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January 24, 2006

Mr. Carl Edlund, Director, P.E.
Multimedia Planning and Permitting Division
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Re: Petition for Withdrawal of Program Approval for Texas RCRA Hazardous Waste Program,
Texas Disposal Systems Landfill, Inc., Docket No: W/Petition TX/RCRA-06-2006-0001

Dear Mr. Edlund:

On behalf of Petitioner, Texas Disposal Systems Landfill, Inc. ("TDSL"), in the above referenced proceeding, we are responding to the letter to you dated December 15, 2005 from Mr. Glenn Shankle, sent on behalf of the Texas Commission on Environmental Quality ("TCEQ"). There are several issues discussed in Mr. Shankle's letter that TDSL needs to address.

First, however, we note that Mr. Shankle's letter makes his position crystal clear. He states, "[I]t is appropriate to classify the co-mingled waste as non-hazardous." Mr. Shankle simply ignores the point of generation classification of the D008 waste and the regulatory requirements that attached at the point of generation at the accident scene in October 1997.¹ He would allow the commingled D008 waste to be classified as if it were a newly generated waste. This is clearly not allowed under the specific RCRA regulations we have previously delineated, such as 40 CFR §§ 261.3(d)(1), 261.5(i), 268.9(a) & (c), and 268.40(a)(1). In any case, we appreciate the fact that he has removed all doubts regarding his interpretation of Texas law and possibly Federal law.

In its Petition, TDSL made its position clear:

TCEQ has interpreted its rules to allow wastes classified as hazardous due to their toxic characteristics to be subsequently diluted or mixed and then reclassified as non-hazardous wastes. Such wastes could then be transported without a valid hazardous waste manifest and disposed of at facilities, such as municipal waste landfills, that are not authorized to manage hazardous wastes. No treatment would be required prior to disposal.

The facts are discussed in detail in the Petition, but in general the legal issues for EPA boil down to whether, under Federal law, these characteristically toxic hazardous wastes can be treated as non-hazardous waste once mixed with other wastes. In other words, can the point of generation of such a hazardous waste be changed to subsequent points of mixing with non-hazardous wastes and, thus, allow reclassification of the mixture?

¹ Zenith characterized the CRT waste as D008 based on process knowledge. Zenith had previously characterized this type of CRT waste from highway accidents as hazardous waste. Zenith has never changed its characterization of the waste.

Penske has argued that, under Texas law, such reclassification is allowed. Mr. Shankle agrees, possibly because of his willingness to accept Penske's argument that an "inadvertent dilution" exception is implied in TCEQ's rules. TDSL does not agree, and TDSL has appealed Mr. Shankle's decision to a Texas court.²

Even if TCEQ had created such an "inadvertent dilution" exception under Texas law, however, the issue in TDSL's Petition is Federal law. Neither Congress nor EPA has created such an exception for characteristically toxic hazardous waste, and for a number of good reasons. For instance, such an exception would encourage unscrupulous generators to evade the law, allowing hazardous waste to be disposed of at landfills without proper treatment.

Mr. Shankle is simply wrong to suggest that the issue before EPA in TDSL's Petition is "whether or not the waste currently stored in the 99 roll-off containers at TDSL's facility is hazardous." Federal law is clear. TCEQ and Penske both designated the D008 waste - the broken CRTs commingled with other waste from the accident scene - as a hazardous waste. Penske sent some of that D008 waste, which had been commingled with other waste from the TDSL landfill working face, to an authorized hazardous waste facility using a proper hazardous waste manifest. That is all that TDSL is requesting for the remainder of the commingled waste. The waste remaining at TDSL is hazardous waste under Federal law, and Mr. Shankle's reclassification approach puts the Texas program in conflict with Federal law.

In a meeting over a year ago, TDSL promised EPA that it would first pursue all options at TCEQ before returning to EPA to request that EPA exercise its authority. TDSL has done so. The result is a conflict in Texas and Federal law that puts TDSL and others at risk in the impossible position of having to comply with conflicting laws. The petition process is the appropriate formal step TDSL must use to resolve that problem.

Again, TDSL wants to emphasize, as it did in its Petition, that it prefers that TCEQ adopt EPA's interpretation of the language used in both state and federal rules for dilution of characteristically toxic hazardous waste. TDSL wants Texas to maintain its RCRA authorization. TDSL has only two options, the Petition or a lawsuit in federal court. Unlike Mr. Shankle, TDSL does not believe that the matter is "best resolved" in federal or any other court until EPA has first had the opportunity to resolve the matter.

In our meeting with your staff and that of Regional Counsel earlier this month, we discussed options for EPA, including the initiation of the authorization withdrawal process and EPA's overfiling of an enforcement action against Penske. We also discussed our options if EPA does not act in a timely fashion. TCEQ has put both EPA and TDSL in tough positions, with few options available.

There are several other aspects of Mr. Shankle's letter to which TDSL needs to respond. For example, Mr. Shankle states that there is little, "if any," D008 waste left at TDSL. That statement is not correct. There can be no dispute that a significant amount of D008 waste (and significant amounts of lead) remains in the commingled wastes at TDSL.³ If Penske had removed all of the D008 waste from TDSL soon after it sent

² Mr. Shankle stated in his letter a position taken by at least one Commissioner of TCEQ, that "this matter is best resolved in court." That may be true for Texas law, but not Federal law. A Texas court is not the appropriate forum for interpreting EPA's rules. An interpretation of Federal law is at issue, and the result could affect every state, as well as generators, shippers, and managers of hazardous waste with toxic characteristics.

³ Penske's own hazardous waste remediation contractor sorted through all the waste that TDSL removed from its landfill working face on the day following the accident. He determined that parts of over 220 CRTs had not been recovered and, thus, remain in the commingled waste, which is now stored in roll-off boxes at TDSL. There are likely to be

the waste to the landfill, there would be no petition. That may also be true if TCEQ had enforced the law eight years ago rather than waiting until 2004 to issue a notice of violation to Penske.

Mr. Shankle also suggests that the reason TDSL filed a petition is to influence its private lawsuit with Penske and Zenith. Thus, he provided you a copy of the lawsuit as the first attachment to his letter. This lawsuit and any other dispute between TDSL and Penske or Zenith are not relevant to the issues before EPA, *i.e.*, the proper administration and enforcement of RCRA regulations. Mr. Shankle knows that. He is obviously suggesting to EPA that the agency consider the potential impact of its decision on such a private lawsuit. That is not appropriate. TDSL is asking EPA to resolve an issue that could affect the entire nation, and all generators, transporters, and managers of characteristically toxic hazardous waste. That this answer may affect one aspect of the TDSL - Penske dispute should not be a concern for EPA or Mr. Shankle.

Finally, TDSL needs to comment on Mr. Shankle's statement that TCEQ "[does] not plan to take further action on Penske's [NOV]." That statement is a clear abdication of the State's commitment and responsibilities under its RCRA authorization from EPA. It is also one more admission that he does not interpret Texas law consistently with Federal law. It is one more clear statement by Mr. Shankle daring EPA to grant TDSL's Petition.

We appreciate the effort that you and your staff have made to address the Petition. If you or they have any questions, please feel free to contact us.

Sincerely,



Richard W. Lowery



James B. Blackburn, Jr.

XC: Stephen L. Johnson, Administrator, EPA
Richard Greene, Regional Administrator, Region VI, EPA
Troy Hill, Associate Director for RCRA, EPA Region VI
David Gillespie, Office of Regional Counsel, EPA Region VI
Cynthia Woelk, Office of the Texas Attorney General
Glenn Shankle, Executive Director, TCEQ
Derek Seal, General Counsel, TCEQ
Bob Gregory, TDSL
Gary Newton, TDSL
Kinnan Golemon, Brown McCarrol, LLP, Counsel for TDSL
Kerry Russell, Russell, Moorman & Rodriguez, LLP, Counsel for TDSL
Philip Comella, Seyfarth Shaw, Counsel for Zenith Electronics Corp.
Pamela Giblin, Derek McDonald, William Johnson, Baker Botts, Counsel for Penske

between 6,000 and 12,000 pounds of CRT waste, which had been characterized by Penske and Zenith as characteristically toxic hazardous waste, in that remaining commingled waste at the TDSL facility.