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Toby Baker, *Commissioner*  
Jon Niermann, *Commissioner*  
Richard A. Hyde, P.E., *Executive Director*



*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 15, 2017

Bridget Bohac, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

**RE: PINTAIL LANDFILL, LLC**  
**TCEQ DOCKET NO. 2017-0791-MSW**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Petition for Contested Case Hearing on Regulatory Taking in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NO. 2017-0791-MSW

|                         |   |                       |
|-------------------------|---|-----------------------|
| PINTAIL LANDFILL, LLC'S | § | BEFORE THE            |
| PETITION FOR CONTESTED  | § | TEXAS COMMISSION ON   |
| CASE HEARING ON         | § | ENVIRONMENTAL QUALITY |
| REGULATORY TAKING       | § |                       |

OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO PETITION FOR CONTESTED CASE HEARING ON  
REGULATORY TAKING

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to Pintail Landfill, LLC's Petition for Contested Case Hearing on Regulatory Taking. For the reasons stated herein, OPIC respectfully recommends the Commission deny the petition.

**I. Background**

On July 5, 2016, Pintail submitted its application for a land use compatibility determination concerning proposed Municipal Solid Waste (MSW) Permit 2391. By letter dated December 1, 2016, the Executive Director (ED) returned the application to Pintail. On December 22, 2016, Pintail filed a motion to overturn (MTO) the ED's return of the application. The Commission received briefing on the motion but declined to set the motion. On February 17, 2017, the MTO was overruled by operation of law. Pintail's petition was timely filed May 26, 2017.

## II. Applicable Law

Pintail has filed this petition under Texas Government Code Chapter 2007, which concerns governmental action affecting private property rights. Section 2007.022 states that a private real property owner may file a contested case with a state agency to determine whether a governmental action of the state agency results in a taking.<sup>1</sup> Also, the contested case must be filed with the agency not later than the 180th day after the date the private real property owner knew or should have known that the governmental action restricted or limited the owner's right in the private real property.<sup>2</sup> Finally, a contested case filed under § 2007.022 is subject to Chapter 2001 of the Texas Government Code.<sup>3</sup>

Chapter 2007 applies only to the following governmental actions: the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure.<sup>4</sup> It also applies to enforcement of those governmental actions, whether the enforcement of the governmental action is accomplished through the use of permitting, citations, orders, judicial or quasi-judicial proceedings, or other similar means.<sup>5</sup>

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<sup>1</sup> TEX. GOV'T CODE § 2007.022.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> TEX. GOV'T CODE § 2007.003(a)(1).

<sup>5</sup> TEX. GOV'T CODE § 2007.003(a)(4).

Under Chapter 2001 of the Texas Government Code, “contested case” means a proceeding in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.<sup>6</sup>

Under Chapter 2007, “market value” means the price a willing buyer would pay a willing seller after considering all factors in the marketplace that influence the price of private real property.<sup>7</sup> “Taking” means a governmental action that:

- (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and
- (ii) is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.<sup>8</sup>

### **III. Analysis of Petition**

Pintail asserts that the ED took governmental action when he returned Pintail’s application, and the ED’s action is therefore within the scope of Texas Government Code Chapter 2007. OPIC respectfully disagrees.

Chapter 2007 is applicable only to certain governmental actions. The ED’s return of the application was not the adoption or issuance of an ordinance,

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<sup>6</sup> TEX. GOV’T CODE § 2001.003(1).

<sup>7</sup> TEX. GOV’T CODE § 2007.002(3).

<sup>8</sup> TEX. GOV’T CODE § 2007.002(5)(B).

rule, regulatory requirement, or resolution.<sup>9</sup> The only possibility is that the ED's return of the application qualifies as the adoption or issuance of policy, guidance, or a similar measure,<sup>10</sup> which is precisely what Pintail argues. However, OPIC finds that Pintail misinterprets the ED's return of the application. As indicated by the ED's December 1, 2016 letter, the ED concluded that the relevant statutes prohibited the granting of Pintail's application. The ED was adhering to applicable statutory prohibitions, not adopting or issuing policy or guidance, and the ED stopped well short of any "governmental action."<sup>11</sup> Without any governmental action as contemplated by Chapter 2007, the chapter does not apply to the ED's return of the application, and Pintail cannot seek a contested case on its taking claim.

While OPIC finds that the petition could be denied because Chapter 2007 does not apply, we will also respond to Pintail's taking claim. Pintail asserts that the ED's return of the application restricts or limits Pintail's right to seek a permit for the operation of an MSW facility. When considering whether such a right even exists, it is informative to consider the TCEQ rule which states that a permit does not convey any property rights of any sort, nor any exclusive privilege, and does not become a vested right in the permittee.<sup>12</sup> If the permit would not convey property rights if granted, it is difficult to see how Pintail's claimed entitlement to seek the permit would be more protected. The ED's

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<sup>9</sup> See TEX. GOV'T CODE § 2007.003(a)(1).

<sup>10</sup> *Id.*

<sup>11</sup> See TEX. GOV'T CODE § 2007.003(a).

<sup>12</sup> 30 TEX. ADMIN. CODE § 305.122(c).

return of the application did not restrict or limit a right to the property that would otherwise exist, absent the return.<sup>13</sup>

Pintail also argues that the ED's interpretation of Texas Health and Safety Code sections 363.112 and 364.012 results in a taking. Again, OPIC respectfully disagrees. Pintail disagrees with the ED's interpretation, but that does not mean the ED's interpretation constitutes a taking. At the root of this disagreement is Pintail's desire for TCEQ to opine on the validity of the local ordinances which prohibit the proposed location of the landfill. However, TCEQ lacks the necessary jurisdiction, and it would therefore be improper for the agency to do so. If Pintail wishes to challenge the validity of the ordinances, TCEQ is not the proper forum for such a challenge. The proper venue for a challenge to the validity of the ordinances would be Waller County District Court.<sup>14</sup> OPIC respectfully recommends the Commission decline to take on this role that is reserved for the judiciary.

Finally, Pintail asserts that the ED's return of the application is the producing cause of a reduction of at least 25 percent in the market value of Pintail's property. To be deemed a taking, the governmental action in question must be the producing cause of a reduction of at least 25 percent in the market value of the affected private real property.<sup>15</sup> Pintail's petition contains nothing more than an assertion that the property has lost the requisite amount of market value. Without further information or documentation, OPIC cannot find

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<sup>13</sup> See TEX. GOV'T CODE § 2007.002(5)(B).

<sup>14</sup> See TEX. CIV. PRAC. & REM. CODE §§ 15.0151(a), 37.006(b).

<sup>15</sup> TEX. GOV'T CODE § 2007.002(5)(B)(ii).

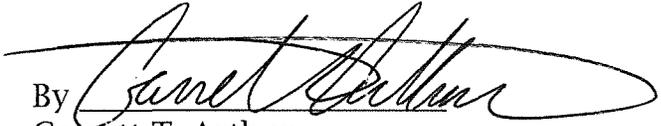
that Pintail has satisfied the reduced market value prong of the taking definition in § 2007.002.

#### IV. Conclusion

OPIC concludes that Pintail is not entitled to file a contested case with TCEQ under Texas Government Code § 2007.022 because the ED's return of the application was not governmental action, and governmental action is required for Chapter 2007 to apply. Even if the Commission determines that the ED took governmental action, the return of the application was not a taking. Therefore, OPIC respectfully recommends the Commission deny this petition.

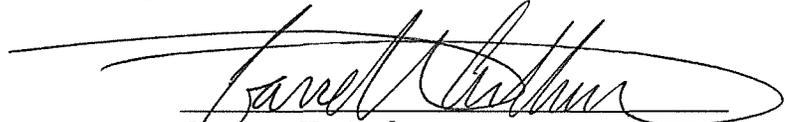
Respectfully submitted,

Vic McWherter  
Public Interest Counsel

By   
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## CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2017, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.



Garrett T. Arthur

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