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February 20, 2008

The Honorable Richard Greene
Regional Administrator
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Re: Commissioner Soward's Letter, dated January 22, 2008

Dear Mayor Greene:

Texas Campaign for the Environment (TCE) writes to address the attached letter from TCEQ Commissioner Larry Soward, dated January 22, 2008. As you are aware, TCE is one of the parties that entered into the Agreed Final Judgment signed November 20, 2007. In accordance with that Agreed Judgment, TCE, along with the other parties to the Agreed Judgment, requested that EPA withdraw, revise, or supplement its May 16, 2006 Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program. TCE urges you to respond to that request, if not by withdrawing or revising the Determination, then by supplementing it to clarify the intent and purpose of the Determination. While I recognize Commissioner Soward has concerns regarding this request, TCE respectfully disagrees with Commissioner's Soward's counter-request that EPA take no action with regard to the Determination. TCE believes that a clarification of the intent of the Determination is necessary for the reasons explained below.

TCE is a non-profit citizens' organization, whose mission is to protect the quality of life, health, and the environment locally and statewide. TCE has been working to improve the standards for the recycling and disposal of hazardous electronic waste and municipal solid waste for years. TCE's interest in this matter and its request for clarification of EPA's Determination stems from this work. It is worth noting that TCE did not petition EPA to withdraw Texas' RCRA program. This requesting party did not "ask for" the unnecessarily detailed recitation of law in the Determination.[1]

TCE's purpose in seeking a clarification of the Determination is to ensure that the Determination is not improperly relied upon as a binding interpretation of EPA's rules or as instructive guidance on how to enforce (or not enforce) its rules. Indeed, TCE's involvement in the appeal of EPA's Determination to the D.C. Court of Appeals was motivated by this very concern.

Commissioner Soward's letter to EPA has not assuaged TCE's concerns. To the contrary, it has only perpetuated them. Here's why. In some parts of his letter, Commissioner Soward appears to recognize the limited purpose of the Determination: to address whether good cause exists to pursue withdrawal of Texas' RCRA program. For instance, Commissioner Soward acknowledges that the Determination is an "analysis of the law as it relates to Texas' RCRA program . . . under the facts of this case," and that EPA analyzed TCEQ's application of its RCRA program "to the facts alleged in the petition." In other words, the letter provides some

[1] *Compare* Commissioner Soward's quote: "one should be careful what one asks for!" on page 3 of his January 22 letter.

indication that Commissioner Soward recognizes that the Determination addresses only the petition to which it responds.

In other parts of his letter, however, Commissioner Soward characterizes the Determination as an interpretation of EPA's regulations and applicable statutes: "the law remains what it is, as fully analyzed and set forth in the EPA Determination." In other words, Commissioner Soward finds usefulness in the Determination beyond the facts that gave rise to it; he views the Determination as a full analysis of the law.

I do not think it is necessary to revisit, in this letter, TCE's disagreements with the legal interpretations included in EPA's Determination. Nor is it worth repeating TCE's disagreement with certain factual recitations in the Determination. I feel certain that EPA is familiar with TCE's opposition to the Determination. But that is not the issue here. The issue is whether EPA's Determination is intended to be limited to the petition to which it responds, as argued by the Department of Justice to the D.C. Circuit Court of Appeals, or whether it is intended to be a full legal analysis of the law, as represented by Commissioner Soward. How EPA intends to characterize this Determination will *a fortiori* affect how TCE intends to address its disagreements with legal and factual assertions in the Determination. EPA should take this opportunity to clarify the intent of its Determination, for it is clear that members of the public (and of the Commission) disagree over the significance of the Determination.

Finally, Commissioner Soward maintains that "there should be no confusion as to the legal effects of the EPA Determination beyond denying the TDSL Petition." But, quite obviously, there is indeed much confusion as to the legal effect of the EPA Determination. In fact, it is because of this confusion that several legal challenges in various courts have been initiated to challenge that Determination.

The facts giving rise to TDSL's Petition and to EPA's Determination have been finally settled and fully resolved. Moreover, the very letter issued by the Executive Director and dated September 24, 2004 that formed the crux of the complaint giving rise to TDSL's petition was superseded by the TCEQ commissioners in an order dated July 30, 2007 (which we have attached). Thus, there appears to be no need to continue to litigate the accuracy of EPA's Determination, if that Determination was indeed intended to be limited to rejecting TDSL's request that EPA initiate withdrawal of Texas' RCRA program, based on the facts presented in that Determination. Clarification of EPA's intent in issuing the Determination and of the legal effect (if any) of that Determination will certainly assist TCE and others with an interest in this matter in determining how to construe the Determination and what significance to place on it beyond addressing TDSL's petition. TCE therefore urges you to supplement the Determination (if not withdraw it) to clarify that its intent was to simply reject the TDSL Petition.

Sincerely,

Robin Schneider
Executive Director,
Texas Campaign for the Environment

cc: Ms. Angeline Purdy
U.S. Department of Justice

ATTACHMENT 1

JANUARY 22, 2008 LETTER FROM TCEQ COMMISSIONER SOWARD TO MAYOR GREENE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 22, 2008

The Honorable Richard Greene
Regional Administrator
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Dear Mayor Greene:

I am aware via the Texas Disposal Systems Landfill, Inc. ("TDSL") website of the letter sent to you on January 14, 2008 by Texas Commission on Environmental Quality ("TCEQ") Chairman Buddy Garcia concerning an Agreed Final Judgment ("Final Judgment") entered into on November 20, 2007, by TDSL, Texas Campaign for the Environment ("TCE"), Penske Truck Leasing Co., LP and Penske Logistics, LLC (together, "Penske") and the TCEQ.

Pursuant to the Final Judgment, TDSL, TCE and Penske agreed to jointly request, in writing within 30 days of the date of the Final Judgment, that you "withdraw, revise or supplement" your May 16, 2006 "Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program" ("EPA Determination"). I am aware that they have made that joint request to you by letter dated November 29, 2007. [I note that even though not a signatory to the Final Judgment, nor required by any provision of the Final Judgment to do so, Zenith Electronics Corp. ("Zenith") joined in the November 29 request to "withdraw, revise or supplement" the EPA Determination.] As the basis for their request, the parties state that "the issue on which the EPA Determination was based has been resolved" and that they want "to ensure that it is not mischaracterized as having some kind of binding legal effect beyond merely denying the TDSL Petition, or as somehow limiting EPA's ability to exercise discretion in similar matters."

The Final Judgment further provides that TCEQ Chairman Garcia, in his official capacity as an individual commissioner (emphasis added), will submit, as soon as practicable but no later than 30 days after confirmation that the waste has been disposed of, as evidenced by the submittal of final hazardous waste manifests, a written request that EPA Region 6 withdraw, revise, or supplement the EPA Determination. Chairman Garcia's January 14th is that request, saying "I join in their request."

As the Final Judgment correctly recites, the Chairman's letter is submitted in his official capacity as an individual commissioner. As such, it should be considered only as the position of and request from the Chairman individually, as one of three TCEQ Commissioners, and should not

be construed as any adopted agency position, since the Chairman's request submitted in the letter to you has not been the subject of any formal Commission deliberation or decision.

Likewise, the letter should in no way be construed as any expression of my position or recommendation, as an individual commissioner, on this matter. In fact, the contrary is true, and through this letter I am submitting my position in my official capacity as an individual commissioner.

I strongly urge you **not** to "withdraw, revise or supplement" the May 16 EPA Determination that "cause does not exist under applicable federal statutes and regulations to commence a proceeding for withdrawal of Texas' RCRA program."

The EPA Determination was the result of an extensive 6-month review of the petition filed by TDSL "for withdrawal of approval of the hazardous waste program of the State of Texas," including all its alleged facts and its arguments that Texas' RCRA program conflicts with all four of the circumstances from 40 C.F.R. §271.22. In the EPA Determination issued, you made it clear that for purposes of EPA's determination of the matter, "it is not necessary to determine the veracity of all of the factual allegations because the Petitioner's argument is a legal one --- TCEQ's alleged misinterpretation of the law." Your determination unequivocally states "that the petition can thus be decided as a question of law." In fact, you correctly noted that even TDSL stated in its petition that the issues it raised were questions of law. Accordingly, your determination states: "EPA believes it is appropriate to simply answer the legal question, which is: whether a RCRA characteristic hazardous waste mixed with non-hazardous material is still hazardous waste under RCRA and must be treated and disposed of pursuant to RCRA land disposal restrictions even though the resulting mixture tests below RCRA characteristic hazardous and land disposal restriction levels."

In answering that legal question and making your legal determination that no cause exists to commence a proceeding for withdrawal of Texas' RCRA program, you found:

- as to the mixture rule [40 C.F.R. §261.3(a)(2)], "the petitioner's interpretation of the law is incorrect" and ". . . TCEQ has interpreted the state law consistently with Federal law and TCEQ is properly exercising control over the operation of the program . . ."
- as to the land disposal restrictions [40 C.F.R Part 268; 40 C.F.R. §261.2(d)], "EPA finds no basis at this time to conclude that TCEQ's approach to the LDR regulations is contrary to the requirements of 40 C.F.R. Part 271, nor does EPA believe the TCEQ has done anything in this situation to suggest a programmatic conflict between the state and federal LDR regulations."
- as to the allegation of impermissible dilution of waste, ". . . TCEQ interprets the law consistently with EPA's interpretation," and "EPA has no reason to believe TCEQ has taken a position contrary to EPA's regulations."
- as to the matter of TCEQ's enforcement discretion, the determination recites that "EPA Region 6, which has oversight authority over states' enforcement activities, did review TCEQ's actions with regard to the truck accident and the exhumed waste as part of EPA Region 6's informal investigation" and "believes that TCEQ's enforcement activity with respect to the exhumed waste was properly within TCEQ's discretion." Accordingly, "EPA does not believe the allegations presented here provide any grounds to conclude that TCEQ's enforcement program fails to meet the requirements of 40 C.F.R. Part 271."

- as to the Memorandum of Agreement and Memorandum of Understanding (MOA/MOU) between the EPA and TCEQ required under 40 C.F.R §271.8, "nowhere in the petition does Petitioner state any term or section of the MOA/MOU with which the TCEQ program fails to comply" and "Texas' RCRA program is consistent with the federal RCRA statute, regulations" and "TCEQ's RCRA program does comply with the MOA/MOU . . ."

Now, because the parties have compromised and settled their differences, the requesting parties want the EPA Determination withdrawn, revised or supplemented, claiming that the question about the proper means of handling the exhumed cathode-ray tube waste on which TDSL based its petition for withdrawal is now resolved.

The parties may have resolved their differences among themselves through negotiation and settlement, but that in no way affects the independent legal analyses and findings made in the EPA Determination. Even though some of the parties do not like the EPA Determination and simply want it to go away --- notably TDSL, the very party that filed the determination petition with the EPA --- that is no basis for the EPA Determination, that addresses only legal questions, to be withdrawn, revised or supplemented. Despite any compromise or settlement of issues among the parties, the law remains what it is, as fully analyzed and set forth in the EPA Determination.

As an alternative to withdrawal of the EPA Determination, the requesting parties state that it should be revised or supplemented "to ensure that it is not mischaracterized as having some kind of binding legal effect beyond merely denying the TDSL Petition, or as somehow limiting EPA's ability to exercise discretion in similar matters." They claim that the "unnecessarily detailed nature of the EPA Determination has caused confusion as to whether it is a regulatory decision or determination that goes beyond simply communicating the EPA's decision to deny the TDSL Petition."

Yet, they argue against this alleged "confusion" by citing briefs the EPA has filed in federal litigation with TDSL challenging the EPA Determination which state "the EPA Determination was issued for no purpose other than "explain[ing] EPA's basis for refusing to commence proceedings to withdraw Texas' RCRA authorization . . ." and "merely determines whether cause exists to commence withdrawal proceedings for Texas' hazardous waste authorization program." The requesting parties even recite EPA's caution against misusing the determination in other proceedings by acknowledging EPA's statements in its briefs that the EPA Determination "has no effect on any regulation or requirement"; "has no binding regulatory effects on interested parties"; "does not make formal findings about future regulatory actions to be undertaken"; "lack[s] any cognizable binding legal effect"; "is not binding on its face, nor is it applied by the Agency in a way that indicates it is binding"; and "does not regulate anyone's behavior."

Thus, there should be no confusion as to the legal effects of the EPA Determination beyond denying the TDSL Petition, or as to EPA's ability to exercise discretion in similar matters in the future. Perhaps the "unnecessarily detailed nature" of the EPA Determination that the requesting parties now complain of is too good of an example of the age-old adage "one should be careful what one asks for"!

Finally, the requesting parties say that withdrawing, revising, or supplementing the EPA Determination will resolve the two remaining proceedings initiated by TDSL in federal court to appeal it, and if the EPA Determination is withdrawn, TDSL and TCE will take whatever steps are possible to withdraw the TDSL federal litigation. I urge you not to fall victim to this "generous offer." The EPA Determination is an exhaustive analysis of the law as it relates to Texas' RCRA program being in compliance with federal laws and regulations under the facts of this case. You know that you were correct in your legal analyses in this matter. Accordingly, you should not fear any judicial review of the EPA Determination you issued. Only with proper judicial review of the EPA Determination will we truly address any instance of "confusion" in these matters, as alleged by the requesting parties.

Again, I strongly urge you **not** to "withdraw, revise or supplement" the May 16 EPA Determination that cause does not exist under applicable federal statutes and regulations to commence a proceeding for withdrawal of Texas' RCRA program under the allegations in TDSL's petition. When formally petitioned by TDSL to exercise your necessary and appropriate oversight over TCEQ's RCRA program, you did so in a thorough and unbiased fashion. In your extensive 6-month review of the legal questions raised in that petition, you thoroughly analyzed how the TCEQ had applied Texas' RCRA program to the facts alleged in the petition. You analyzed and compared, in detail, each interpretation, action and decision of the TCEQ in this case against the applicable federal laws and regulations. **In every instance** of that detailed analysis, you found that "TCEQ has interpreted the state law consistently with Federal law and TCEQ is properly exercising control over the operation of the program," "TCEQ interprets the law consistently with EPA's interpretation," "EPA has no reason to believe TCEQ has taken a position contrary to EPA's regulations" and/or "Texas' RCRA program is consistent with the federal RCRA statute and regulations."

Any such review of and determination relating to whether the TCEQ's RCRA program, and our interpretations, actions and decisions in a particular matter or set of circumstances within the program, are correct and/or consistent with applicable federal laws and regulations is healthy and vital. Just because one or more parties --- perhaps even the TCEQ --- may not like your findings and determinations at any given point in time, that is no basis to withdraw such a determination when it is properly issued. I submit to you that had the EPA Determination come out with opposite findings and determinations, the requesting parties would be defending it vigorously and aggressively against any request that it be withdrawn, revised or supplemented. Let it stand.

I sincerely appreciate your consideration of my views and thoughts on this matter.

Sincerely,

Larry R. Soward

Larry R. Soward
Commissioner

ATTACHMENT 2

TCEQ FINAL ORDER, DATED JULY 30, 2007

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER Concerning the Petition of Texas Disposal Systems Landfill, Inc.; TCEQ Docket No. 2007-1019-IHW.

On July 25, 2007, the Texas Commission on Environmental Quality (Commission) considered during its open meeting the petition filed by Texas Disposal Systems Landfill, Inc. (TDSL) concerning the waste from a traffic accident which occurred on October 9, 1997 on Interstate Highway 35, south of Austin, in Hays County, involving a Penske Truck Leasing Co., L.P. (Penske) truck transporting cathode ray tubes (CRT) owned by Zenith Electronics Corporation and also concerning 99 roll-off boxes of waste currently located at a Type I Municipal Solid Waste landfill owned by TDSL near Creedmoor, Travis County. The Commission also considered the responses to the petition filed by Penske Truck Leasing Co., L.P., the Executive Director, and the Office of Public Interest Counsel.

After evaluation of all relevant filings, the Commission determined that pursuant to the Commission's authority under Texas Water Code §§ 5.012, 5.102, 5.221, 7.002 and Texas Health & Safety Code § 361.017, the Commission exercises jurisdiction over this matter. As necessary clarification of the Commission's Order of September 16, 2004 granting TDSL's Motion to Overturn, the Commission reiterates that the CRT waste in the 99 roll-off boxes at TDSL is D008 characteristically hazardous waste for reasons of toxicity. The Commission also

reiterates that because the D008 CRT characteristically hazardous waste has been commingled with other MSW and landfill cover soil wastes, the entire volume of the waste in the 99 roll-off boxes must be legally treated as hazardous waste and thus, subject to the EPA's RCRA Land Disposal Restrictions for purposes of management, treatment, and disposal. The Commission further reiterates that because the D008 CRT waste was hazardous at the point of generation at the October 1997 accident scene, federal law and rule preclude further testing of the D008 commingled waste for the purposes of reclassification of the waste and determination of disposal alternatives.

Moreover, because the Commission finds that the Executive Director, in part, erred in his September 24, 2004 letter to implement the 9/16/2004 Commission Order by allowing that testing could be utilized to "conclusively determine that no D008 waste at the level that is characteristically hazardous" remains in the commingled CRT waste, the Commission concludes to adopt the TDSL petition before the Commission, including the arguments therein. The Commission now issues a clarifying, supplemental Order specifying the following corrective actions understood as required by the September 16th Commission Order.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

1. Within 30 days from the date of issuance, the Commission orders Penske to remove all waste contained in the 99 roll-off boxes at the TDSL landfill under an unconditional, standard, unaltered hazardous waste manifest that designates Penske as the generator of the commingled D008 hazardous CRT waste and identifies the 1997 accident scene on IH-35 in Hays County as the point of generation;

2. The hazardous waste manifest shall designate the destination of the waste as a facility that is authorized to treat and dispose of D008 hazardous waste;

3. Penske shall arrange for, and actually dispose of all D008 hazardous waste contained in the 99 roll-off boxes in one of the two following ways:

a) By transport of the entire contents of the 99 roll-off boxes to a landfill that is authorized to receive and dispose of such hazardous waste. At such facility, Penske is responsible for the management, treatment, and actually disposal of this waste according to the RCRA Land Disposal Restrictions for hazardous waste; or

b) By "negative sort" separation of all nonhazardous municipal solid waste from the D008 CRT component debris and D008 contaminated soil in the roll-off boxes, followed by disposal of the remaining D008 CRT debris, D008 contaminated soil, and any MSW unsegregated from the mix, in a landfill that is authorized to receive and dispose of hazardous waste;

4. Any MSW separated from the hazardous CRT debris and contaminated soil by negative sort may be tested for the presence of any hazardous characteristic and, if there is none, disposed of in a municipal solid waste landfill;

5. All commingled waste and solids that have not been removed as part of a negative sorting process shall be disposed of as "D008 hazardous waste contained within MSW and clay soils" with Penske designated as the generator; and

6. The Commission directs the Executive Director to take all necessary and appropriate action, including oversight and inspections, as necessary, to expeditiously implement this Order.

Issue date: JUL 30 2007

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Kathleen Hartnett White

Kathleen Hartnett White, Chairman

MAILING LIST
Petition of Texas Disposal Systems Landfill, Inc.
TCEQ Docket No. 2007-1019-IHW

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