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An Analysis of EPA's Response to TDSL's Request to Overfile Enforcement Action and to Encourage the TCEQ to Direct the Proper Disposal of D008 Waste Generated at a Truck Accident Scene on October 9, 1997

Overview

Texas Disposal Systems Landfill, Inc. ("TDSL") submitted a petition to withdraw the Texas Hazardous Waste Program to the Environmental Protection Agency Region 6 ("EPA") on November 14, 2005. The primary purpose of the Petition was to provide the EPA with the basis to encourage or force the TCEQ to follow the letter and spirit of RCRA, and to disregard political pressure to allow Municipal Solid Waste (MSW) landfills to be used as dumps for mismanaged hazardous wastes. TDSL also used the petition process to present the facts of the case to EPA, to counter the concerted efforts of the TCEQ and Penske to rewrite history. TDSL filed the petition after the Executive Director of the Texas Commission for Environmental Quality ("TCEQ") stated in an October 12, 2005 letter that he was going to defer enforcement of the RCRA Program in this case to a state district court. The enforcement at issue related to a Notice of Violation issued by the Executive Director to Penske for hazardous waste management violations in 1997 that resulted in hazardous waste generated by Penske being sent to TDSL's landfill as non-hazardous waste and abandoned there to this date. The October 12, 2005 letter clarified and was consistent with the Executive Director's refusal to bring enforcement in this case over the past several years. The EPA issued a response dated May 16, 2006, relying on incorrect assumption of facts, denying TDSL's petition to withdraw and taking a position that no further enforcement action was warranted.

In explaining its response, EPA stated that “many, if not all” the critical facts are in dispute, when they are not. EPA was also very careful to state that it was not making any factual determinations in the dispute between TDSL, Penske and Zenith concerning the hazardous waste Penske generated and effectively caused to be shipped to TDSL. EPA stated there were many fact questions that needed to be determined by a trier of fact. It said, “EPA does not believe it is appropriate to act as the finder of fact.” EPA did reference disputed legal issues (not facts), but misstated key undisputed facts, which we believe materially altered their conclusions and their legal determination. EPA simply ignored its, and TCEQ’s, responsibility under RCRA to be the fact finder in such situations and, instead, relied on incorrect assumptions supplied by Penske and the Executive Director to make a determination that no further enforcement is needed.

What EPA did do is announce some legal principles regarding the mixture rule, land disposal restrictions, and the impermissible dilution rule which, if applied together, would allow hazardous waste generators to ship hazardous waste to a MSW landfill and, once the hazardous waste is commingled with the non-hazardous waste and landfill clay cover soils, assert that the diluted mixture is no longer hazardous and, therefore, can remain in the municipal solid waste landfill. TDSL obviously believes that any such interpretation of RCRA creates a massive regulatory loophole, which many generators of hazardous waste will use to their financial advantage. Simply put, EPA has created an “inadvertent dilution exemption” for toxic characteristic hazardous waste disposed in a MSW landfill subsequent to the known point of hazardous waste generation, when no such exception exists in RCRA.

In reality these new EPA legal principles do not apply to the actual facts in this case. Some of the reasons the legal principles in the EPA’s response do not apply

to the D008 toxic characteristic hazardous waste generated at the Penske truck accident scene on October 9, 1997 are explained below.

Factual Misstatements

In its summary of allegations, EPA says, “At least some of the CRT’s were mixed with non-hazardous accident debris, solid waste, and soil when they were placed into the face of the TDSL landfill, sorted for visible CRT parts which were taken to another facility, and the remaining removed waste (“exhumed waste”) was containerized at TDSL.” The “exhumed waste” is referenced throughout the response, even though EPA’s definition of the exhumed waste in its response does not reflect what actually exists in this case. Although the EPA says the solid waste and CRT’s were “sorted for visible CRT parts which were taken to another facility,” this did not occur to any of the 99 containers’ contents currently stored for Penske at the TDSL landfill. EPA also made a similar invalid assumption in a December 10, 2004 letter by Robert Dellinger to the National Solid Wastes Management Association in which he said “although we understand from conversations with Texas State officials that they take the position that all hazardous waste has been removed from the landfill...”. EPA is inappropriately relying upon the assumption that all (or virtually all) of the hazardous CRT waste was removed from the commingled containerized waste, when, in fact, there was no CRT waste sorted from the commingled waste that was removed and containerized in the 99 boxes stored at the TDSL landfill. The truth is that only a small amount of the hazardous CRT waste was accessible on the surface of the landfill working face immediately after the landfill operators learned that they had received seven dump truck loads of hazardous accident debris over the previous hour. That glass accident debris and other glass soiled solid waste was removed from the surface of the landfill working face six years before the entire

commingled hazardous CRT Waste and commingled non-hazardous waste and clay landfill cover soil was removed for future hazardous waste sorting or disposal. EPA's statement is inaccurate but important because there remains an estimated 6,000 to 10,000 pounds of hazardous CRT waste in the so called exhumed waste that still needs to be addressed in accordance with the legal principles EPA recites in its response (related to treatment and disposal). Penske's own hazardous waste remediation expert confirmed that 223 CRT steel bands and the associated CRT glass were not recovered and must remain in the commingled waste, which is now in the 99 containers. Further, the damaged and discarded hazardous components were CRTs (component parts discarded during the manufacturing process), not finished television sets.

Mixture Rule

The EPA states that when a characteristic hazardous waste is mixed with non-hazardous waste and the resulting mixture does not exhibit any characteristics of hazardous waste, then the resulting mixture is no longer characteristic hazardous waste. There are two problems with applying this general statement to what EPA calls the exhumed waste. First, the hazardous CRT waste generated at the truck accident scene is a toxic characteristic (D008) waste. Simply diluting the waste does not remove the bioaccumulative hazardous constituent. So, therefore when it is commingled with non-hazardous waste, the toxic characteristic remains as an environmental threat. As of now, Penske, Zenith and TCEQ have failed to homogenize or sort out the CRT D008 waste that is commingled within the municipal and commercial solid waste and clay landfill cover soils. Penske and Zenith have refused to sort out the toxic CRT waste from the non-hazardous fraction of solid waste and clay soils, as was done with the remainder of the Penske trailer's contents, which was removed from the surface of the working face of the

landfill and from the scene of the accident. Second, the EPA also refers to the commingled exhumed waste as an amalgamated mixture, when no homogenous mixing has occurred in this instance. EPA simply says it presumes the exhumed waste is a mixture of solid waste when, in fact, it is not a mixture appropriate for SW 846 representative sampling. EPA just represents that if the exhumed waste does not exhibit any characteristics of hazardous waste, then it would not be a regulated hazardous waste; even if it contained pieces of CRTs that would be hazardous if sorted and sampled alone. The sampling performed by Penske, Zenith and TCEQ to date is not representative because it was of the separate fractions of non-hazardous waste and soil only. No samples of the toxic CRT waste that were found during the excavation and that remains commingled with the containerized solid waste and landfill cover soils were tested.

Even if you assume EPA's interpretation of the mixture rule is correct and that the Executive Director and Defendant's incorrect assumption that the CRT waste has been sorted out of the containerized commingled waste, there is not sufficient analysis of the hazardous characteristics of the exhumed waste to classify it as non-hazardous waste. To determine if the exhumed waste exhibits a characteristic of hazardous waste under EPA's interpretation of the law, representative samples must be taken. Representative samples are very difficult to obtain because the presumed mixture is a heterogeneous material that is not uniformly dispersed. Under EPA's interpretation, the exhumed waste must be either homogenized or a sufficient number of random grab samples (not composites as was previously done) should be taken. A sufficient number of random grab samples would be at least 25 per container, maybe more depending on the volume of the container. Randomness is determined by laying out a grid with equal areas, then using a random number generator program that identifies different locations in the container from which to take one of the grab samples. Each grab sample must first

be analyzed for total lead to insure it is representative. Total lead should be at least 300 ppm to be representative based on a material balance analysis. If the grab sample is at least 300 ppm, then the TCLP test can be performed. If no samples are at least 300 ppm from a container, then another round of random grab samples should be taken from the same container and analyzed for total lead. If any of the 25 representative sample results of at least 300 ppm total lead exceeds the 5 ppm, TCLP limit, then either the entire contents of the container should be classified as regulated hazardous waste or a negative sort to remove the hazardous portion should be performed. The hazardous portion should be sent to an authorized Subtitle C facility for treatment and disposal. Since no representative sampling of the containerized waste as described above has occurred, re-classification of the exhumed waste from hazardous to non-hazardous is inappropriate at this time.

Land Disposal Restrictions

EPA correctly states that once a waste exhibits a toxic hazardous characteristic (such as D008 lead) when generated, it must meet LDR treatment standards before it may be land disposed. The D008 CRT waste was generated at the truck accident scene on October 9, 1997. The subsequent commingling of that D008 CRT waste with household waste, commercial waste and clay landfill cover soils is no substitution for treatment under LDRs. The point of hazardous waste generation did not move to the landfill or to the waste containerization, just because the generator, who was several hours late in notifying the accident responders and TDSL that the accident debris was hazardous waste, chose to not bear the cost for the proper removal, treatment and disposal of the D008 waste glass generated at the accident scene. EPA also stated a number of critical facts remain unresolved that would help determine which LDRs apply in this case. Such facts would include whether the accident scene waste exhibited a toxic characteristic, and

whether the exhumed waste is a newly generated waste. According to all the known data provided by Penske and Zenith, regarding the Zenith CRTs at the Penske truck accident scene, the CRTs and the minimal mixture of other waste at the accident scene were a D008 toxic characteristic waste at the moment the truck overturned. According to the EPA, even if the D008 CRT waste was mixed so that the resulting mixture in the landfill no longer exhibits the toxic characteristic for lead, it still must be treated to the LDR treatment standard for lead, as well as all underlying toxic hazardous constituents included under 40 CFR § 261.24, Table 1 (See Page 9, full paragraph 2, of EPA May 16, 2006 response to TDSL Petition). This requirement alone defeats Penske and Zenith's position that the commingled waste in the 99 containers has been properly sampled, does not need LDR treatment and can now be disposed in a non-hazardous waste landfill. No LDR determination has been made and there has been no LDR evaluation or determination on "all underlying hazardous constituents".

As for the commingled D008 CRT waste, non-hazardous waste and landfill clay cover soil in the containers, EPA also states that one of the LDR's standards for this debris are "work practices," such as separating the contaminating fraction from the non-hazardous material before sampling. TDSL agrees with this position and acknowledges that this sorting and separation of the known presence of 6,000 to 10,000 pounds of D008 CRT waste could be done, just as Penske managed the remainder of the accident debris in 1998, or, in the alternative, treat the entire commingled waste matrix as D008 waste and dispose of it accordingly.

Impermissible Dilution

EPA quotes the rule that a person is prohibited from diluting a restricted waste as a substitute for adequate treatment to achieve compliance with the LDR treatment

standard. In this case, there was no actual dilution of the hazardous component of the CRT waste. The CRT waste, which is commingled with the landfill waste in the 99 containers, still exhibits the same toxic characteristic that it did when it was generated at the accident scene. Further, the CRT waste can be hand sorted from the contents of the 99 containers. Again, the non-detect TCLP data provided to EPA by the TCEQ and referred to in the EPA response is misleading because it was for soil samples retrieved from the surface of some of the containers of commingled exhumed waste, not samples of the D008 CRT waste contained within the containerized waste. The sample testing also was limited to lead, and did not take into consideration any hazardous constituents in the municipal solid waste that lose their RCRA exemption in this situation.

Summary

EPA had an opportunity to make decisions in its response to TDSL's petition that could have established a clear national precedent that toxic characteristic hazardous waste cannot be converted to non-hazardous waste through mixing and abandoning in MSW landfills, inadvertent or otherwise. Instead, EPA passed on this opportunity by refusing to make some basic factual determinations, such as the point of generation of the hazardous CRT waste, the identity of the generator, whether the CRT waste could avoid proper treatment by abandonment in a MSW landfill, and whether the CRT waste still exhibits the characteristic that it did at the accident scene. By simply announcing some general legal principles without a reliance upon specific facts, EPA simply confused the situation. EPA further confused the situation by stating that it was not relying upon the disputed facts recited in their letter, and then basing its position that no further enforcement is warranted on those same inaccurate assumptions. Clearly, EPA and the TCEQ are required by RCRA to determine the facts related to the enforcement needed in this

case. It is irresponsible for EPA and TCEQ to defer to a state district court and jury to render technical rulings under RCRA as a part of a trial to determine damages.

There is no chance for a verdict in a civil damages lawsuit to render such definitive answers appropriate for an environmental agency enforcement action. While EPA has ruled that the D008 CRT waste and other underlying hazardous constituents present in the waste matrix must meet the LDRs before land disposal (See EPA's Robert Dellinger letter dated December 10, 2004, EPA's letter response to TCEQ dated September 2, 2004 and EPA's May 16, 2006 response to TDSL's Petition, page 9), EPA should clarify that the D008 CRT debris must either be separated from the commingled waste matrix for treatment and disposal as D008 waste, or the commingled waste in the 99 containers must be treated for lead and other underlying hazardous constituents found in the household and commercial waste and disposed of accordingly. EPA chose to leave the impression that the TCEQ has acted responsibly, while failing to make the crucial determinations required to prevent similar illegal disposal of toxic characteristic hazardous waste. EPA's response has established a dangerous national precedent that is directly contrary to the letter and spirit of RCRA. EPA should initiate its own enforcement investigation and clarify its position on the need for enforcement against Penske and Zenith for the mismanagement of their hazardous waste since October 9, 1997.