

**SOAH DOCKET NO. 582-15-2082  
TCEQ DOCKET NO. 2015-0069-MSW**

<b>APPLICATION OF 130</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>ENVIRONMENTAL PARK, LLC</b>	<b>§</b>	<b>OF</b>
<b>FOR PROPOSED PERMIT NO.</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>
<b>2383</b>	<b>§</b>	

**TJFA, L.P. & EPICC’S REPLY TO APPLICANT’S RESPONSE TO  
TJFA/EPICC’S MOTION TO REOPEN THE RECORD TO ADMIT  
PROTESTANTS’ EXHIBITS P-47 & P-48**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES KERRIE JO  
QUALTROUGH AND CASEY BELL:

COME NOW Protestants TJFA, L.P. and Environmental Protection in the Interest  
of Caldwell County (collectively, “Protestants”) and file this Reply to Applicant’s  
Response to TJFA/EPICC’s Motion to Re-Open the Record to Admit Protestants’  
Exhibits P-47 and P-48.

**I. PENDING MOTIONS**

- TJFA/EPICC’s Motion To Strike Portions of Applicant’s Response to Closing Arguments: This motion requests the ALJs to strike various sections of Applicant’s Response to Closing Arguments. This motion was filed on December 22, 2016 and Applicant’s response was filed on December 27, 2016. TJFA and EPICC filed their reply to Applicant’s response to the motion on January 4, 2017.
- TIFA/EPICC’S Motion to Re-Open the Record to Admit Protestants’ Exhibit P-47 & P-48: This motion requests that the ALJs admit into evidence Protestants’ Exhibit P-47 (a letter from the TCEQ Executive Director returning the permit application for the Pintail Landfill in Waller County) and Exhibit P-48 (a copy of the TCEQ registration

for the Pintail Landfill Transfer Station in Waller County). This motion was filed and served after 5:00 pm on December 22, 2016 and is deemed filed and served on December 23, 2016. Applicant filed its response to this motion on December 28, 2016. By this filing, Protestants are submitting their reply, which is due January 5.<sup>1</sup>

## II. ARGUMENT

Protestants submit this reply to briefly address 3 points raised by Applicant in its response to the motion to re-open the record. Applicant argues that the motion to re-open the record should be denied because (1) it is untimely; (2) the motion is “one more in a long line of actions” taken to seek delay and those efforts should not be rewarded; and (3) the exhibits are not relevant. Each of these points is addressed, in turn, below.

Applicant argues that Protestants’ motion is untimely because the record has closed in this matter. But Applicant misses the point. Protestants filed a motion to *reopen the record* because the record has closed, and the record must be reopened, if Protestants’ exhibits are to be admitted. Applicant has cited to no legal authority in support of its argument that Protestants’ motion to reopen the record is untimely.<sup>2</sup>

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<sup>1</sup> Because SOAH was closed on January 2, in observance of New Year’s Day, Protestants have not included January 2 in their calculation of the deadline for filing a reply brief.

<sup>2</sup> Applicant also argues that the motion is untimely because Protestants did not seek to admit Exhibit P-47 until 21 days after the Executive Director issued the letter to Pintail. Here, again, Applicant offers no legal support for its argument. In any event, Applicant agreed to December 22 as the deadline to submit replies to responses to closing arguments. Protestants referred to information included in Exhibits P-47 and P-48 in their replies to responses to closing arguments. Thus, Protestants sought to admit the exhibits to provide support for their replies. Further, Applicant has not challenged the authenticity of the exhibits. This is because the two documents were issued to Pintail, a landfill company that is also owned by Green Group Holdings, and Applicant’s representatives have had possession of these documents and have known about them since their issuance. They cannot claim to be surprised or prejudiced by the admission of these exhibits now.

Next, Applicant claims that the motion is sought for purposes of delay, consistent with a long line of prior actions taken during this proceeding. It is unclear from the response what long line of prior actions Applicant is referring to. Assuming for the sake of argument that Applicant is referring to the delay of the evidentiary hearing to allow Protestants to conduct a subsurface investigation at the site, it is worth noting that Applicant agreed to this delay. More importantly, Applicant relied on this delay. Applicant conducted its own subsurface investigation, even before Protestants commenced theirs. Applicant did so without filing any motion requesting a delay or providing the parties with adequate notice of Applicant's intentions. Applicant then prepared a so-called "supplemental geology report," to attempt to correct deficiencies and inaccuracies in its application, based on the new information collected from its unapproved and untimely subsurface investigation. Again, Applicant did so without seeking a remand to the Executive Director or filing any motion with the SOAH ALJs. So, Applicant's argument regarding Protestants' attempts at delay is simply without merit here.

Next, Applicant argues that the Exhibits are simply not relevant. But these exhibits are offered in reply and rebuttal to a specific argument raised in Applicant's response to closing arguments: because Caldwell County adopted its ordinance after the filing of the landfill permit application and the transfer station registration application, the County's ordinance violated the Health and Safety Code, and it would have therefore been inappropriate for Mr. Worrall to have consider the ordinance. *Applicant's Response to Closing Arguments*, p. 14. In fact, Applicant has been making this argument since the day

of the preliminary hearing, in an effort to prevent the County from participating in this hearing and to prevent the consideration of any of the concerns raised by the County, which are also reflected in the County's landfill siting ordinance.

During the preliminary hearing, Applicant's counsel cross-examined County Commissioner Munoz and offered into evidence 2 exhibits: Applicant's transfer station registration application and the approved transfer station registration, Exhibits 6 and 7 respectively. The cross-examination of Commissioner Munoz and the offer of the two exhibits were in furtherance of Applicant's argument that the County had no standing and no jurisdiction to contest the landfill permit application because the landfill siting ordinance was passed *after* the transfer station registration application was submitted to TCEQ.<sup>3</sup> Applicant continued to pursue a variation of this argument up through the submission of its Closing Arguments. And presumably, this is why Applicant did not inform its land use expert, Mr. Worrall, about the existence of the landfill siting ordinance (even though the landfill siting ordinance clearly reflects the concerns of the County in the various "whereas" clauses). *See* Tr. V. 1, p. 67, ll. 10-23 (testimony by Worrall admitting that he did not check to see if landfill siting ordinance existed even though such an ordinance would reflect the desires of the county regarding siting of landfills).

Exhibits P-47 and P-48 demonstrate that TCEQ has now rejected Applicant's argument. In the Pintail case, Waller County had also passed a landfill siting ordinance

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<sup>3</sup> The discussion surrounding the County's landfill siting ordinance begins at about 56:30 of the recording of the preliminary hearing, and Applicant's counsel's cross-examination of Commissioner Munoz begins at about the 58:00 mark. The 2 exhibits are discussed at about the 1:00 mark.

*after* Pintail had filed its transfer station registration application. And yet, TCEQ acknowledged that this did not invalidate the landfill siting ordinance; the ordinance remained valid.

Applicant argues that in the Pintail matter, the landfill siting ordinance was passed *before* the landfill permit application was submitted, and that's the reason the application was returned. This is true. But the point is that the ordinance was not invalidated by the fact that a transfer station registration application was already on file when the ordinance was passed. This is reflected in Exhibits P-47 and P-48.

Furthermore, in this case, Applicant did not submit its landfill permit application until *after* the landfill siting ordinance was passed. The only applications that were on file at TCEQ by Applicant on the date that Caldwell County passed its landfill siting ordinance were an application for a transfer station and an application for a land-use compatibility-only determination. *See* 30 Tex. Admin. Code § 330.57(a) (distinguishing between a landfill permit application and a "partial application" to determine land-use compatibility alone). Applicant had not filed a landfill permit application at the time the County's siting ordinance was adopted.<sup>4</sup>

Finally, Applicant makes a confusing argument in footnote 1 of its response, stating that Applicant does not claim, "and has never claimed," that the County's

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<sup>4</sup> Applicant quotes a statement from Protestants' reply to responses to closing arguments suggesting that Protestants conceded that the landfill permit application was filed before the County's siting ordinance was adopted. This was a misstatement. It should have instead stated: "Admittedly, in this case, a land-use compatibility application was filed with TCEQ before the adoption of the County's landfill siting ordinance." In any event, the evidence in this case reflects that only a land-use compatibility application (and a transfer station registration application) were on file at TCEQ when the County passed its ordinance, as Commissioner Munoz testified during the preliminary hearing.

ordinance is invalid, only that the ordinance does not prevent TCEQ from issuing a permit to Applicant. But this is contrary to every argument that Applicant has made regarding the relevance of the landfill siting ordinance. First, Applicant tried to prevent the County from even participating as a party in this proceeding, arguing, during the preliminary hearing, that the County had no standing and no jurisdiction to contest the landfill permit application, in part, because its siting ordinance was adopted after the transfer station registration application had been submitted to TCEQ. Later, Applicant argued, in response to closing arguments, that the County's ordinance "violated" certain sections of the Health and Safety Code. And even in its most recent filing of a motion to overturn in the Pintail matter, Pintail (the sister corporation of 130 Environmental Park, for which Biggs and Matthews also prepared a landfill permit application) argued that Waller County had no authority to adopt an ordinance prohibiting the proposed Pintail landfill site because Pintail had already filed an application to obtain a transfer station authorization: "Under Tex. Health & Safety Code § 363.112(c), once Pintail filed an application to obtain authorization for the transfer station, neither the City nor the County had authority to adopt an ordinance prohibiting the use of the Pintail Landfill Site for the processing or disposal of municipal or industrial solid waste."<sup>5</sup> This motion was filed in response to the Executive Director's decision to return Pintail's application.

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<sup>5</sup> The motion to overturn is attached for the convenience of the ALJs and is on file with the TCEQ's Chief Clerk's office. The ALJs may take judicial notice of the existence of this pleading, but not of the truth of the allegations in the pleading; accordingly, Protestants do not offer the attached motion to overturn for the truth of the allegations in the motion, *Guyton v. Monteau*, 332 S.W.3d 687, 693 (Tex. App.—Houston [14th Dist.] 2011, no pct.).

And finally, it is worth recalling that the siting ordinance was not even made known to Applicant's land use expert, Mr. Worrall.

Applicant may now wish to re-characterize its arguments regarding the County's siting ordinance, particularly in light of the Pintail matter. But throughout this proceeding, Applicant has made it abundantly clear that it has no regard for the County's landfill siting ordinance, and that it believes that the filing of the transfer station registration application dispensed with any need to consider the ordinance, because it was no longer valid here. This argument has now been rejected, as evidenced by Exhibits P-47 and P-48.

**PRAYER**

For the reasons stated above, Protestants respectfully request that the ALJs grant its motion to reopen the record and admit Exhibits P-47 and P-48.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

By my signature, below, I hereby certify that a true and correct copy of the foregoing document has been served on the following attorneys of record by electronic mail, facsimile, or US Mail on this 5<sup>th</sup> day of January, 2017.



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**VIA US MAIL**

# Attachment A

**TCEQ DOCKET NO. \_\_\_\_\_**

**APPLICATION BY PINTAIL  
LANDFILL, LLC FOR NEW  
MUNICIPAL SOLID WASTE PERMIT  
NO. 2391**

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**BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY**

**PINTAIL LANDFILL, LLC'S MOTION TO OVERTURN  
THE EXECUTIVE DIRECTOR'S RETURN OF  
ITS MSW LANDFILL APPLICATION**

To The Honorable Commissioners:

COMES NOW, Pintail Landfill, LLC ("Pintail"), and submits its Motion to Overturn the Executive Director's Return of Its MSW Landfill Application. In support of this Motion, Pintail shows as follows:

**I. Introduction**

On July 5, 2016, Pintail filed Parts I and II of an application, No. 2391 (the "Application") for a municipal solid waste ("MSW") landfill permit for the Pintail Landfill, located at 24644 Highway 6, Hempstead, Waller County, Texas (the "Pintail Landfill Site"). Pintail included a memorandum demonstrating the ordinances adopted by Waller County (the "County") and the City of Hempstead (the "City") did not preclude the siting of the landfill at the Pintail Landfill Site. A copy of the memorandum is attached hereto as Attachment 1.

The Executive Director determined Parts I and II of the Application were administratively complete on July 19, 2016. The Executive Director informed Pintail, "This declaration does not constitute a determination on land use compatibility, including review of any local ordinance regarding siting of landfills. Rather, the Executive Director will review whether any local ordinance or order prohibits the processing or disposal of municipal solid waste in the proposed landfill area during the substantive technical review of the application." A copy of the Executive Director's July 19, 2016 correspondence to Pintail is attached hereto as Attachment 2. Pintail published notice of, and held a public meeting on October 25, 2016, in Hempstead to accept comments regarding Parts I and II of the Application.

Following the public meeting, on December 1, 2016, the Executive Director determined, “Since the City of Hempstead’s and Waller County’s ordinances prohibiting landfills in the proposed location [of the Pintail Landfill Site] were adopted before Pintail filed this application, the Commission ‘may not grant’ Pintail’s Application. See Tex. Health & Safety Code sections 363.112 and 364.012.” A copy of the letter informing Pintail of this decision is attached hereto as Attachment 3. The Executive Director erred in making this determination.

Pintail’s Motion to Overturn is based on the following: (1) the Pintail Landfill Site is located in the extraterritorial jurisdiction (“ETJ”) of the City, and therefore the City’s ordinance is the appropriate consideration and not the County’s ordinance; (2) The City and the County each failed to comply with the requirements of Tex. Health & Safety Code § 363.112 (and the County also failed comply with the requirements of Tex. Health & Safety Code § 364.012) to specifically designate by ordinance areas where disposal of municipal solid waste *may* and *may not* be prohibited and therefore neither ordinance validly limits the Commission’s authority to issue a permit to Pintail at the proposed site; (3) the Pintail Landfill Site is actually authorized under the terms of the City’s and the County’s ordinances; (4) Waller County’s ordinance’s presumption of de facto suitability for publicly-owned or operated landfills is unsupported by any facts and is contrary to established public policy; (5) the areas purported to be prohibited by the City’s ordinance encompass the entirety of the City and its ETJ in violation of Tex. Health & Safety Code § 363.112(a) and therefore cannot validly limit the TCEQ’s authority to permit Pintail’s landfill; and (6) Pintail applied for a permit to construct and operate a transfer station prior to the adoption of the County’s ordinance and obtained the transfer station permit prior to the adoption of the City’s ordinance, and thus, for yet another reason, neither ordinance can prohibit the permitting of the landfill at the Pintail Landfill Site according to law.

Pintail respectfully requests the Commission determine that the local ordinances do not preclude the filing, processing and permitting of MSW Application No. 2391, overturn the Executive Director’s decision to return the Pintail application, and require him to continue processing the Application.

## **II. Statutory Authority**

Section 363.112 of the Health & Safety Code gives Texas municipalities and counties limited authority to adopt an ordinance prohibiting solid waste processing or disposal in certain areas within their jurisdiction. Section 364.012 has similar provisions but is specifically limited

to an ordinance adopted by a county. *See* Tex. Health & Safety Code 364.012(b), (e), (f). For a county to adopt an ordinance prohibiting the disposal of municipal or industrial solid waste in the county, the county must also find “disposal of the municipal or industrial solid waste is a threat to the public health, safety, and welfare.” Tex. Health & Safety Code § 364.012(a). Because of the similarity of the substance of the two statutes, the applicability of Section 363.112 to both municipalities and counties, and the fact that the Pintail site is wholly within the jurisdiction of the City of Hempstead, this Motion focuses the discussion of the applicable statutory authority primarily on Section 363.112.

Under Section 363.112, to exercise this authority to prohibit the processing or disposal of solid waste in certain areas of a municipality or county, the governing body must also specifically designate an area of the municipality in which solid waste processing or disposal is not prohibited. Tex. Health & Safety Code § 363.112(a). To be a valid exercise of the limited authority granted a municipality or county to limit the TCEQ’s authority to issue a landfill permit, therefore, a municipality’s or a county’s site prohibition cannot blanket its geographic jurisdictional boundaries, and some specific area within the jurisdictional territory must be designated for processing or disposal of solid waste in order for a limitation on the TCEQ’s permitting authority to even arguably be established.

While the TCEQ may not grant a permit to process or dispose of solid waste in an area prohibited by an ordinance adopted in accordance with Section 363.112, TCEQ is not prohibited from granting a permit for the processing or disposal of solid waste where the ordinance is not in accordance with § 363.112 because it fails to specifically designate the area in the municipality or county where disposal of municipal or industrial solid waste is not prohibited. Tex. Health & Safety Code § 363.112(d).

A municipality or county is also not authorized to adopt an ordinance prohibiting the processing or disposal of municipal or industrial solid waste in an area for which an application for a permit or other authorization under Texas Health & Safety Code ch. 361 has been filed with and is pending before the TCEQ, or where a permit or other authorization under Chapter 361 has been issued by the TCEQ. Tex. Health & Safety Code § 363.112(c). TCEQ is not prohibited from granting a permit for the processing or disposal of solid waste for an area when, at the time of the adoption of an ordinance, that area was the subject of either an application or a permit under Chapter 361.

TCEQ has the authority to determine whether its authority to issue permits is restricted by an ordinance, including whether the ordinance makes the specific designations required by the statute or whether the ordinance seeks to prohibit the location of a facility in an area for which an application for a permit or other authorization under Texas Health & Safety Code ch. 361 has been filed with and is pending before the TCEQ or where a permit or other authorization under Chapter 361 has been issued by the TCEQ. Tex. Health & Safety Code § 363.112(d).

The Executive Director's analysis with respect to his ability to process Pintail's Application appears to have been limited to whether either the Waller County or City of Hempstead ordinance, on its face, purports to prohibit the siting of the landfill at the Pintail Landfill Site. The Executive Director erred by failing to consider whether the Application was subject to either ordinance; whether the Application was authorized under either ordinance; whether the ordinances included the required specific designations required by the statute; or whether the ordinances had attempted to prohibit the location of the Pintail landfill in an area for which an application for a permit or other authorization under Texas Health & Safety Code ch. 361 has been filed with and is pending before the TCEQ, or where a permit or other authorization under Chapter 361 has been issued by the TCEQ. Pintail respectfully requests the Commission determine that the local ordinances do not preclude the filing and processing (technical review) of MSW Application No. 2391 or otherwise limit the authority of the TCEQ to issue a permit to Pintail, overturn the Executive Director's decision, and require him to continue processing the Application.

### **III. Ordinances**

#### **A. Waller County**

On August 26, 2011, Waller County adopted Ordinance No. 2011-001, which purports to prohibit solid waste disposal in areas of the county by designating other areas of the county in which solid waste disposal is not prohibited. See Attachment 4. Section 3 of the ordinance states disposal of municipal or solid waste is **not** prohibited in the following areas:

- (a) any area within a 2 mile radius of any privately-owned site holding a currently or previously valid permit for municipal or solid waste disposal issued by TCEQ or a predecessor agency as of the date of the adoption of the Ordinance, but not afterwards;
- (b) a disposal site owned and/or operated by any unit of local government; and
- (c) This Ordinance shall be construed as exercising the full authority conferred on the County under Texas Health and Safety Code Sections 363.112 and 364.012, subject only to the limitations imposed on the County's authority by state or federal law.

On February 13, 2013, Waller County adopted Ordinance No. 2013-001, which amended Ordinance No. 2011-001 and repealed Section 3 of that ordinance. See Attachment 5. In addition, Ordinance No. 2013-001 prohibited the disposal of municipal solid waste and industrial solid waste in all areas of Waller County except the following:

- (1) Areas inside the corporate limits of any municipality;
- (2) Areas for which a pending application for a solid waste permit or other solid waste authorization under Chapter 361, Texas Health & Safety Code, has been filed with and declared administratively complete by the Texas Commission on Environmental Quality or its predecessor agency;
- (3) Areas for which a solid waste permit or other solid waste authorization under Chapter 361, Texas Health & Safety Code, has been issued by the Texas Commission on Environmental Quality or any of its predecessor or successor agencies provided the permit or other authorization is effective and valid on the effective date of this ordinance; or
- (4) Areas that do not require a permit for the collection, handling, storage, processing and disposal of industrial solid waste .... [under] Texas Health & Safety Code § 361.090.

Ordinance No. 2013-001 specifically referenced and authorized the area of the Pintail Landfill Site. See Ordinance No. 2013-001, Section 5, p. 3.

As discussed in further detail below, the net consequence of litigation between the City of Hempstead, Waller County and others regarding the validity of Ordinance No. 2013-001, and a Settlement Agreement resolving that litigation, Ordinance No. 2013-001 was decreed void and Waller County's Ordinance No. 2011-001 is the operational ordinance for purposes of considerations of area prohibitions but only for areas outside the incorporated area and ETJ of Hempstead.

Waller County Ordinance No. 2011-001 includes a set of criteria both allowing and prohibiting the siting of solid waste disposal locations. From a review of the ordinance one concludes:

- (1) a publicly-owned (City, Town or Municipality) or operated landfill can be sited anywhere in the County;
- (2) all areas in the County are suitable for a publicly-owned or operated landfill;
- (3) no justification is included in the ordinance supporting a determination that privately-owned and operated landfills are less protective of human health and the environment than are landfills that are either publicly-owned or publicly-operated;
- (4) a privately-owned and operated disposal site with a current permit issued by TCEQ for municipal or industrial solid waste disposal is a suitable location for a landfill;
- (5) a privately-owned and operated disposal site previously permitted by TCEQ or any of its predecessor agencies is a suitable location for a landfill;

(6) any area within a 2-mile radius of any location described in Item Nos. 4 and 5 above is a suitable location for a landfill;

(7) any area within a 2-mile radius of a current or previously permitted disposal site is de facto a suitable location for a landfill, but any area within a 2-mile radius of a publicly-owned or operated landfill is not; and

(8) the date for determining site eligibility for a privately-owned and operated landfill is the date of Ordinance No. 2011-001's adoption, August 26, 2011.

### **B. City of Hempstead**

The City of Hempstead has adopted an ordinance purporting to govern its incorporated boundaries and the City's extraterritorial jurisdiction ("ETJ") and prohibit the processing and disposal of waste within its entire territorial bounds in obvious contravention of the limited authority municipalities are granted by Tex. Health & Safety Code § 363.112. On September 8, 2015, the City of Hempstead adopted Ordinance No. 15-109, which seeks to limit the location of solid waste processing and disposal facilities, landfills, and transfer stations within the City and its ETJ. See Attachment 6.

Section 3 of the ordinance states processing and disposal of solid waste within Hempstead's city limits and ETJ is permitted only in areas located at least 5,280 feet from all residences, highway rights-of-ways, and public or private water wells used for potable water. Section 2 of the ordinance prohibits processing and disposal of solid waste in areas not meeting the requirements in the ordinance. Section 2 also states the ordinance does not apply to: (1) areas for which a pending application for a solid waste permit or other solid waste authorization under Health & Safety Code Chapter 361 has been filed with and declared administratively complete by TCEQ; (2) areas for which a solid waste permit or other solid waste authorization under Health & Safety Code Chapter 361 has been issued by TCEQ, if the authorization is effective and valid on the effective date of the ordinance; and (3) areas covered by Health & Safety Code Section 361.090 (which addresses on-site industrial waste facilities).

### **IV. Pintail Landfill Site is Located in City's ETJ and Is Not Subject to Waller County's Ordinance**

By virtue of a Settlement Agreement arising from litigation among the City of Hempstead, Waller County and others arising from the Pintail Landfill matter, Waller County does not regulate the disposal of waste within the City of Hempstead's ETJ. On February 20, 2015, Waller County entered an Order of Commissioners Court authorizing entry of a

compromise settlement agreement and release with the City of Hempstead and the Citizens Against the Landfill in Hempstead (“CALH”) in relation to litigation brought by the City of Hempstead and CALH against the County. The settlement agreement is attached hereto as Attachment 7 (the “Settlement Agreement”). As part of the Settlement Agreement, Waller County agreed it would not exercise any authority pursuant to the Texas Health & Safety Code concerning disposal of solid waste within the City of Hempstead’s ETJ unless and until: (1) requested to do so by the City of Hempstead; and (2) such action is approved by the Waller County Commissioners Court. The City of Hempstead has made no such request of Waller County and Waller County has taken no such action.

For its part, also on February 20, 2015, the trial court entered an Agreed Final Judgment to conclude the litigation (the “AFJ”). The AFJ is attached hereto as Attachment 8. Under the AFJ, Ordinance No. 2013-001 was ordered, adjudged and decreed to be void. AFJ, p. 2. As a result, Waller County’s Ordinance No. 2011-001 is the ordinance to consider for purposes of area prohibitions but only for areas outside the incorporated area and ETJ of Hempstead. Waller County’s Ordinance No. 2011-001 cannot be a basis for the Executive Director to refuse to process Pintail’s Application, because the Pintail Landfill Site is located entirely within the incorporated or ETJ areas of the City of Hempstead. *See also* Tex. Health & Safety Code § 364.011(a).

**V. The City’s and the County’s Respective Ordinances Failed to Properly Designate Areas Where a Landfill May and May Not be Located**

Hempstead Ordinance No. 15-109 fails to specifically designate any area of the City or its ETJ, by metes and bounds, in which the disposal of municipal or industrial solid waste is not prohibited, as required by Tex. Health & Safety Code § 363.112(a).

As explained above, the Texas Legislature has required a county or municipality seeking to prohibit landfill sites within its jurisdiction to specifically designate area(s) of the county or municipality where the disposal of municipal or industrial solid waste is not prohibited. The designations must be specific geographical areas, not a reference to siting criteria such as a particular distance from a residence, rights-of-way, water wells, or, in the case of Waller County’s ordinance, a reference to currently or previously permitted privately-owned and operated disposal sites.

In advising Travis County on the Agency's long-standing interpretation of the requirements for a valid ordinance, the Executive Director's legal staff stated as follows:

... [W]e do have a handful of cities and counties which have adopted different types of ordinances. We really didn't start to see them until the last six to eight years. Really the first two to come through, the main litigation and interpretation that we got out of the courts and the legislature had to do with -- with kind of the race to the courthouse issue. The idea of could you prevent something that already had been application on file, that was resolved by the legislature in the late 90s. We really haven't had any administration or court litigation regarding cities and counties that impose the types of site criteria, the idea of having a certain distance from a school or a church or a residence. We do have -- we do have similar types of requirements in our rules. But we haven't been faced with that issue and just to clarify, *I'm here on behalf of the executive director of our agency representing our permitting staff.* I'm not speaking for our three Commissioners. And we haven't had that issue come to them to be litigated. Which -- which it's the executive director's understanding under the -- under the state laws that you all reference and the amended ordinance, which I believe is the -- is the health and safety code, 363, I always forget which one is 112, which one is 012, there's one in 363, one in 364 which basically say the same thing. The way that we have looked at those from the permitting perspective, what you are -- *we are looking to local governments that specifically lays out metes and bounds of where you can and can't have facilities. That would be considered in the front part of our permitting process that we would check, if it's an area where the county designated you can't put it, we don't go any further.* We don't process the application. *It's a different issue the way it's been proposed in the amended ordinance where it's created a detailed set of siting criteria which are somewhat different from ours, which it's something that I think our office is -- is not willing to halt the permitting process,* but we would certainly consider it -- in our land use consideration as part of whether or not it's a compatible land use, so if it's -- if somebody proposed a facility that doesn't comply with all of your siting criteria, we would consider that in determining whether or not we think it's compatible with the land uses in the area. But *we wouldn't consider the first step of being prohibited as being clearly designated as an area that you can't have a facility.*

... >> well, if the application of our distances leaves you with no site in Travis County, what would the -- what would the commission's response to that be?

>> well, that kind of -- that really points out the difference between the two different avenues that I was discussing earlier. One is that we generally look at compatible land use. The other is we specifically look at if the county has prohibited locations. *And by creating these siting criteria, it's -- my office's*

*interpretation that doesn't clearly designate an jury (sic) where you can't have a facility. So we could still issue a permit that didn't necessarily comply with the siting criteria created.*

...

>> okay. What would the commission's response be to -- to an action of that nature by -- by Travis County? we would like to get that on here, what they are going to tell is.

>> speaking for the executive director, I do not know. I'm not aware that we have been faced with that issue or been asked to enforce such a restriction. It's my opinion that more likely that would be played out in district court. Whether or not that would be enforceable or not.

Travis County Commissioners Court, Agenda Item 6, Oct. 18, 2005 (Emphases added)(Complete transcript of which is attached as Attachment 9).

The Executive Director, as reflected in this transcript, has historically determined the siting-criteria approach taken by some local governments (and taken by the County and the City here) does not comply with the requirements of Tex. Health & Safety Code §§ 363.112(a) and 364.012(b) and, therefore, does not preclude the processing of a permit application or issuance of a permit. To properly and specifically designate areas where a landfill is and is not prohibited, a municipality or county must do so using "metes and bounds of where one can and can't have facilities." Again, the Legislature clearly intended municipalities and counties to be explicit and specific, and establishing siting criteria that constantly change depending on events occurring outside the Ordinance making process, such as a new residence or a water well, is contrary to the statutory requirements set out by the Legislature and the TCEQ's interpretation of those requirements.

Likewise, the Waller County Ordinance does not include a metes and bounds description of the allowed and prohibited areas. The lack of such a description is not in conformance with the County's limited siting authority granted by Texas Health and Safety Code §§ 363.112 or 364.012 and, historically, the TCEQ has found siting-criteria ordinances to not be a restriction on its permitting authority.

#### **VI. The City's and the County's Respective Ordinances Each Authorizes the Siting of the Pintail Landfill**

Setting the above analysis aside, by its express terms, the City's Ordinance does not prohibit the siting of a landfill in any area for which an application for a solid waste permit had

been filed with and declared administratively complete by the TCEQ, as of the Ordinance's adoption date, September 8, 2015. On the adoption date of the Ordinance, there was a pending, administratively complete application for the same area (actually a little larger area at the Pintail site) that is contemplated in the Pintail Application. On July 22, 2011, Pintail filed an application, assigned MSW No. 2377, for a Type I municipal solid waste landfill to be located at the Pintail Landfill Site (the "Original Pintail Application"). The Original Pintail Application was pending before SOAH on the Ordinance's adoption date, namely, September 8, 2015, and, therefore, the area for the proposed landfill is not prohibited by the Ordinance.

The Ordinance, on its face, took a snapshot in time on September 8, 2015. Thus, the conditions on the adoption date control the application of the Ordinance and define the areas the City did not prohibit for use as solid waste disposal areas, including the Pintail site. Much like the use of "incorporation by reference" statutes, the interpretation of the Ordinance is made as it existed at the time of its adoption. Under the express terms of the Ordinance, the proposed site for the Pintail Landfill is in an area not prohibited from being the site of a landfill operation.

In order to prohibit this area from being used for solid waste disposal, the City of Hempstead would have needed to amend its Ordinance after the date on which no pending application was before the TCEQ for this area. Arguably, this would be any date after (but not before) October 5, 2015, the date on which TCEQ terminated its consideration of the original Pintail Landfill application, and before July 5, 2016, when Pintail submitted the Application in this matter. The City of Hempstead took no action to amend its ordinance in that period. As a result, the Pintail Landfill Site is an expressly authorized location under the City's Ordinance.

The legal conclusion above is well supported by principles in Texas law carefully set out in a letter signed by Chairman Shaw and Governor Abbott (then Attorney General Abbott) dated August 2, 2010 pertaining to the regulation of greenhouse gases. See Attachment 10. Laws and rules purporting to automatically update based on actions external to the enacting body are constitutionally and statutorily offensive, especially where the legislature has prescribed notice requirements. Section 363.112 (b) provides: "(b) The ordinance or order must be published for two consecutive weeks in a newspaper of general circulation in the area of the municipality or county, as appropriate, before the date the proposed ordinance or order is adopted by the governing body." Just as the Chairman and Governor observed in the August 2nd letter: "Texans concerned with [the reach of the ordinance] could not have known to participate and comment on

the decision to [prohibit areas already authorized] in [September 2015], when the [TCEQ determined the ordinance would preclude the site in October 2016].” The notice requirements set forth in statute are not satisfied by the Executive Director’s apparent position that areas can roll into being covered by the Ordinance when the areas could not have been prohibited when the ordinance was adopted.

Pintail filed its original application, No. 2377, with TCEQ for a municipal solid waste landfill permit for the Pintail Landfill on July 22, 2011, prior to the adoption date of County Ordinance No. 2011-001. Pursuant to Tex. Health & Safety Code § 363.112(c), Waller County had no authority to prohibit the siting of a landfill at the Pintail Landfill Site. By definition, that site was not prohibited. Waller County has not taken any action since August 26, 2011 to prohibit the siting of a landfill at the Pintail Landfill Site. Even if the Waller County Ordinance was applicable to the City’s ETJ – which it is not - without additional action on the part of Waller County, the Pintail Landfill Site remains an area not prohibited for use as a waste processing or disposal facility.

#### **VII. Waller County’s Ordinance’s Presumption of Suitability for Publicly-Owned or Operated Landfills is Unsupported by any Facts**

Ordinance No. 2011-001’s presumption of de facto suitability for publicly-owned or operated landfills is unsupported by any facts and contrary to legislative findings expressed and applicable requirements in the Texas Solid Waste Disposal Act. The County has given no reasons why restrictions that apply solely to private companies are necessary to protect public health, safety and welfare. Thus, the Waller County Ordinance is arbitrary and capricious and violative of substantive due process and the commerce clause because it favors publicly-owned waste disposal facilities over privately-owned facilities while simultaneously creating a disparity among privately-owned disposal facilities and companies in the County. The Legislature has recognized unreasonable requirements on the disposal of solid waste that are not warranted by the circumstances are not within the county’s defined powers to regulate solid waste disposal. Tex. Health & Safety Code § 364.011(b).

Further, the Waller County Ordinance is contrary to the Legislature’s finding that many private operators possess the management expertise, qualified personnel, and specialized equipment for the safe collection, handling, and disposal of solid waste. Tex. Health & Safety

Code § 363.003(8). The Legislature has also determined there is a benefit to the state to work in cooperation with private business as it relates to the disposal of solid waste. *Id.* at § 363.003(9). The arbitrary distinctions in the Waller County Ordinance between publicly- and privately-owned facilities and between existing privately-owned sites versus new sites bear no logical relationship to the finding a county must make to invoke its authority to prohibit waste disposal in certain areas of the county - “disposal of the municipal or industrial solid waste is a threat to the public health, safety, and welfare.” Tex. Health & Safety Code § 364.012(a). In effect, then, by determining all areas within the county are suitable for the siting of a publicly-owned or operated landfill, the County has also determined all areas of the County are suitable for the siting of a privately-owned and operated landfill.

**VIII. The City’s Ordinance Prohibits the Siting of a Landfill  
in Virtually the Entirety of the City, including its ETJ,  
in Violation of Tex. Health & Safety Code § 363.112(a)**

In a manner that is obvious, the City seeks to place a complete prohibition on the siting of waste disposal activities in its incorporated boundaries and ETJ by purporting to prohibit any site within one mile of any residence, right-of-way of a highway or Farm-to-Market Road, or water well. Notably, as discussed above, the Executive Director has consistently rejected such an approach. The areas purported to be prohibited by Ordinance No. 15-109 encompass the entirety of the City, including its ETJ. Attachments 11 and 12, which were drawn to reflect the Hempstead Ordinance siting criteria, illustrate the ban the Ordinance seeks to impose with respect to the siting of a landfill in the City. If the TCEQ credits the Ordinance and ignores the “adoption date” argument above, the TCEQ is allowing what the Legislature expressly sought to deny, namely the authority for a local county or municipal government to prohibit the siting of waste processing and disposal sites in the local government’s geographical jurisdiction, necessarily pushing waste disposal, even for its own citizens’ waste, to other municipalities and counties.

If municipalities and counties can circumvent the clear legislative intent and restrict the authority of the TCEQ so easily, the TCEQ’s management of solid waste in Texas will no longer be a comprehensive view but rather a piecemeal program controlled by purported bans at the local level. Such a result is expressly prohibited by Tex. Health & Safety Code § 363.112. Not only does the City’s Ordinance fail to specifically designate permitted areas, it also so defined

criteria so as to completely prohibit solid waste disposal. As a result, Ordinance No. 15-109 does not restrict the TCEQ as it violates the letter and spirit of Tex. Health & Safety Code § 363.112. Further, considering the City's Ordinance as a bar to Pintail's Application is contrary to the long-standing position of the TCEQ and, therefore, it should not serve as a basis for an Executive Director decision to decline to process Pintail's Application.

**IX. Pintail's Transfer Station Predates the Adoption of Either the County's  
or the City's Ordinance Making Neither Ordinance Capable of  
Prohibiting the Siting of the Landfill**

TCEQ issued Pintail an authorization for an MSW transfer station, Municipal Solid Waste Processing Registration No. 40259. See Attachment 13. The location authorized for the transfer station includes the entirety of the Pintail Landfill Site (and a little beyond that). Following issuance of this authorization, the TCEQ, through the Attorney General's Office, defended challenges to the permit and TCEQ's issuance thereof.

As noted on the front page of the registration, TCEQ issued the authorization "under provisions of Texas Health & Safety Code Chapter 361. Under Tex. Health & Safety Code § 363.112(c), a municipality or a county "may not prohibit the processing or disposal of municipal or industrial solid waste in an area of that municipality or county for which: (2) a permit or other authorization under Chapter 361 has been issued by the commission." By the terms of the statute, Pintail's transfer station registration, issued under Chapter 361, prevents either Waller County<sup>1</sup> or the City of Hempstead from prohibiting the processing or disposal of municipal or industrial solid waste at the Pintail Landfill Site.

Further, transfer stations are common support facilities for landfills. Under the registration, "[Pintail] is authorized to store and process wastes, and to recycle recovered materials in accordance with [the registration]." Attachment 13, at 1. Pintail is specifically authorized to accept construction and demolition waste from the construction and demolition of residential, community, commercial, institutional, and recreational activities. *Id.* at 3. This type of waste falls within TCEQ's definition of "municipal solid waste" for which Pintail's

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<sup>1</sup> As discussed above, at the time of the adoption of Waller County's Ordinance, Pintail's application for its MSW transfer station registration was pending before TCEQ. Under Tex. Health & Safety Code §§ 363.112(c)(1), and 364.012(e)(1), Waller County had no authority to prohibit the location of a landfill in the area that is the subject of that registration application. As noted, that area includes the entirety of the Pintail Landfill Site (and a little beyond that).

Application seeks authorization to receive, process and dispose. *See* 30 Tex. Admin. Code § 330.3(33), (88). It should come as no surprise an authorization for a transfer station would come within the types of authorizations referenced in Tex. Health & Safety Code § 363.112(c)(2).

Under Tex. Health & Safety Code § 363.112(c), once Pintail filed an application to obtain authorization for the transfer station, neither the City<sup>2</sup> nor the County had authority to adopt an ordinance prohibiting the use of the Pintail Landfill Site for the processing or disposal of municipal or industrial solid waste. The Executive Director erred in finding the respective ordinances prevent the Commission from granting a permit to Pintail for the Pintail Landfill Site.

## **X. Conclusion**

In conclusion, as demonstrated in detail above, neither the County's nor the City's active ordinance restricts the TCEQ's permitting authority because neither ordinance specifically designates areas within their respective jurisdictions, by metes and bounds, in which waste disposal is permitted. As a result, neither ordinance can serve as a basis for any decision on the part of the Executive Director to decline to process Pintail's Application and issue a permit if TCEQ requirements are satisfied. Further, Waller County has agreed not to regulate the disposal of waste in the City's ETJ, where the entirety of the Pintail Landfill is proposed to be located. Thus, the County's Ordinance is not applicable to the current application. Further, even if the City's Ordinance was otherwise in accord with the authority granted municipalities – which it is not - if properly interpreted, the ordinance allows the siting of the Pintail Landfill at the location proposed in the Pintail Application because there was a pending application that had been declared administratively complete by the TCEQ for the same area (actually a little larger) at the time of the adoption of the City's Ordinance and TCEQ had issued a registration for a transfer station at the site. By the express terms of the City's Ordinance, the proposed site for the Pintail Landfill is a site authorized for the disposal of solid waste. Finally, as noted, Pintail had obtained the transfer station registration before the City's Ordinance was adopted and the City was therefore barred from prohibiting the use of the Pintail Landfill Site for the processing and disposal of municipal and industrial solid waste under Tex. Health & Safety Code § 363.112(c). Consequently, Pintail respectfully requests the Executive Director to proceed with the processing of the Pintail Application.

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<sup>2</sup> Pintail had obtained the transfer station registration before the City's Ordinance was adopted.

Pintail respectfully requests the Commission determine the local ordinances do not preclude the filing of MSW Application No. 2391 or otherwise limit the TCEQ's authority to issue a permit for an MSW landfill at the Pintail site, grant its Motion to Overturn the Executive Director's Return of Its MSW Landfill Application, and require the Executive Director to continue processing the Application.

Respectfully submitted,

/s/

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing Pintail Landfill, LLC's Motion to Overturn the Executive Director's Return of Its MSW Landfill Application has been served by email to counsel for the Executive Director, as well as to the parties to the SOAH hearing referenced herein, as listed below, on this the 22nd day of December, 2016.

/s/

\_\_\_\_\_  
John A. Riley

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