d 650, 653 (Tex. App., 1998).

<sup>66</sup> *Kettlewell v. Hot-Mix, Inc.*, 566 S.W.2d 663 (Tex. App. 1978).

<sup>67</sup> Tex. Health & Safety Code § 382.056(n).

<sup>68</sup> Tex. Water Code § 5.556.

<sup>69</sup> Tex. Water Code § 5.556(f).

<sup>70</sup> *Citizens Bank of Bryan v. First State Bank*, 580 S.W.2d 344, 348 (Tex. 1979) (“The cardinal rule in statutory interpretation and construction is to seek out legislative intent from a general view of the enactment as a whole.”).

the agency.”<sup>71</sup> From the previously stated provisions in the Health & Safety Code and from a reading of the Act as a whole, it is clear that the legislature intended for the Commission to have authority to protect the public health, general welfare, and physical property of the State of Texas – and in that capacity, the authority to refer cases to a public hearing in the permitting process. The argument that TCEQ may not call a hearing on its own authority strips the Commission of the power to execute its duty to protect the public health and general welfare when practical, economically feasible, necessary, or convenient, as required by statute.

Furthermore, whether referral of a contested case hearing to SOAH is practical, economically feasible, necessary, or convenient involves not a question of law, but is a policy determination within the discretion of the commission.<sup>72</sup> In this case, far from being an arbitrary and capricious decision by the agency, the referral of air Permit No. 20345 to SOAH for a contested case hearing, is precisely the procedure required by the court to evaluate whether there is a “rational connection between the facts found and the choices made” in an agency’s final determination;<sup>73</sup> and a contested case hearing referral is not a final determination regarding the air permit.

**B. The Commission’s duty to protect the public interest and the public health statutorily applies to the issuance and renewal of preconstruction permits.**

The plain words of the statute instructs the Commission to grant permits based on the information available, including public comment, only if there is no indication that the emissions

---

<sup>71</sup> *Alton McDaniel*, 982 S.W.2d at 652; *see also Sexton v. Mount Olive Cemetery Ass’n*, 720 S.W.2d 129 at 137-39 (Tex. App. 1986) (stating that the full extent of power specifically granted to the agency “must be ascertained with due regard for the rule that the Legislature generally intends that an agency should have by implication such authority as may be necessary to carry out specific powers delegated”).

<sup>72</sup> *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1971) (“Assuming consistency with law and the legislative mandate, the agency has latitude not merely to find facts and make judgments, but also to select the policies deemed in the public interest. The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues.”).

<sup>73</sup> *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

under the permit will contravene the protection of the public health. Specifically the Health and Safety Code section 382.0518(b) states that:

The commission shall grant within a reasonable time a permit or permit amendment to construct or modify a facility if, from the information available to the commission, including information presented at any hearing held under Section 382.056(k), the commission finds: . . . (2) no indication that the emissions from the facility will contravene the intent of this chapter, including protection of the public's health and physical property.”<sup>74</sup>

While the facts of the original permit process may be relevant to the permit renewal process, the Commission is not limited to these twelve-year-old facts in its determination of whether the current facts merit a permit renewal. In contrast, the Plaintiff argues that “[b]y law, the only issues permissibly considered by TCEQ in deciding whether or not to renew an air permit are (1) [w]hether the facility is or has been in substantial compliance with the Texas Clean Air Act, and (2) the condition and effectiveness of existing emission control equipment and practices.”<sup>75</sup> The Health and Safety Code section 382.055(d) militates against this interpretation and textually provides that the Commission at a minimum examine these factors:

In determining whether and under which conditions a preconstruction permit should be renewed, the commission shall consider, *at a minimum*: (1) the performance of the owner or operator of the facility according to the method developed by the commission under Section 5.754 Water Code; and (2) the condition and effectiveness of *existing* emission control equipment and practices.<sup>76</sup>

The administrative record on ASARCO's Permit No. 20345 has raised a number of unresolved issues related to the public health.<sup>77</sup> The argument that there is no indication that emissions from ASARCO will contravene protection of the public health is an inapplicable legal fiction the

---

<sup>74</sup> Tex. Health & Safety Code § 382.0518(b)(2).

<sup>75</sup> See Initial Brief Plaintiffs at 11-12, *ASARCO Incorp. v. TCEQ*, No. GN4-01709 (261st Jud. Dist. Travis Cty. Tex., filed Nov. 10, 2004).

<sup>76</sup> Tex. Health & Safety Code § 382.055(d) (emphasis added).

<sup>77</sup> See A.R. Item No. 3.

Plaintiff constructs based upon its 1992 permit application.<sup>78</sup> The condition and effectiveness of existing emission control and practices is indeterminable, because the El Paso ASARCO facility has been closed since 1999.<sup>79</sup> This factor alone merits a referral of the permit to SOAH for a fact-finding hearing, if not a denial of the permit altogether.

However, the Commission is not required to rely on this factor alone, because the two considerations included in Health & Safety Code section 382.055(d) are minimum considerations. These considerations do not preempt or exclude the considerations involved in the original permit process, particularly, that there be “no indication” that emissions from the facility will contravene the “protection of the public’s health and physical property.”<sup>80</sup> The Commission may also consider the cumulative risk of particular air pollutants<sup>81</sup> and other factors, consistent with federal and state law, it finds relevant.

Furthermore, the legislature expressly provides the Commission with the authority to impose requirements more stringent than those of the existing permit if “the [C]ommission determines that the requirements are necessary to avoid a condition of air pollution”<sup>82</sup> A fact-finding hearing is a necessary procedural element for the commission to make these determinations, as required by statute.

1. A permit renewal is more than a formality.

Although Plaintiff argues that a permit renewal is a “ministerial exercise,” the whole Act clearly contemplates a procedure that is more than a formality. The private interests of the applicant and affected persons, plus the public interest of the affected community, are

---

<sup>78</sup> See generally Initial Brief for Plaintiffs at 11-12, *ASARCO Incorp. v. TCEQ*, No. GN4-01709 (261st Jud. Dist. Travis Cty. Tex., filed Nov. 10, 2004).

<sup>79</sup> A.R. Item No. 11 (“ASARCO has not operated the facility since 1999 for economic reasons, but has maintained personnel at the site and has paid fees in order to keep its permit in the event it becomes profitable to operate again.”).

<sup>80</sup> Tex. Health & Safety Code § 382.0518(b)(2).

<sup>81</sup> Tex. Water Code § 5.130.

<sup>82</sup> Tex. Health & Safety Code § 382.055(e).

substantive rights protected throughout the statutory scheme; and rather than abrogate the Commission's duty to protect public health in the permit renewal process, the Act retains the public interest as a central element to be weighed against those other interests.

Furthermore, in statutory construction, it is presumed that in enacting the statute the intention of the legislature is to favor the public interest over any private interest.<sup>83</sup> In order for the Commission to fulfill its duty to that public interest, it must have a plenary power to call a fact-finding hearing on its own authority.

**C. Texas Health & Safety Code section 382.056(p) preempts section 382.056 (g) and (o), thereby granting the Commission the authority to call a contested case hearing on air Permit No. 20345.**

Texas Health and Safety Code section 382.056(p) preempts subsections (g) & (o) and grants the commission the authority to refer ASARCO's permit to SOAH. Subsection (p) provides that "the commission by rule shall provide for additional notice, opportunity for public comment, or opportunity for public hearing to the extent necessary to satisfy a requirement to obtain or maintain delegation or approval of a federal program."<sup>84</sup> Title V of the Federal Clean Air Act ("FCAA") is structured to allow each state to develop its own permitting program, and to require the EPA to enforce the state's obligation to implement such a plan.<sup>85</sup> The FCAA recognizes that it makes sense for states to take the lead in carrying out the purposes and objectives of law, because pollution control problems often require a special understanding of

---

<sup>83</sup> Tex. Gov't Code § 311.021(5) ("In enacting a statute, it is presumed that: (5) public interest is favored over any private interest.")

<sup>84</sup> See Tex. Health & Safety Code § 382.056(p). (2003-04).

<sup>85</sup> See Timothy L. Williamson, *A Review of Major Provisions: Fitting Title V into the Clean Air Act: Implementing the New Operating Permit Program*, 21 *Env'tl. L.* 2085, 2098 (1991).

local industry, housing, and geography.<sup>86</sup> State permitting authorities, however, are under an obligation to comply with the requirements set forth in Title V.<sup>87</sup>

To ensure compliance with Title V, each state's permit program must contain within it certain minimal elements.<sup>88</sup> One element is a requirement that the permitting agency have adequate authority to assure that each permitted pollution source complies with applicable requirements under the FCAA.<sup>89</sup> It is precisely this federally required minimal element which is inconsistent with denying the hearing on ASARCO's renewal permit. In addition, to maintain delegation of its permit program, the state must retain its authority to ensure compliance of all its permitted sources over the life of the permit program.<sup>90</sup> Failure to do so could potentially result in program revocation by the EPA or other sanctions.<sup>91</sup>

A contested hearing is necessary in this case to assure compliance. The unique circumstances surrounding ASARCO's renewal permit requires the Commission to conduct a contested hearing. A contested hearing is necessary to ensure that ASARCO will not cause or contribute to a condition of air pollution under the terms of the proposed permit. ASARCO has been idle since 1999.<sup>92</sup> For the past five years the Commission has not been able to monitor ASARCO's emission limitations nor have they received monitoring reports from ASARCO to ensure continued compliance with its permit.<sup>93</sup> Accordingly, it is important that reexamination of ASARCO's facilities be conducted because evidence of upkeep and the condition of the plant

---

<sup>86</sup> See generally 42 U.S.C. § 7401(a)(1-4) (2000).

<sup>87</sup> 42 U.S.C. § 7661a (b) (2000).

<sup>88</sup> *Id.*

<sup>89</sup> 42 U.S.C. § 7661a (b)(5)(A).

<sup>90</sup> 42 U.S.C. § 7661a (i).

<sup>91</sup> *Id.*

<sup>92</sup> A.R. Item No. 11 (stating that "ASARCO has not operated the facility since 1999 for economic reasons, but has maintained personnel at the site and has paid fees in order to keep its permit in the event it becomes profitable to operate again.").

<sup>93</sup> Tex. Health & Safety Code § 382.0514(3)(a) & (b) (stating that the commission may require, ... as a condition of the permit a periodic report of the results of sampling and monitoring; and the certification of compliance.); see also A. R. Item No. 11.

bears directly on whether ASARCO can meet the permits requirements.<sup>94</sup> Furthermore, assurance of ASARCO's compliance is economically reasonable and technically practicable considering the age of the facility and the past effects of its emissions on the surrounding area.<sup>95</sup>

Texas Health & Safety Code section 382.056(p) acts as a catch-all in this case. Under the uncommon circumstances surrounding ASARCO's permit, the Commission is under an obligation to hold a public hearing of ASARCO's permit to maintain delegation of its Title V permit program.<sup>96</sup> By holding a public hearing of ASARCO's renewal permit the Commission is ensuring that its permit program satisfies the federally mandated minimal elements of the FCAA. For this reason, the Commission is well within its authority to refer ASARCO's permit to SOAH for reexamination.

**D. In the alternative, if Texas Health and Safety Code section 382.056(p) does not preempt section 382.056(g) & (o) it would be federally preempted by Title V of the FCAA.**

If section 382.056(p) of the Texas Health and Safety Code does not grant the commission the authority to refer ASARCO's renewal application to SOAH, then the subsections (g) & (p) are preempted by federal law. The EPA requires that a state permitting agency have adequate authority to assure that each permitted source complies with applicable requirements under the FCAA.<sup>97</sup> By not honoring subsection (p) the commission is left with subsections (g) & (o), both of which fall below the minimal requirements of Title V of the FCAA.

1. Subsections (g) & (o) do not meet the minimal elements required by the FCAA.

Subsections 382.056(g) & (o) divest the Commission of its authority to assure compliance of a permitted source. These subsections severely constrain the Commission's

---

<sup>94</sup> A.R. Item No. 23.

<sup>95</sup> See Tex. Health & Safety Code § 382.055(e).

<sup>96</sup> See Tex. Health & Safety Code § 382.056(p).

<sup>97</sup> 42 U.S.C. 7661a(b)(5)(A).

ability to investigate renewal permits, thus affecting its ability to assure compliance. Subsection (g) limits the commission's authority to conduct public hearings of renewal permits to requests for modification, increases in allowable emissions, and instances where a renewal would result in emissions of an air contaminant not previously emitted.<sup>98</sup> Similarly, subsection (o) restricts the commission's authority to assure compliance to instances where the application involves a facility for which the applicant's compliance history is of the lowest classification.<sup>99</sup>

By limiting the Commission's federally delegated authority to assure compliance of ASARCO's renewal permit, subsections (g) & (o) strip the Commission of its ability to accomplish the purposes and objectives of Congress. Congress designed the FCAA to protect public health and welfare from any actual or potential adverse effects which may be reasonably anticipated to occur from air pollution or from exposure to pollutants.<sup>100</sup> Congress also intended that the FCAA assure that any decision to permit increased air pollution in any area is made only after consideration of all the consequences of such a decision and after adequate opportunities for informed public participation in the decision making process.<sup>101</sup>

2. Where section 382.056(p) falls short, federal law will preempt.

Where a state regulation conflicts with federal law by standing as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress, it will be preempted.<sup>102</sup> Subsection (g) & (o) presents such an obstacle in this situation. The unique circumstances surrounding ASARCO's renewal permit require a contested hearing to assure its compliance with the FCAA. Subsections (g) & (o) frustrate the Commission's ability to conduct such a hearing, therefore, affecting its ability to insure the protection of the health and welfare of

---

<sup>98</sup> Tex. Health & Safety Code § 382.056(g).

<sup>99</sup> Tex. Health & Safety Code § 382.056(o).

<sup>100</sup> 42 U.S.C § 7470(1) (2000).

<sup>101</sup> 42 U.S.C. § 7470(5).

<sup>102</sup> *Hines v. Davidowitz*, 312 U.S. 52 (1941).

El Paso's citizens. Evidence of ASARCO's upkeep and maintenance of its facility and monitoring reports ensuring compliance have not been readily available to the Commission.<sup>103</sup> Consequently, the only way to protect the citizens of El Paso is to hold a contested hearing to assure ASARCO's facility will not cause or contribute to a condition of air pollution under the terms of the proposed permit. By not allowing a public hearing under section 382.056(p), the law in Texas would preclude the Commission from ensuring ASARCO's compliance pursuant to the FCAA, thereby, defeating Congress' intent. For this reason, subsection (g) & (o) should be preempted by federal law.

Subsections (g) & (o) stand as obstacles to the Commission's execution of Congress' second objective.<sup>104</sup> ASARCO's idleness and twelve-year old air modeling make it impossible for the Commission to know whether ASARCO's facility will not emit an increased amount of pollution from its originally permitted amount when it becomes operational.<sup>105</sup> Therefore, the only instrument available to determine whether ASARCO's facility will comply with its original permit is to hold a contested hearing. Subsections (g) & (o) strip the Commission of its ability to exercise such authority, thereby, depriving it of its ability to accomplish Congress' stated objective. As a result, Congress's delegated authority to assure compliance of all permitted sources under Title V would preempt Texas law. The Commission would, therefore, be granted the authority to assure that ASARCO's facility and current permit comply with the applicable standards, regulation, and requirements of the FCAA.

Texas Health and Safety Code section 382.056(g) & (o) divest the Commission of its federally delegated authority to assure that ASARCO is in compliance with the requirements of

---

<sup>103</sup> See A. R. Item No. 23.

<sup>104</sup> See 42 U.S.C. § 7470(5).

<sup>105</sup> See A.R. Item No. 23.

the FCAA.<sup>106</sup> Subsections (g) & (o), therefore, fail to meet the minimum elements set out by the EPA. As a result, the Commission's ability to accomplish and execute the purposes and goals of Congress is being stripped. Accordingly, Title V should preempt Texas law and control over this matter.

**E. A decision to limit the Commission's ability to hold a hearing on a no-increase air permit renewal will implicate Title VI.**

Although Title VI and Executive 12,898 are not explicitly part of the issues before the court, the Amicus Curiae hold the belief that if the Commission is denied the ability to hold a hearing on this matter, Title VI will be implicated. Pursuant to Title VI, agencies must ensure that program or activities receiving federal assistance that affect human health or the environment do not directly, or through contractual or other arrangement, use criteria, methods or practices that discriminate on the basis of race, color, or national origins. The Commission accepts grants of financial assistance from the EPA and subjected itself to the restrictions of Title VI of the Civil Rights Act of 1964.<sup>107</sup> Section 601 of Title VI provides that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by the Title.<sup>108</sup> Section 602 authorizes federal agencies "to effectuate the provisions of [section 601] . . . by issuing rules, regulations, or orders of general applicability."<sup>109</sup> The EPA in furtherance of its mission and authority has promulgated a regulation forbidding funding recipients to "utilize

---

<sup>106</sup> See 42 U.S.C. § 7661a(b)(5)(A).

<sup>107</sup> 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.*

<sup>108</sup> 42 U.S.C. § 2000d.

<sup>109</sup> 42 U.S.C. § 2000d-1

criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."<sup>110</sup>

The principles of environmental justice are concerns for federal and state agencies and administrators. An example of such stated overriding concern is in Executive Order 12,898. Executive Order 12,898 is “the first significant successes in the area of federal implementation of environmental justice principles” and specifically “requires federal agencies to collect data on the health and environmental impact of their programs and activities on ‘minority populations’ and ‘low-income populations’ and to develop policies to achieve environmental justice.”<sup>111</sup> Although unlike Title VI which requires federal agencies to ensure that their funding recipients comply their programs and implementing policies in a nondiscriminatory manner,<sup>112</sup> Executive Order 12,898 does not create legally enforceable rights or obligations.<sup>113</sup> However, Executive Order 12,898 specifically requires that federal agencies such as the EPA, and TCEQ as its agent, to make achieving environmental justice part of their mission by evaluating the effects of their programs, policies, and activities on minority and low-income populations.<sup>114</sup> “Under the Executive Order, each federal agency is required to develop an agency wide environmental justice strategy ‘that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, or activities on minority

---

<sup>110</sup> 28 CFR § 42.104(b)(2) (1999).

<sup>111</sup> U.S. Commission on Civil Rights, *Not In My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, 2 (Oct. 2003) (citing Exec. Order No. 12,898, §§ 1-101, 3-3) [hereinafter *Not In My Backyard*]. Furthermore, the Commission notes that the “Council on Environmental Quality defines low-income populations based on the annual statistical poverty thresholds from the Census Bureau’s Current Population Reports.” *Id.* at 2 n.6 Specifically, the Council on Environmental Quality defines “Minority” “as anyone who is American Indian or Alaska Native, Asian or Pacific Islander, black (non-Hispanic origin), or Hispanic; “Minority populations” are identified where “the minority population of an affected area exceeds 50 percent or the minority population percentage of the affected area is meaningfully greater than the minority population percentage in the general population.” *Id.* (citing Council on Environmental Quality, *Guidance Under the National Environmental Policy Act*, app. A, (Dec. 1997).

<sup>112</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7.

<sup>113</sup> See generally Exec. Order No. 12,898.

<sup>114</sup> See Exec. Order No. 12,898 §§ 1-101, 1-104, 2-2.

populations and low-income populations.’’<sup>115</sup> EPA has similar federal regulations it abides by to comport to Title VI.<sup>116</sup> Specifically, the federal regulation provides against specific prohibitions. Section 7.30 provides that:

No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin, or on the basis of sex in any program or activity receiving EPA assistance under the Federal Water Pollution Control Act, as amended, including the Environmental Financing Act of 1972.<sup>117</sup>

In addition to the protections provided via legislation and statutes by Congress and the EPA that specifically protect communities of color and low-income populations from discrimination, federal agencies and grant recipients of federal monies have a duty to ensure environmental justice.

TCEQ is in a unique position to ensure that the principals of environmental justice are adhered to in these proceeding. It’s clear that with all these federal laws and regulations, there is a duty on the part of federal agencies and grant recipients to ensure that communities of color and low-income communities are integral to the decision-making process.<sup>118</sup> At a time when some have observed that devices such as the Executive Order 12,898 has had limited effect, the Commission must faithfully adhere to overriding principles of environmental justice.<sup>119</sup>

Recently, the Commission on Civil Rights observed that after:

hearings, interviews, research, and a review of relevant literature reveals that while there has been some limited success in implementing Executive Order 12,898 and the principles of environmental justice, significant problems and

---

<sup>115</sup> *Not In My Backyard*, *supra* note 111, at 2 (citing Exec. Order No. 12,898 §1-103).

<sup>116</sup> 49 CFR § 7.10 (2000).

<sup>117</sup> 49 CFR § 7.30.

<sup>118</sup> *See* *Not in My Backyard*, *supra* note 111, at iv.

<sup>119</sup> *See id.* at iii.

shortcomings remain. Federal agencies still have neither fully incorporated environmental justice into their core missions nor established accountability and performance outcomes for programs and activities. Moreover, a commitment to environmental justice is often lacking in agency leadership, communities are not yet full participants in environmental decision-making.<sup>120</sup>

In noting the above laws and regulations, it is the belief of the Amicus Curiae before this court that through its recommended public hearing regarding ASARCO's permit renewal, the Commission is abiding by its legal duties and obligations under Title VI and related EPA regulations in providing a forum for further fact-finding.

1. TCEQ as a recipient of EPA funds serves an important administrative role in providing a viable mechanism that can address, respond and provide access to participatory involvement of El Paso's minority and low-income community.

The federal courts have indirectly noted the administrative process is the best mechanism to address concern regarding discriminatory impact on minority communities.<sup>121</sup> Whether a decision to allow a site-permit application imposes a discriminatory disparate impact is up to EPA or other permitting agencies such as TCEQ.<sup>122</sup> The administrative record is clear that a limitation of the TCEQ's ability to hold a public hearing under its plenary authority thwarts the intent and objective of Congress' and the EPA's ability to abide by Title VI and Executive Order 12,898. Specifically, the administrative record sheds light on related Title VI issues that are implicated by the Commission's plenary authority to provide a hearing.

---

<sup>120</sup> See *id.*

<sup>121</sup> See *Alexander v. Sandoval*, 532 U.S. 275 (2001); *S. Camden Citizens in Action v. New Jersey Dep't of Env't Prot.*, 274 F.3d 771 (3d Cir. 2001); and *Gonzaga v. Doe*, 536 U.S. 273 (2002).

<sup>122</sup> See *id.*

- a. The Administrative Record indicates that there are Title VI concerns that are implicated by the ability of TCEQ to hold or not to hold a public hearing on ASARCO's renewal for their permit.

The administrative record indicates Title VI concerns. Specifically, the letter from Patricia Juarez requested that “public participation and stakeholder input” should be conducted in consideration of Executive Order 12,898.<sup>123</sup> Furthermore, Ms. Juarez advances the notion that public participation should be taken in light of “Environmental Justice Principles.”<sup>124</sup> Diego Fernandez, who lives on the boarder, stated that “re-open[ing] the ASARCO plant in El Paso, Texas” will affect their “health,” “environment and “future.”<sup>125</sup> Another letter by several individuals, including “Maria Vera,” “Ana Valez,” and “Raymundo Vera, Sr.,” written in Spanish to TCEQ stated that they were not in agreement with re-opening the ASARCO plant because it would further contaminate the air and harm their families.<sup>126</sup> Texas Senator Shapleigh and Ben Andrews & Linda Kittle raised the same concerns and specifically mentioned that high levels of lead have been found in children residing on El Paso's Westside.<sup>127</sup> Mr. Andrews and Ms. Kittle observed that a Multiple Sclerosis Cluster was discovered in the same area.<sup>128</sup> A letter by Venita Vasquez not only raised the concern that the people living in the communities adversely affected by ASARCO are being deprived of due process of law guaranteed by the Fifth and Fourteenth Amendments, but argued that a denial of ASARCO's hearing may demonstrate environmental discrimination on the part of TCEQ.<sup>129</sup>

---

<sup>123</sup> See A.R. Item No. 3.

<sup>124</sup> See *id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (Note: the signature on these letter are difficult to read. We have made the best attempt to accurately note who submitted the letter).

<sup>127</sup> See *id.* (comment by Ben Andrews & Linda Kittle); see also A.R. Item 31 (Presentation by Senator Shapleigh are on the Agenda Tapes).

<sup>128</sup> See A.R. Item No. 3 (comment by Ben Andrews & Linda Kittle).

<sup>129</sup> See *id.* (Comment from Venita Vasquez dated May 28, 2002).

- b. Title VI is implicated by the undeniable demographic of El Paso and Census Tract 14 which includes ASARCO's facility and the surrounding community.

Not only is El Paso a minority community, but a low-income one. As previously mentioned, while Hispanics in Texas make up 32% of the total population statewide,<sup>130</sup> Hispanics are the majority racial group in Census Tract 14 and El Paso County.<sup>131</sup> Further, El Paso is a low-income community. Specifically, in Census Tract 14, the median household income is \$16,827.<sup>132</sup> The percentage of families living below the poverty line in Census Tract 14 is 23.2%.<sup>133</sup> El Paso County's percentage of families living below the poverty line is 20.5% and approximately twice as high as the statewide level of 12%.<sup>134</sup> The demographics of El Paso and the community surrounding ASARCO indicate that not only is the area a minority one, it is predominantly impoverished.

## V. CONCLUSION

ASARCO has failed to establish any legal, statutory, or factual basis to warrant a reversal of the Commission's decision to hold a hearing in the public interest on the renewal of its permit. The Amicus Curiae urges the court to affirm the Commission's decision.

---

<sup>130</sup> US Census 2000: American Factfinder at <http://factfinder.census.gov>.

<sup>131</sup> See *infra* Part III.

<sup>132</sup> See U.S. Census Bureau, Census 2000 Summary File 4, Matrices PCT88, PCT89, PCT90, PCT121, PCT123, PCT124, PCT125, PCT126, and PCT127.

<sup>133</sup> See U.S. Census Bureau, Census 2000 Summary File 4, Matrices PCT157, PCT158, PCT160, PCT161, PCT162, PCT163, and PCT164.

<sup>134</sup> US Census 2000: American Factfinder at <http://factfinder.census.gov>