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REGARDING: ORDER NO. 15 - RULING ON PENDING MOTIONS
DOCKET NUMBER: 582-14-3597

JUDGE PENNY WILKOV

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SOAH DOCKET NO. 582-14-3597
TCEQ DOCKET NO. 2012-0302-MSW

APPLICATION BY PINTAIL § BEFORE THE STATE OFFICE
LANDFILL, LLC FOR NEW §
MUNICIPAL SOLID WASTE PERMIT § OF
NO. 2377 § ADMINISTRATIVE HEARINGS

ORDER NO. 15
RULING ON PENDING MOTIONS

I. DISCUSSING APPLICANT'S PRIVILEGE CLAIM FOR PRODUCTION OF
REDACTED DOCUMENTS

On March 10 and April 2 and 13, 2015, the Administrative Law Judges (ALJs) issued Order Nos. 12, 13, and 14 ruling on and discussing discovery issues pertinent to the following parties: the Texas Commission on Environmental Quality (TCEQ) Executive Director (ED), through its attorneys Anthony Tatu and Ron Olson; Pintail Landfill, LLC (Applicant) through its attorney Brent W. Ryan; the Office of Public Interest Counsel (OPIC) through its attorneys Garrett T. Arthur and Isabel Segarra Trevino; Citizens against the Landfill in Hempstead (CALH) through its attorneys Wesley McGuffey, Blayre Pena, and Michael L. Woodward; Organization for the Environmental Health of Hempstead (OEHH) through its attorney Marisa Perales; and the City of Hempstead (City) through its attorney Diana Nichols. The parties have filed various related pleadings and engaged in negotiations relating to the disputes. On April 28, 2015, Applicant filed a letter withdrawing its Motion to Clarify and/or Reconsider Rulings on Privilege Log in Order No. 12 and its April 22, 2015 request for *in camera* review of documents. Applicant stated that it had produced to the City and CALH all documents required to be produced by Order No. 12. Accordingly, the Administrative Law Judges will not rule on those requests by Applicant.¹

¹ In an April 27, 2015 filing, CALH informed the ALJs that the documents Applicant had submitted for *in camera* review were uploaded on the State Office of Administrative Hearings (SOAH) electronic case management system and were available for public viewing. The ALJs immediately notified SOAH Docketing and the filing was designated as confidential and only accessible to the ALJs. Pursuant to SOAH rule, 1 Texas Administrative Code § 155.101(c)(3), material submitted for *in camera* review must be supplied in a sealed and labeled container with the outside of the container marked "IN CAMERA REVIEW" in bold print at least one inch in size. The ALJs do not know whether Applicant met that requirement because the paperwork was delivered to the ALJs without the container.

II. GRANTING REQUEST FOR PARTY STATUS OF THE WALLER COUNTY COMMISSIONERS COURT

On April 15, 2015, the Waller County Commissioners Court (County) filed a Petition for Intervention in this case stating that, due to negotiations by prior Waller County Commissioners, the County agreed not to request party status at the preliminary hearing held on July 22 and September 4, 2014. The County pointed out that, based upon a jury verdict, a District Court Order confirmed that a "Host Agreement" entered into with prior Commissioners and Applicant not to oppose the site, as well as a 2013 Ordinance removing any impediment to the site, have been voided as result of a violation of the Open Meetings Act. The County has now adopted a resolution to retain counsel and to seek party status in this SOAH case.

Applicant opposes the intervention and denies that Waller County meets the qualifications as an affected person. Applicant argues that the application pre-dated any ordinance prohibiting the site, the County only has civil suit enforcement capabilities under the Texas Water Code, and the Texas Commission on Environmental Quality (TCEQ) does not have jurisdiction over road access issues.

Rulemaking authority is granted to the TCEQ by Texas Water Code § 5.115 to adopt rules specifying factors which must be considered in determining whether a person is an affected person in a contested case arising under the air, waste, or water programs within the TCEQ's jurisdiction. Pursuant to that authority, the TCEQ has adopted 30 Texas Administrative Code §55.203(b), which states "(e)xcept as provided by § 55.103 of this title (relating to Definitions), governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons." Clearly the County is an affected person because the landfill is located in Waller County and the County has authority under state law over issues raised by the application pursuant to Health and Safety Code, Subchapter E, Sections 361-363. The County has met the qualifications as an affected person.

The ALJs must consider, however, whether the failure to seek to be admitted as a party at the preliminary hearing was due to good cause and extenuating circumstances, and whether the hearing in progress will not be unreasonably delayed. The ALJs find that good cause and extenuating circumstances were demonstrated by the County in that part of the consideration for the parties to enter into the Host Agreement was the County's forbearance from seeking party status. The ALJs find that, because the agreement not to seek party status was part of the illegal agreement, good cause and extenuating circumstances are demonstrated.

As for unreasonable delay, the County stated in its motion that it will not seek to modify the discovery deadlines or the hearings dates, will not retain expert witnesses, and will not conduct additional discovery. The ALJs find that, based on the County's representations, the admission of the County as a party will not result in unreasonable delay of the hearing in progress. The County's motion is granted.

III. GRANTING THE UNOPPOSED CONTINUANCE AND EXTENSION OF DEADLINES

CALH and the City requested a 60-day continuance and a 60-day extension of all procedural deadlines based on the recent discovery that a witness was not disclosed as having relevant knowledge regarding geology issues, the recent delivery of 1,700 additional documents by Applicant, and the necessity to conduct additional discovery based on this new evidence. According to CALH and the City, the ED, OPIC, and the Applicant are not opposed to a continuance. The ALJs also note that Applicant did not file a response opposing the continuance by the deadline set in 1 Texas Administrative Code § 155.307(d). Accordingly, the Motion for Continuance is granted and the hearing and prehearing conference are rescheduled as follows:

A prehearing conference will convene on:

October 29, 2015, at 10:00 a.m.
State Office of Administrative Hearings
William P. Clements Building
300 W. 15th Street, 4th Floor
Austin, Texas

The hearing on the merits will convene on:

November 2, 2015, through November 13, 2015, at 9:00 a.m. each day
State Office of Administrative Hearings
William P. Clements Building
300 W. 15th Street, 4th Floor
Austin, Texas

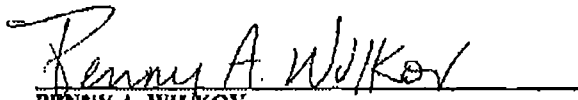
Adjusting Procedural Schedule

Because the hearing date has been adjusted, the ALJs also adjust the prehearing schedule (by 69 days, except where the date fell on a weekend) as follows:

DEADLINE/DATE	EVENT
July 27, 2015	Deadline to complete discovery
July 27, 2015	Deadline for Applicant to prefile its direct case in writing, including prefiled testimony and exhibits, a list of exhibits, and a list of witnesses in the approximate order of their presentation, with a very brief description of the subject matter of each witness's testimony
September 3, 2015	Deadline for each party other than Applicant, the ED, and OPIC to prefile its direct case in writing, including prefiled testimony and exhibits, a list of exhibits, and a list of witnesses in the approximate order of their presentation, with a very brief description of the subject matter of each witness's testimony

DEADLINE/DATE	EVENT
October 5, 2015	Deadline for the ED and OPIC to prefile its direct case in writing, including prefiled testimony and exhibits, a list of exhibits, and a list of witnesses in the approximate order of their presentation, with a very brief description of the subject matter of each witness's testimony
October 12, 2015	Deadline to file objections to any prefiled evidence and to any expert witness, and to file dispositive motions
October 19, 2015	Deadline to file responses to objections to any prefiled evidence and to any expert witness, and responses to dispositive motions
October 29, 2015	Prehearing conference convenes at 10:00 a.m. in the SOAH hearing facility in Austin, Texas, to rule on objections, pending motions, and other prehearing matters
November 2, 2015	Hearing on the merits convenes at 9:00 a.m. in the SOAH hearing facility in Austin, Texas each working day until completed.
November 13, 2015	Estimated end of the hearing on the merits

SIGNED May 4, 2015.


PENNY A. WILKOV
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS


ELIZABETH DREWS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: PINTAIL LANDFILL LLC
SOAH DOCKET NUMBER: 582-14-3597
REFERRING AGENCY CASE: 2012-0302-MSW

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
ALJ PENNY WILKOV

REPRESENTATIVE / ADDRESS

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