

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 16, 2005

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

Re: Petition for Withdrawal of Texas' Resource Conservation and Recovery Act Program, dated November 14, 2005, Docket No: W/Petition-TX/RCRA-06-2006-0001

Dear Mr. Edlund:

I'm in receipt of your recent letter advising the Texas Commission on Environmental Quality (TCEQ) of the Environmental Protection Agency's (EPA) informal investigation of Texas Disposal Systems Landfill's (TDSL) Petition (Petition) for Withdrawal of Program Approval for Texas Resource Conservation and Recovery Act (RCRA) Hazardous Waste Program. As set forth in your letter, the agency is afforded the opportunity to examine the petition and provide any information or comments that it believes are relevant to the matter. Accordingly, attached are the following items:

- 1) Lawsuits filed by TDSL and Penske Truck Leasing Co., L.P. (Penske) against the TCEQ¹;
- 2) The Executive Director's Original and Supplemental Responses to TDSL's July 9, 2004 Motion to Overturn (MTO);
- 3) EPA's September 2, 2004 letter to the TCEQ concerning disposal of wastes under RCRA;
- 4) The Executive Director's September 24, 2004 letter to Penske concerning the Commission's September 16, 2004 Order;
- 5) The Executive Director's October 19, 2004 letter of clarification to TDSL concerning the September 24, 2004 letter to Penske;
- 6) Transcript of Commission's Consideration of TDSL's October 18, 2004 MTO on December 1, 2004;
- 7) The Executive Director's October 12, 2005 letter to Penske;
- 8) Federal rulemaking preambles relating to the Mixture Rule and Land Disposal Restriction (LDR) Dilution Prohibition (55 FR 22520, June 1, 1990; 62 FR 64636 at 64644, December 8, 1997; 63 FR 25886, May 26, 1998; and 66 FR 27266, May 16, 2001); and

¹ An Agreed Order of Consolidation signed by the parties on 12/5/05; the Court ordered the following seven causes of action - Cause Nos. GN402245, GN403433, GN403519, GN403551, GN403900, GN404119, and GN404231 - be consolidated into one action under Cause No. GN402245.

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10) EPA Guidance Documents, FAXBACKs 11173, 12030, 13164 and 11140 relating to the Mixture Rule and LDR Dilution Prohibition.

I will not belabor the extensive and differing legal interpretations that have been advanced by the parties and the unique circumstances which have given rise to this petition; the various legal arguments are fully articulated in the attached seven causes of action. Rather, I will focus on the fundamental issue of this dispute which is whether or not the waste currently stored in the 99 roll-off containers at TDSL's facility is hazardous. Based on the facts and applicable RCRA regulations, it is appropriate to classify the co-mingled waste as non-hazardous as the available analytical data indicates that the waste does not exhibit a hazardous characteristic. This does not reflect a change in the agency's interpretation of applicable RCRA rules, including the Mixture Rule (40 CFR §261.3) and the LDR Dilution Prohibition (40 CFR §268.3). Importantly, it is consistent with EPA's applicable rules, preambles and FAXBACKs. The TCEQ has and continues to comply with the RCRA Delegation Memorandum of Agreement.

To briefly recap, on October 9, 1997, an accident involving a truck operated by Penske that was transporting television picture tubes owned by Zenith Electronics Corporation (Zenith) resulted in approximately 98 cubic yards, including approximately 200 picture tubes, of accident-related debris being deposited on the working face of TDSL's facility. The following day, approximately 80 cubic yards of accident debris was removed from the landfill, with the focus being the visible picture tube waste, and taken to an authorized facility by Penske. The vast majority of the waste in the 99 roll-off boxes is municipal solid waste disposed of at the landfill on the day of the accident, along with at most a very small portion, if any, of the remaining accident debris. Notwithstanding my exercise of authority to require Penske to remove the commingled waste, the waste remains in roll-off containers at TDSL's facility due to TDSL's refusal to allow Penske access to the material and the parties' ongoing legal dispute as to how the waste should be handled. Accordingly, because this matter is best resolved in court, I do not plan to take further action on Penske's Notice of Violation pending the resolution of this matter in court proceedings.

In closing, I assure you that TCEQ takes very seriously the agency's responsibility for the administration of Texas' RCRA Program as has been demonstrated in this matter and all RCRA issues handled by this agency since program approval. Please do not hesitate to contact me on any additional questions you may have.

Sincerely,



Glenn Shankle, Executive Director
Texas Commission on Environmental Quality

cc: David Gillespie, EPA, Region 6
Gautman Srinivasan, OGC, EPA
Tom Reinhart, OSW, EPA
Cynthia Woelk, Associate Attorney General, Office of the Attorney General
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