CAUSE NO. D-1-GN-16-006192

PINTAIL LANDFILL, LLC,	§	
	§	
PLAINTIFF,	§	
	§	IN THE DISTRICT COURT OF
VS.	§	
	§	
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, AND, IN HIS OFFICIAL CAPACITY, RICHARD A. HYDE, P.E., AS TCEQ EXECUTIVE DIRECTOR,	§	TRAVIS COUNTY, TEXAS
	§	
DEFENDANTS	§	126th JUDICIAL DISTRICT
	§	
CITIZENS AGAINST THE LANDFILL IN HEMPSTEAD,	§	
	§	
INTERVENOR	§	

PINTAIL LANDFILL, LLC'S REPLY TO TCEQ'S AND CALH'S RESPONSE BRIEFS

TO THE HONORABLE KARIN CRUMP:

Pintail Landfill, LLC ("Pintail") files this reply to the response briefs filed by the Texas Commission on Environmental Quality ("TCEQ") and Citizens Against the Landfill in Hempstead ("CALH") with respect to the hearing on the merits of this appeal of an administrative action from the TCEQ. This brief addresses statements and arguments made by TCEQ and CALH in the context of the seven issues Pintail has raised in this appeal. Pintail respectfully requests the Court reverse

the Executive Director's decision to return Pintail's 2016 Landfill Application ("2016 Landfill Application") and the Commission's decision on Pintail's Motion to Overturn (collectively, "TCEQ's Decision") and remand this matter to TCEQ with a direction that the Executive Director resume processing Pintail's municipal solid waste ("MSW") application. In support thereof, Pintail shows the following:

I. STANDARD OF REVIEW

Pintail's appeal raises two sets of issues: (1) issues requiring a statutory interpretation; and (2) issues regarding whether TCEQ followed the Administrative Procedures Act (the "APA"), or otherwise made a decision not supported by substantial evidence or otherwise violated Tex. Gov't Code §2001.174(2).

First, TCEQ has improperly applied two statutory provisions, Tex. Health & Safety Code §§363.112, 364.012 ("§§363.112, 364.012"), with respect to TCEQ's authority to grant Pintail an MSW permit when a city or county has adopted an MSW siting ordinance. Despite CALH's and TCEQ's repeated assertions,[1] Pintail does not seek a determination of the validity of two ordinances, but instead a statutory interpretation of the TCEQ's authority to process and grant Pintail's MSW application, even when a city or county has adopted an MSW siting ordinance.

[1] *See* TCEQ's Response Brief, at 7, 10, 16, 25; CALH's Response Brief, at 2, 20, 44, 48, 50.

Contrary to CALH's contention,[2] statutory interpretation is a question of law the court reviews de novo.[3] In a de novo review, a court must determine and give effect to the Legislature's intent for the statutory provision it is reviewing.[4] In interpreting a statute, as TCEQ agrees, courts begin with the plain language of the statute itself. As the Texas Supreme Court has ruled, "If the statute is clear and unambiguous, we must apply its words according to their common meaning in a way that gives effect to every word, clause, and sentence."[5]

This standard of review applies when the court is reviewing agency decisions based on a statutory or regulatory interpretation.[6] An agency's interpretation of a statute it enforces is due "serious consideration" but only if the agency's interpretation has been formally adopted after formal proceedings, the statutory

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[2] *See* CALH's Response Brief, at 19-20. CALH bases its contention on the fact Pintail has not sought a declaratory judgment regarding the validity of the two ordinances relevant to this proceeding, or the interpretation of any statute or ordinance. Texas courts have long held an action for declaratory judgment will not be heard by a court if the declaratory judgment claim is redundant or duplicative of another claim pending before the Court. *See Texas Liquor Control Bd. v. Canyon Creek Land Corporation*, 456 S.W.2d 891, 895 (Tex.1970); *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex.1990). Pintail has sought judicial review of an agency's administrative decision, and a declaratory judgment action seeking statutory interpretation of the same issue raised in Pintail's claim for judicial review would be duplicative.

[3] *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017).

[4] *USA Waste Services of Houston, Inc. v. Strayhorn*, 150 S.W.3d 491 (Tex. App. – Austin 2004, review denied).

[5] *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *see also First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008).

[6] *Cadena Comercial USA Corp.*, 518 S.W.3d at 325.

language is ambiguous, and the agency's construction is reasonable and does not conflict with the statutory language.[7] TCEQ's interpretations under review here have not been adopted formally; they conflict with the plain language of the relevant statutory provisions; and, therefore, they are not reasonable. An agency's opinion or interpretation cannot change plain language.[8] Under the plain language of §§363.112, 364.012, TCEQ was not prohibited from processing Pintail's MSW application and granting it an MSW permit.

Second, Pintail asserts TCEQ's actions violated Tex. Gov't Code §2001.174(2). While this statutory provision includes the substantial evidence standard referenced by TCEQ and CALH, the provision includes a broader review by the Court than suggested in TCEQ's and CALH's response briefs. Section 2001.174(2) states a court:

> shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (A) in violation of a constitutional or statutory provision;
> (B) in excess of the agency's statutory authority;
> (C) made through unlawful procedure;

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[7] *See id.*; *Texas Dep't of Ins. v. American Nat. Ins. Co.*, 410 S.W.3d 843, 853-54 (Tex. 2011) *Railroad Comm'n of Texas v. Texas Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011); *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747-48 (Tex. 2006).

[8] *Texas Citizens for a Safe Future and Clean Water*, 336 S.W.3d at 625.

(D) affected by other error of law:

(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Whether an agency's action satisfies this standard is a question of law. TCEQ's Decision violates Section 2001.174(A), (B), (C), (E), and (F). Specifically, TCEQ's Decision was based on actions by the TCEQ that violated a statutory provision; exceeded its statutory authority; and caused the agency to issue and revise rules through unlawful procedures. Further, TCEQ's Decision was not reasonably supported by substantial evidence; and was arbitrary or capricious or characterized by abuse of discretion both in terms of the agency's statutory interpretation and its adoption of new and revised statutory interpretations that were not promulgated through the required rulemaking procedures.

II. OBJECTIONS TO INCLUSION OF MATERIALS AND ALLEGED FACTS OUTSIDE OF THE RECORD

CALH's Response Brief relies on a transcript of a TCEQ proceeding that is outside of the administrative record.[9] TCEQ properly prepared and filed the complete administrative record[10] and the Court is confined to the administrative

[9] *See* CALH Response Brief, Appendix 11.

[10] *See* TEX. GOV'T CODE §2001.175(b).

record.[11] Pintail objects to CALH's attempt to improperly put this additional material before the Court. Pintail further objects to CALH's inclusion of alleged facts in its brief that are outside the record.

III. TCEQ'S AUTHORITY UNDER TEX. HEALTH & SAFETY CODE §§363.112, 364.012

TCEQ acknowledges in its Response Brief that the Legislature granted it authority under §§363.112, 364.012 to determine whether an ordinance is applicable.[12] However, TCEQ again fails to recognize each of the components of the authority it was provided under these sections and suggests its authority is limited to determining "whether the proposed landfill site lies within the area prohibited by the ordinance."[13] From a reading of the plain language of these provisions, however, TCEQ has been granted the following authority:

Section 363.112:

- Was the area in which the processing or disposal of waste prohibited by an ordinance or order authorized by Subsection (a)[14]
    - Subsection (a) requires the city or county to specifically designate the area within its jurisdiction in which the disposal of waste will not be prohibited.

[11] TEX. GOV'T CODE §2001.175(e).

[12] TCEQ's Response Brief, at 17.

[13] *Id.*

[14] TEX. HEALTH & SAFETY CODE §363.112(d).

Thus, to determine whether the ordinance was "authorized by Subsection (a)," TCEQ must determine whether the city or the county specifically designated the area within its jurisdiction in which the disposal of waste will not be prohibited.

- Did the city or county violate Subsection (c) in passing the ordinance[15]
    - Did the city or county purport to prohibit the processing or disposal of waste in an area for which an application for a permit or other authorization under Chapter 361 has been filed with and is pending before the commission?
    - Did the city or county purport to prohibit the processing or disposal of waste in an area for which a permit or other authorization under Chapter 361 has been issued by the Commission?

Section 364.012:

- Did the county violate Subsection (e) in passing the ordinance
    - Did the County purport to prohibit the processing or disposal of waste in an area of that county for which an application for a permit or other authorization under Chapter 361 has been filed with and is pending before the commission?
    - Did the County purport to prohibit the processing or disposal of waste in an area of that county for which a permit or other authorization under Chapter 361 has been issued by the Commission?

[15] *Id.*

- Is the application for the processing or disposal of waste in an area for which that processing or disposal is prohibited by an ordinance?

The Executive Director conducted no such analysis. His letter concluded, "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."

The Commission has been directed by the Legislature to conduct a broader inquiry before determining its authority to grant a permit is limited by an ordinance. TCEQ's authority is not limited to merely determining "whether the proposed landfill site lies within the area prohibited by the ordinance." TCEQ acknowledges the provisions can be read to require the broader inquiry the plain language of the statute requires.[16] In fact, to give the phrase "ordinance or order authorized by Subsection (a)" meaning, as the Court must,[17] the §§363.112 and 364.012 provisions must be read to require this inquiry.[18] Because TCEQ failed to conduct the required

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[16] TCEQ's Response Brief, at 19.

[17] *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *see also First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008) ("If the statute is clear and unambiguous, we must apply its words according to their common meaning in a way that gives effect to every word, clause, and sentence.")

[18] The Legislature gave TCEQ authority to determine whether an application is for the processing or disposal of waste in a prohibited area, and gave TCEQ discretion as to whether to specify through rules the procedures by which the agency would make that determination. *See* TEX. HEALTH & SAFETY CODE § 364.012(f).

inquiry, this matter should be remanded back to the TCEQ with direction for the Executive Director to resume processing Pintail's application.[19]

IV. PLAIN LANGUAGE OF TEX. HEALTH & SAFETY CODE §§ 363.112, 364.012 DEMONSTRATES TCEQ HAS AUTHORITY TO PROCESS PINTAIL'S APPLICATION AND GRANT AN MSW PERMIT

Pintail agrees with CALH's strong defense of the principle that:

> ... the Court must take Section 363.112[20] as she finds it, and it would not be appropriate for the Court or Defendants to rewrite the Legislature's text. This is because courts "must presume the Legislature 'chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.'"[21]

The plain language of §§363.112, 364.012 shows the TCEQ has the authority to process Pintail's application and grant Pintail an MSW permit.[22] This analysis is supported by either of two sets of facts that were present at the time of the City's and the County's adoption of their respective ordinances.[23] TCEQ erred by failing

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[19] In this portion of its brief, TCEQ also addressed in passing Pintail's Chapter 361 authorization. *See* TCEQ's Response Brief, at 19, fn 42. Pintail's response is set forth in Section IV(A) of this Reply Brief.

[20] Pintail notes CALH's argument is equally applicable to Tex. Health & Safety Code §364.012.

[21] CALH'S Response Brief, at 45.

[22] CALH incorrectly contends Pintail did not argue the July 2011 Application grandfathered the proposed site for the 2016 Application. Pintail argued the presence of the 2011 Application barred the County and the City from adopting their respective ordinances and that the County and the City had failed to adopt any other ordinances during a time when Pintail had no application pending before TCEQ. *See* Pintail's Initial Brief on the Merits, at 7-8, 13, 23, 43-46.

[23] Pintail has asserted the City and the County entered into a settlement agreement that rendered the County ordinance inapplicable to Pintail's proposed landfill. TCEQ contends in error that the settlement agreement is not part of the record on which TCEQ's Decision was made. Pintail provided a copy of the settlement agreement as Attachment 7 to Pintail's Motion to Overturn, which is found at AR Vol. 3, Item 15.

to analyze either of these sets of facts in making TCEQ's Decision, and the Court should remand this matter back to the TCEQ with direction for the Executive Director to resume processing Pintail's application.

The plain language of §§363.112, 364.012 bars a city or county from prohibiting:

> the processing or disposal of municipal or industrial solid waste in an area of the municipality or county for which: (1) an application for a permit or other authorization under Chapter 361 has been filed with and is pending before the commission; or (2) a permit or other authorization under Chapter 361 has been issued by the commission.[24]

Pintail had filed an application for a permit or other authorization under Chapter 361 (an application for an MSW transfer station and an application for an MSW landfill); and Pintail had received an authorization under Chapter 361 (the transfer station registration) for the area for which Pintail seeks an MSW landfill permit. These applications and the Chapter 361 registration precluded the County and City from adopting ordinances that sought to prohibit MSW disposal for the Pintail Landfill Site.

[24] TEX. HEALTH & SAFETY CODE §§363.112(c), 364.012(e). Pintail notes that because §364.012 is limited to a county's authority to enact a municipal or industrial waste siting ordinance that section's reference to the governing body is to a county as opposed to a municipality and a county.

A. Chapter 361 Authorization – Transfer Station Registration

On August 2, 2011, Pintail filed an application with the TCEQ for a Tex. Health & Safety Code ch. 361 authorization permitting the construction and operation of an MSW transfer station for the Pintail Landfill Site. This application was pending before TCEQ prior to the adoption of the County's ordinance on August 26, 2011. On July 23, 2013, TCEQ issued Pintail the authorization, Municipal Solid Waste Processing Registration No. 40259, under provisions of Tex. Health & Safety Code Chapter 361 to construct and operate the MSW transfer station.[25] The Chapter 361 authorization was issued prior to the adoption of the City's ordinance on September 8, 2015. The authorized site included and was slightly larger than Pintail's 2016 Landfill Application Site. By the plain language of §363.112(c), Pintail's transfer station application and authorization, applied for and issued under Chapter 361, prevented the County and City from prohibiting the disposal of municipal or industrial solid waste at the Pintail Landfill Site.

TCEQ and CALH contend §§363.112(c), 364.012(e), in the words of TCEQ, "should be read to refer to authorizations for the *same* type of activity as that for which the permit is sought." [26] However, these are not the words the Legislature

[25] TCEQ issued the authorization "under provisions of Texas Health & Safety Code Chapter 361." *See* AR Vol. 3, Item 15 (Attachment 13, p. 1 to Pintail's Motion to Overturn).

[26] *See* TCEQ's Response Brief, at 25 (Emphasis in Original); *see also* CALH's Response Brief, at 26-28. CALH goes further, contending the statutes require TCEQ to consider MSW processing

chose to use and, as CALH notes, it would not be appropriate for the Court or Defendants to rewrite the Legislature's text.[27] If the Legislature intended for the Chapter 361 authorizations to be limited to a certain type of Chapter 361 authorization, the Legislature was certainly capable of doing so. Instead, the Legislature referred to any authorization applied for or issued under Chapter 361, including Pintail's application for, and TCEQ's issuance of, a Chapter 361 transfer station registration.

TCEQ notes, "Chapter 361 sets out a comprehensive regulatory scheme for controlling all aspects of solid waste and a key part of the Commission's regulation is the requirement that an authorization be obtained for a diverse range of solid waste management activities."[28] TCEQ also notes the types of authorizations, the process to obtain the authorizations, and the level of public participation varies across this wide range of solid management activities.[29]

There is no evidence the Legislature was unaware of these differences when it last amended the two sections in 1999, as the Legislature has frequently enacted

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vs. disposal; industrial waste processing vs. disposal; and MSW activities vs. industrial waste activities. *See* CALH Response Brief, at 27. There is no indication in the plain language of the statutes that the Legislature considered, much less required, such a compartmentalized application of the statutes. If the Legislature had intended such a required application of the statutes, it would have enacted far more complicated statutory language.

[27] CALH's Response Brief, at 45.

[28] TCEQ's Response Brief, at 27.

[29] *Id*., at 27-28.

changes to Tex. Health & Safety Code ch. 361.[30] In any event, the Legislature chose the broader reference to "Chapter 361 authorizations" and not a narrower phrase that could have supported the interpretation TCEQ and CALH ask the Court to adopt. The plain language of §§363.112(c), 364.012(e) directs the TCEQ and the Court otherwise.

TCEQ and CALH also raise perceived "absurdities" they suggest should cause the Court to ignore the plain words of the statutes and adopt a narrower interpretation.[31] The "absurdity" of a 1000-acre pet cemetery is presented as if it is a given that the Legislature wanted municipalities and counties to have the maximum opportunity to prohibit the processing or disposal of municipal or industrial solid waste in areas of the municipality or county. Again, there is no evidence of such Legislative objective or intent. The fact that §§363.112 and 364.012 give limited authority to counties and municipalities to ban solid waste sites argues against the perceived "absurdity," which would only result in 1000 acres of the hypothetical county or city remaining available for the processing or disposal of solid waste. Neither TCEQ nor CALH explain why that would be an absurd result.

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[30] *See, e.g.*, TEX. HEALTH & SAFETY CODE §361.003. The Legislature has amended this section, regarding Chapter 361 definitions, nine times since its original enactment in 1989. Seven of these amendments occurred before the Legislature 1999 amendments of Tex. Health & Safety Code §§363.112 and 364.012.

[31] TCEQ Response Brief, at 28-29.

Of course, TCEQ has a role in the permitting process and is not required to issue an authorization for whatever an applicant seeks.[32] In the case of a pet cemetery, an operator provides notification to TCEQ of its intent to operate a pet cemetery 90 days prior to beginning operations.[33] As TCEQ noted in its preamble on its proposal of 30 Tex. Admin. Code §330.11, the 90-day period allows "… TCEQ staff to provide compliance assistance, to investigate whether the activity is exempt from permitting and registration requirements, and to prevent any unauthorized management of MSW."[34] Even for a pet cemetery, TCEQ has reserved for itself a role in the permitting process to determine whether the activity is exempt from further permitting requirements and to ensure that unauthorized MSW management is prevented.

As in the pet cemetery hypothetical, in this case the TCEQ considered and issued Pintail an authorization under Chapter 361. The registration authorizes a Type V Transfer Station, not a 1000 acre pet cemetery, and plainly states, "The facility contains 410.37 acres."[35] Through its issuance of the registration, TCEQ

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[32] TCEQ also posits, in error, that the pet cemetery could be used to grandfather a hazardous waste site. Sections 363.112 and 364.012 apply only to municipal and industrial solid waste sites.

[33] *See* 30 TEX. ADMIN. CODE § 330.11(a), (e)(7).

[34] 30 Tex. Reg. 5545, 5549 (Sep. 9, 2005).

[35] AR Vol. 3, Item 15 (Attachment 13 to Pintail's Motion to Overturn).

authorized a facility, not an area, as TCEQ and CALH now contend. TCEQ defended its issuance of this Chapter 361 authorization.

If TCEQ had objected to the size of the facility, it had the authority to require Pintail to reduce the acreage of the facility, or to deny the application. It chose to do neither. TCEQ's present litigation position does not mesh with its action in granting the Chapter 361 authorization for the 410.37-acre transfer station facility. TCEQ's decision not to tailor the boundaries of the facility cannot be revisited in this case. But, of course, that does not prevent the agency from doing so with respect to future applications for transfer stations (or pet cemeteries).[36] Further, the Court should decline TCEQ's invitation to use its regrets and hypotheticals as a rationalization and justification for the Court to judicially revise the plain language of the statutes to prevent here, and in the future, a situation that is within TCEQ's ability to control administratively. As a result, TCEQ's and CALH's "absurdities" argument should fail.

[36] TCEQ also asserts any reading of the statutes other than as TCEQ proposes would allow for the issuance of a landfill permit for "an area where it would constitute a "threat to the public health, safety and welfare." TCEQ Response Brief, at 29. Given that it is the State's policy to safeguard the health, welfare and physical property of the people and to protect the environment by controlling the management of solid waste, surely TCEQ would not permit a site that would constitute a "threat to the public health, safety and welfare." *See* TEX. HEALTH & SAFETY CODE §§ 361.002(a), 363.002. Again, TCEQ's argument assumes it has no role to play in the permitting process and no ability to prevent the "horribles" on which its arguments rely.

B. Chapter 361 Application –MSW Landfill Permit

Similarly, prior to the City's and County's adoption of their ordinances, Pintail had already filed its July 2011 Application and the application was pending before TCEQ at the time each ordinance was adopted. Under the plain language of §§363.112(c), (d), 364.012(e), (f), the City and the County were barred from prohibiting the processing or disposal of MSW in the area for which Pintail had filed its application for an MSW permit. By including the area proposed in Pintail's pending MSW application, the City and the County had violated §§363.112(c), 364.012(e) and TCEQ was not prohibited from granting Pintail an MSW permit for this area.[37] The area covered by Pintail's July 2011 Application is slightly larger than the area proposed in Pintail's 2016 Application, and neither the City nor the County had adopted an ordinance that did not violate §§363.112(c), 364.012(e) at the time of Pintail's 2016 Application, so TCEQ continued to have authority to grant an MSW permit for the area proposed by Pintail in its 2016 Application.

Pintail's "snapshot" argument is again based on the plain language of §§363.112(c), 364.012(e). Pintail has noted there was a window of time in which Pintail had no permit application on file with TCEQ. If the City or County had

[37] TCEQ acknowledges, "To the extent Health and Safety Code sections 362.112 (sic) and 364.012 could be read to imply some additional power on the agency, it may be that the Commission could also act to determine whether a local government violated the requirement that it grandfather existing and pending authorizations. TCEQ's Response Brief, at 12; *see also id*., at 19.

adopted an ordinance in compliance with the requirements of §§363.112, 364.012 that prohibited Pintail's proposed landfill location during this window of time, TCEQ would have been barred from granting Pintail an MSW permit for that location. Neither the City nor the County did so. Because the City and County violated the requirements of these provisions, TCEQ was not prohibited from granting Pintail's MSW permit.

TCEQ and CALH assert Pintail's argument here has already been rejected by the Third Court of Appeals.[38] However, the language to which each party refers does not represent a holding of the Court. The case addressed whether Mr. Kelsoe had timely filed his petition for judicial review, which the Court found he had not. The language is dicta, included in a footnote discussing whether Mr. Kelsoe had been affected sufficient to warrant judicial review, and it is not clear this issue was litigated at all before the trial court, or argued before the appellate court. This mention in a portion of a footnote has no precedential value.

TCEQ and CALH contend a prior application or authorization would only allow TCEQ to grant a permit for a site that was facially prohibited by a city or county ordinance if the application was for the same activity as the prior application

[38] *See* TCEQ's Response Brief, at 25-26, 31-32; CALH's Response Brief, at 22, each citing *Texas Comm'n on Envtl. Quality v. Kelsoe*, 286 S.W.3d 91, 95 n.6 (Tex. App. – Austin 2009, pet. denied).

or authorization. This reading presents an absurdity inconsistent with the plain language of the provisions at issue here – an absurdity the Court is required to avoid.

Under such a reading, Pintail could only apply for and be granted a permit in the face of the City's or the County's ordinance if Pintail already had an MSW landfill application pending before TCEQ or if it already had been issued an MSW permit by TCEQ. In either case, Pintail would have no need to file an application for an MSW landfill permit. It would already be in the application process or it would already have the permit.

This illogical interpretation renders §§363.112(c), (d) and 364.012(e), (f) nullities and would not give effect to every word, clause and sentence of these provisions.[39] Therefore, such an interpretation cannot be correct.

V. THE PLAIN LANGUAGE OF THE COUNTY AND CITY ORDINANCES DID NOT PROHIBIT THE PINTAIL LANDFILL SITE

TCEQ erred because the County and City Ordinances, by their plain language, allowed MSW processing and disposal at sites that had previously been issued permits or other authorizations under Chapter 361, or had an application pending with the TCEQ for an authorization under Chapter 361, at the time each ordinance was adopted. Pintail had filed an application for its Chapter 361 transfer station

[39] *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *see also First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008).

authorization prior to the adoption of the County's ordinance. TCEQ had issued Pintail the transfer station authorization, and had pending Pintail's July 2011 Application for a landfill permit prior to the adoption of the City's ordinance. By the plain language of the County's and City's ordinances, the disposal of municipal or industrial solid waste was not prohibited at Pintail's proposed landfill site.

CALH is correct that the Court should look to the plain meaning of the words in the respective ordinances.[40] Under the plain language of the County and the City ordinances, neither ordinance prohibited Pintail's proposed landfill site. This conclusion is separate and apart from the Commission's consideration of the Legislature's intent as to the types of authorizations considered to be included within the phrase "permit or other authorization under Chapter 361." For example, the City did not distinguish the types of authorizations issued under ch. 361 in its ordinance and, consequently, the City Ordinance does not prohibit a permit from being issued for the Pintail Landfill Site. As such, TCEQ erred in determining the Commission had no authority to issue a permit to Pintail for this site.

TCEQ's Decision disregarded the plain language of the County and City Ordinances, was in violation of Section 363.112, was not reasonably supported by

[40] CALH's Response Brief, at 36.

substantial evidence, and was arbitrary and capricious. Therefore, TCEQ's Decision should be reversed, pursuant to Tex. Gov't Code §2001.174(2)(A), (E), (F).

VI. TCEQ'S PERMITTING AUTHORITY IS NOT LIMITED WHERE AN ORDINANCE FAILS TO SPECIFICALLY DESIGNATE THE AREAS WHERE MSW DISPOSAL IS NOT PROHIBITED

The County and City Ordinances fail to specifically designate any area of the County or City or its ETJ, respectively, in which the disposal of municipal or industrial solid waste is not prohibited, as required by §§363.112(a) and 364.012(b). As such, TCEQ's permitting authority is not limited.

As CALH notes, §§363.112(c), 364.012(e) use the word "area," which CALH, relying on Merriam-Webster, defines as "a flat surface or space; the amount of surface included (as within the lines of a geometric figure)."[41] As CALH notes, the area (of a rectangle at least) is determined by measuring and then multiplying the length and the width of the surface. To determine the "area" of property, one would measure the length of the property's segments, as described in a county's property records as the property's metes and bounds. A county does not specifically describe property by reference to its distance from residences, rights of way, or water wells, because those features are transient. A county specifically describes or designates property using metes and bounds, which remain constant regardless of any changes

[41] CALH's Response Brief, at 23.

around the property. Neither the City nor the County ordinance specifically designated an "area" or "flat surface or space" in which the disposal of municipal or industrial solid waste is not prohibited.[42]

TCEQ's Decision was in violation of §§363.112, 364.012; was not reasonably supported by substantial evidence; and was arbitrary and capricious. Therefore, TCEQ's Decision should be reversed, pursuant to Tex. Gov't Code §2001.174(2)(A), (E), (F).

VII. TCEQ FAILED TO COMPLY WITH THE APA IN MAKING STATUTORY INTERPRETATIONS AND IN MAKING REVISIONS TO LONG-STANDING INTERPRETATIONS

A. New Policy on Chapter 361 Authorizations

It has already been established, and neither TCEQ nor CALH contest, that: (1) Pintail had filed an application for its Chapter 361 transfer station authorization prior to the adoption of the County's ordinance; and (2) TCEQ had issued Pintail its Chapter 361 transfer station authorization prior to the adoption of the City's ordinance. To counter these facts, TCEQ and CALH allege, without basis, that a Chapter 361 transfer station registration is not the type of Chapter 361 authorization contemplated by the Legislature when it enacted §§363.112(a), 364.012.

[42] Not only do the County and City Ordinances fail to specifically designate permitted areas, they also so defined criteria so as to attempt to completely prohibit solid waste disposal. *See* Pintail's Initial Brief on the Merits, at 16-18.

But TCEQ's interpretation of §§363.112(a), 364.012 with respect to the scope of Chapter 361 authorizations is TCEQ's statement of general applicability that implements or interprets law such that it constitutes a rule.[43] TCEQ engaged in no formal rulemaking proceeding to promulgate this new rule. When an agency promulgates a rule without complying with proper rulemaking procedures, the rule is invalid.[44] When an agency makes a decision based on an invalid rule, the decision must be reversed and remanded to the agency if substantial rights of the appellant have been prejudiced by the decision.[45] TCEQ's Decision prejudiced Pintail's rights to have its MSW application processed and its permit granted if Pintail demonstrated its application met all applicable permitting requirements.

B. Revision of Metes and Bounds Policy

While TCEQ acknowledges the substance of the 2005 TCEQ testimony on the metes and bounds issue – namely that the Executive Director's authority to process an MSW application was not limited in the absence of an ordinance that included a metes and bounds description of the area in which MSW disposal would

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[43] *See* TEX. GOV'T CODE §2001.003(6)(A).

[44] TEX. GOV'T CODE §2001.035(a); *El Paso Hosp. Dist. v. Texas Health and Human Serv. Comm'n*, 247 S.W.3d 709, 715 (Tex. 2008).

[45] *Texas St. Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520, 527 (Tex. App. – Austin 2014, review denied).

not be prohibited[46] – TCEQ has asserted the TCEQ employee who recited this agency policy was not authorized to bind the agency.[47] TCEQ fails to acknowledge that the TCEQ employee, according to his testimony, was appearing on behalf of, and speaking for the Executive Director.[48] His testimony did not create policy, as inaccurately characterized by TCEQ, but instead was recounting what the Executive Director's policy had been with respect to the metes and bounds issue.

TCEQ minimizes the effect of the policy by stating that even when metes and bounds were not provided in an ordinance, the Executive Director would merely look at the ordinance later in the agency's process to see if it prohibited a landfill in the proposed location.[49] Instead, the testimony reflected that the Executive Director would not treat the ordinance as a bar to processing and granting the application, but would consider the siting criteria referenced in the ordinance in the Executive Director's consideration of land use compatibility.[50] Ultimately, the Commission would make a land use compatibility determination as part of its decision to issue a permit,[51] but would not be barred from doing so by the existence of an ordinance

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[46] *See* TCEQ Response Brief, at 38 (While contesting the transcript, TCEQ did not deny that the statements were made, or that the staff member was speaking on behalf of the Executive Director).

[47] *Id*., at 38-39.

[48] AR Vol. 3, Item 15, at A-37 (Attachment 9 to Pintail's Motion to Overturn).

[49] *See* TCEQ Response Brief, at 38.

[50] AR Vol. 3, Item 15, at A-37 (Attachment 9 to Pintail's Motion to Overturn).

[51] *See* 30 TEX. ADMIN. CODE §330.61(g), (h).

using siting criteria (e.g., 5280 feet from any residence), rather than a metes and bounds description of where MSW disposal would be permitted.

TCEQ's and CALH's arguments ignore in large part the significant permitting process through which an applicant must go before it may be issued a permit. CALH in particular raises a number of factual issues Pintail expects to address in a permitting process and likely in a contested case hearing. These issues are premature at this time and do not address the issue of whether TCEQ's permitting authority has been limited by either the County's or the City's ordinances.

As occurred in *Oncor Elec. Delivery Co. v. Pub. Util. Comm'n*,[52] TCEQ's Decision represented a departure from the agency's prior practice without notice to Pintail or other affected parties, and without an explanation for the departure. Without any notice to the public or the ability for the public to provide comment, the Executive Director changed this long-standing interpretation without going through a rulemaking process, as required by the APA,[53] and relied on this change to support his decision that the County or City Ordinances prohibited the Commission from issuing Pintail and MSW landfill permit.

[52] 406 S.W.3d 253, 264-69 (Tex. App. – Austin 2013, no pet.).

[53] *See* TEX. GOV'T CODE §§2001.023 - .030.

The Executive Director's revision of this policy without going through the required rulemaking process renders the revision invalid.[54] TCEQ's Decision, which was based on the invalid rule revision, is also invalid. As a result of TCEQ's actions, Pintail's substantial right to have its permit application processed has been prejudiced.

TCEQ's Decision was based on a policy change promulgated in violation of the APA; was made in excess of TCEQ's statutory authority; and was made through unlawful procedures. TCEQ's Decision was not reasonably supported by substantial evidence and was arbitrary or capricious. TCEQ's Decision should therefore be reversed, pursuant to Tex. Gov't Code §2001.174(2)(A), (B), (C), (E), and (F).[55]

[54] When an agency promulgates a rule without complying with proper rulemaking procedures, the rule is invalid. TEX. GOV'T CODE §2001.035(a); *El Paso Hosp. Dist.*, 247 S.W.3d at 715.

[55] When an agency makes a decision based on an invalid rule, the decision must be reversed and remanded to the agency if substantial rights of the appellant have been prejudiced by the decision. *Witcher*, 447 S.W.3d at 527.

VIII. PRAYER

WHEREFORE, for the reasons stated above, and pursuant to Tex. Gov't Code §2001.174(2)(A), (B), (C), (E), (F), Pintail requests the Court reverse TCEQ's Decision and remand this matter to TCEQ with a direction that the Executive Director resume processing Pintail's MSW Application. Pintail asks for any and all further relief to which it may show itself to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Pintail Landfill, LLC's Reply Brief has been sent to the following persons by electronic filing system on this 21st day of December, 2017.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief has been compiled using a computer program in Word with a 14-point font conventional typeface for the body of the brief and footnotes in 12-point font. Excluding the portions of the brief exempted pursuant to Tex. R. App. Proc. 9.4, this brief contains 7,378 words.

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