LOWERRE & FREDERICK
ATTORNEYS AT LAW
44 East Avenue, Suite 100
Austin, Texas 78701
(512)469-6000/482-9346 [facsimile]

BLACKBURN & CARTER
ATTORNEYS AT LAW
4709 Austin St
Houston, Texas 77004
(713)524-1012/524-5165[facsimile]

August 25, 2006

Richard Greene
Regional Administrator
Environmental Protection Agency
1445 Ross Avenue
Suite 1200
Mail Code: 6RA
Dallas, TX 75202-2733

RE: TDSL APPEALS FILED IN WESTERN DISTRICT OF TEXAS, 5TH CIRCUIT COURT OF APPEALS, AND THE DISTRICT OF COLUMBIA COURT OF APPEALS

Dear Mr. Greene:

1. Purpose of Letter: This letter is sent for three purposes:

First, it is a request that EPA withdraw its letter of May 16, 2006 ("letter determination") in response to Texas Disposal Systems Landfill, Inc. ("TDSL") petition to revoke Texas' RCRA delegation (Docket No: w/petition TX/RCRA-06-2006-001) ("Petition"), due to the errors in EPA's assumptions about the facts and its error in application of federal law.

Second, it is to put EPA on notice that its May 16, 2006 letter establishes a bad public policy precedent. The principles announced in the May 16, 2006 letter determination will allow hazardous waste generators to ship regulated hazardous waste to non-hazardous municipal solid waste landfills to be diluted with non-hazardous waste and clay cover soils rather than be disposed at an authorized facility.

Third, it is to advise EPA that, although TDSL has filed petitions for review of EPA's decision, those appeals may not be necessary if EPA withdraws its letter. These appeals have been filed in

the Western District of Texas (Civil Action No. 1:06-CV-642LY), United States Court of Appeals for the Fifth Circuit (No. 06-60740), and United States Court of Appeals for the District of Columbia (No. 06-1279).

One of TDSL's primary concerns with EPA's letter determination is that EPA did not accept the facts in TDSL's petition as true; nor did it conduct its own investigation to determine the facts. Instead, EPA claims it did no fact finding, yet rejected the factual allegations of TDSL. EPA apparently accepted the statements from TCEQ or Penske as true, even though many of statements are inaccurate.

By this letter, Petitioner TDSL again directs EPA's attention to the attached letter from Robert Dellinger to Dr. Edward Repa. This letter directly contradicts EPA's position with regard to the application of the LDRs. Some of the language in the Dellinger letter may have caused confusion regarding the actual facts in this case, and may have led to the incorrect assumptions reflected in EPA's May 16 letter determination---that all the toxic characteristic hazardous wastes have been removed from the mixed wastes or blended into it as a type of treatment. That is not true, as explained in more detail below.

TDSL also directs EPA to the Preamble to the relevant hazardous waste regulations. Like the Dellinger letter, the Preamble interprets the applicability of the LDRs in a manner that is directly contrary to EPA's interpretation in its letter decision.

2. Factual Errors: EPA's decision is clearly based on incorrect factual assumptions. TDSL may be partly to blame if it did not assist EPA in determining which of TCEQ's and Penske's factual claims were true or at least undisputed. Penske has often succeeded at obfuscating the facts. Nevertheless, in embarking on an "informal investigation of the allegations in the Petition," EPA should have determined the veracity of the factual allegations made by TCEQ or Penske before relying upon them to reach its decision.

In its letter determination, EPA states that it "does not believe it is appropriate to act as the finder of fact." TDSL agrees, but only if EPA assumes facts in the petition are true. EPA did not. Instead, EPA apparently accepted incorrect statements of fact presented by others.

EPA also states that "many, if not all," the critical facts are in dispute. This statement is, in part, inaccurate. Many of the most pertinent facts that form the basis of TDSL's Petition are not in dispute. Those facts should have been accepted by EPA as true. TDSL has highlighted some of those facts below.

EPA's incorrect assumption about the location or condition of the D008 wastes: Perhaps the best, and the most troubling, example of EPA's mischaracterization of the undisputed facts is reflected in its list of "critical facts [that] remain in dispute," including "whether the initial waste (the amalgamation of CRTs and soil picked up after the accident) exhibited a characteristic." No one—not Penske, TCEQ, or TDSL—disputes that the broken CRTs at the accident scene are D008 hazardous waste. And no one disputes that the point of generation was the scene of the accident. EPA should have, at the very least, accepted these facts as true.

On page 4 of EPA's letter determination, EPA makes another significant erroneous assumption. EPA assumes that all the identifiable and removable hazardous waste in the mixture of the D008 wastes and the municipal solid wastes was removed. EPA states the "mixture of solid waste and CRTs" in question has been "sorted for visible CRT parts which were taken to another facility, and the remaining removed waste was containerized at TDSL." Yet, there is no question that the waste that remains at TDSL has **not** been sorted! That is the crux of the problem for which TDSL seeks redress.

It is true that some of the commingled hazardous and municipal solid waste was removed, sorted, and transported to another facility shortly after it was delivered to TDSL, but not all of the commingled waste was removed. Seven truckloads of broken CRTs and accident debris were delivered and deposited at the TDSL landfill. Only a portion of that waste (the portion that was visible and accessible on the surface of the working face) was initially removed.

The commingled waste that was not immediately removed is the waste that is of concern here. That waste was simply left at the TDSL landfill, until TDSL exhumed it and stored it in the 99 containers. TCEQ has provided several letters to TDSL that acknowledge and approve of the efforts by TDSL to isolate the waste in these containers. No one has sorted this waste, and

certainly, no one has proposed to remove it under a proper hazardous waste manifest. Yet, it is undisputed that at least some D008 hazardous waste remains in those 99 containers.[1]

In his December 16, 2005 letter to EPA, TCEQ Executive Director Glenn Shankle describes the waste in the 99 containers as municipal waste, "along with at most a very small portion, if any, of the remaining accident debris."[2] Of course, neither Mr. Shankle nor his staff has actually sorted the waste to determine how much D008 hazardous waste remains in the containers. Nevertheless, the fact that Mr. Shankle recognizes that at least some D008 hazardous waste might remain in the containers is significant. At the very least, it demonstrates that despite the risk of the presence of D008 toxic hazardous waste, TCEQ has determined that the waste be classified as special waste, without even fully investigating the character of the waste.[3]

EPA's assumption that all of the identifiable CRT waste has been sorted and removed is again highlighted when EPA describes the "exhumed waste" as an "amalgamated mixture." There is nothing in the record to support such an assumption. The D008 waste materials are still distinguishable, not amalgamated. There was never an effort to homogenize the waste to allow for representative sampling or for treatment of the mixture to eliminate or reduce the toxic characteristic materials.

The fact is that the D008 wastes still exist in discrete pieces that are still distinguishable, can still be sorted, and can still exhibit their characteristic toxicity. There is no credible evidence to the contrary. The fact that Penske could sort the D008 waste from some of the commingled waste and did not even try with other commingled waste should be proof enough.

On page 6 of its decision, EPA states that the Petitioner claims the entire mixture must be treated as hazardous waste. That is not what Petitioner claims. With some evaluation, some of the

---

[1] The amount of D008 hazardous waste that is in those containers may be a disputed fact. TDSL's expert has opined that an estimated 6,000 to 10,000 pounds of hazardous CRT waste remains in the containers. The fact that at least some D008 hazardous waste remains in those containers, however, is not in dispute. For purposes of TDSL's petition and EPA's determination, the presence of any D008 hazardous waste is what is of paramount importance.

[2] Although he uses the term "debris," it is clear that Mr. Shankle is referring to D008 hazardous waste; he makes no distinction between the accident debris and the CRTs or "picture tube waste."

[3] Even Penske's hazardous waste remediation expert confirmed that CRT steel bands and the associated CRT glass were not recovered from the landfill working face. Yet, rather than confronting the evidence that some amount of D008 waste must remain in the containers and investigating how much of that waste remains or determining how it should be treated, the Executive Director has chosen to assume that little, if any, hazardous waste remains, and the "matter is best resolved in court." In other words, when faced with a difficult decision, the Executive Director shirked his duties, and punted to the judicial system.

commingled waste might be treated as non-hazardous waste. Until then, the mixture must be managed as having hazardous waste within it. The sorting that was started can continue and any part of the mixture that is properly cleaned of D008 waste can then be removed as a non-hazardous waste.

But the D008 CRT waste – the toxic characteristic hazardous waste in the mixture was not changed by the mixing. There is no evidence that the CRT wastes in the mixture "no longer exhibit" the toxic characteristics that make them hazardous. Indeed, that is the crux of the problem: CRT waste undisputedly remains in the commingled waste stored in the containers on TDSL's property, but there has been no attempt to identify, separate, and test that waste for exhibition of toxic characteristics.

Perhaps if Petitioner had more clearly presented the actual facts and more precisely explained that the CRT wastes can still be observed, sometimes in large chunks, in the commingled waste stored in the containers on TDSL's property, EPA would have reached a different decision, one that is consistent with the Dellinger letter. Yet, there is no factual or legal basis for EPA to assume that the D008 waste has been removed, homogenized or amalgamated, resulting in only a non-hazardous waste mixture.

EPA's incorrect assumption regarding the amount of D008 wastes: EPA also got some of the most basic facts wrong. EPA states, for example, that the wastes involved "19-inch color televisions," when in fact the waste involved hundreds of Cathode Ray Tubes, not 19-inch television sets. Penske's own expert confirmed that steel bands from 223 CRTs were not recovered. Those bands and other associated CRT waste remain in the commingled waste, which remains at the TDSL landfill site. There remains an estimated 6,000 – 10,000 pounds of toxic characteristic 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.

EPA's failure to allow Petitioner to address any failures to explain the facts: In conducting its informal investigation, if EPA indeed discovered that it was lacking some basic factual information, it should have allowed Petitioner an opportunity to provide that information. This is especially true given the fact that representatives of Petitioner met with EPA and specifically asked if anything in

the petition was unclear or if additional information was needed. The representatives of EPA's Region 6 office indicated that they needed no additional information or clarification.

Thus, while EPA purports to base its conclusions on strictly legal issues that do not depend on resolving any factual disputes, EPA resolved or assumed a number of facts, and it did so directly contrary to the facts clearly presented in the petition. As will be discussed below, EPA's legal analysis is, therefore, flawed.

3. Legal Errors: EPA makes a number of erroneous statements of law, which are explained below. A discussion of those errors must begin with the assumption of basic, undisputed facts. Those facts are, as explained above, that the broken CRTs are D008 toxic hazardous wastes, and that the point of generation was the scene of the accident. It is axiomatic that hazardous wastes, such as these broken CRTs, cannot lose their hazardous character simply because they are combined with other substances. They are subject to "cradle-to-grave" regulation in order to protect public health and the environment.

Mixture Rule

TDSL does not dispute that the mixture rule, specifically, 40 CFR § 261.3(a)(2), does not apply here. That rule provides that solid waste that is not otherwise hazardous becomes a hazardous waste if it is mixed with a *listed* hazardous waste. Because the broken CRTs are *characteristic* toxic hazardous wastes and not listed hazardous wastes, the municipal solid wastes that are commingled with the broken CRTs and stored in the 99 containers are not presumed to be hazardous, simply by virtue of the mixture. TDSL does not claim otherwise.

Nevertheless, the broken CRT parts that remain in the commingled waste are hazardous. They have not been properly treated. Thus, they retain their toxic hazardous characteristic. There is nothing in the rules that allows for altering their classification as D008 toxic characteristic hazardous wastes.

EPA's interpretation and application of the definition of hazardous wastes and the mixture rule here are quite simply erroneous. EPA states that if a mixture of characteristic hazardous waste and non-hazardous solid waste does not exhibit any characteristic of hazardous waste, then the mixture is no longer hazardous waste. EPA first cites the definition of hazardous waste for support, 40 CFR § 261.3(d)(1). This rule, however, does not support EPA's interpretation.

Reading subsections (c) and (d) of section 261.3 together, EPA's rules provide that unless and until it no longer exhibits a characteristic of hazardous wastes, a hazardous waste remains a hazardous waste. In other words, unless and until a hazardous waste is properly treated to remove its characteristic, it remains hazardous. The rule says nothing of mixtures.[4] Applying the rule to the broken CRTs at issue here, those CRTs were classified as toxic characteristic hazardous waste at the point of generation; they have not been treated to remove that characteristic; their character cannot be changed simply by combining them with other substances; and they therefore remain toxic characteristic hazardous waste, under EPA's rules.

Land Disposal Restrictions

In its letter determination, EPA explains that LDRs may apply to once-characteristic hazardous waste that no longer exhibits a characteristic when disposed. This explanation of the LDRs is simply inconsequential here. The broken CRT parts in the 99 containers are undisputedly toxic characteristic hazardous wastes; they still exhibit their toxic characteristic, for they have not been treated to remove the characteristic. Thus, they are subject to LDRs. There should be no confusion with regard to this issue; the rules regarding LDRs are clear.

Nevertheless, EPA states that a number of critical facts remain in dispute, and these facts bear on if and when LDRs apply. EPA goes on to list some of those disputed facts as: (1) whether the initial waste exhibited a characteristic; (2) the extent to which the CRTs were removed from the "amalgamated mixture"; (3) whether the exhumed waste is deemed "newly generated"; and (4) the contents of the exhumed waste. These factors, however, have no bearing on the applicability of the LDRs.

First, it is undisputed that the initial wastes, the broken CRTs, were toxic characteristic hazardous wastes. There is no need for EPA to await resolution of this issue, for there is no dispute.

Second, there is no dispute that no CRTs were removed from the "amalgamated mixture" currently stored in the 99 containers. Identifiable CRTs were removed from the surface of the landfill

[4] EPA has acknowledged that some characteristic hazardous wastes can be treated by dilution. In those cases, the so-called "mixture" that results from the dilution of the waste may no longer exhibit a hazardous waste characteristic and thus, may no longer be considered a hazardous waste. Dilution, however, is not an acceptable treatment for toxic characteristic hazardous wastes. Thus, toxic characteristic hazardous wastes cannot lose their hazardous character simply because they are combined with other substances. They must be properly treated. In fact, in its Preamble to the rules, EPA provides an example that illustrates this very point.

working face shortly after they were deposited there, but no sorting of the CRT parts currently stored in the 99 containers has occurred.

Third, the exhumed waste is not "newly generated" waste. The broken CRTs remain in that commingled waste, and those broken CRTs are still hazardous wastes. It is worth repeating that a hazardous waste does not lose its character simply because it is combined with other substances. Indeed, in its Preamble, EPA expressed that its rules were intended to avoid the enormous difficulties of determining new points of generation every time a hazardous waste is altered in some respect. The toxic characteristic wastes at issue here were never properly treated. They retain their toxic characteristics. And their point of generation is still the scene of the accident.

Finally, regarding the contents of the exhumed waste, it is undisputed that at least some broken CRT parts remain in that commingled waste. This is the most pertinent and crucial fact. Taking this undisputed fact as true, as EPA should have, the legal issue becomes quite simple. The commingled waste must be sorted, and the toxic characteristic hazardous waste must be removed and treated. In the alternative, all of the commingled waste in the 99 containers must be removed from the TDSL facility under a proper hazardous waste manifest.

Impermissible Dilution

EPA writes in its letter determination regarding the dilution rule:

> While improper "dilution" of a characteristic hazardous waste under RCRA might be unlawful, **"dilution of a characteristic hazardous waste has nothing to do with whether the dilution or mixed waste is classified subsequently as characteristic hazardous waste."**

While EPA and TCEQ enjoy broad discretion in deciding whether to pursue an enforcement action for improper dilution, that is not the issue here. The issue is whether the D008 toxic characteristic hazardous waste that remains in the commingled waste must be managed as a hazardous waste.

EPA appears to assume that the commingling of the hazardous waste with municipal solid waste is akin to "dilution" of the hazardous waste. Assuming, for the sake of argument, that the commingling of the waste is equivalent to dilution, the dilution that may have occurred here was not

a proper treatment, and no one claims it is. To the contrary, in the Preamble to the relevant rules, there is much discussion regarding when dilution is proper to treat characteristic hazardous wastes. In that Preamble, EPA acknowledged that in some instances, dilution is considered an acceptable treatment method to remove the hazardous characteristics of ignitability, corrosivity, and reactivity. Thus, for "non-toxic hazardous characteristic wastes," it does not matter how the non-toxic characteristic property is removed, so long as it is removed. But the same standard is not true for toxic characteristic hazardous wastes. "Simple dilution is not effective treatment for toxic constituents." This is because dilution does not remove or treat any toxic constituent from the waste. It simply increases the volume of waste but does not necessarily stabilize the underlying toxic lead constituent.

Absent proper treatment of toxic characteristic hazardous waste, the waste obviously remains hazardous, as it still contains its toxic constituents.[5] It must therefore be transported as hazardous waste unless and until it is treated.

EPA correctly states on page 9 that the LDR standards for soil or debris are "work practices," such as separating the contaminating fraction from the non-hazardous material before sampling. This separation of the hazardous CRTs can still be done. Penske did so with the remainder of the accident debris in 1998 that is no longer at the TDSL site. But that has not yet been done with the waste stored in the containers.

TCEQ's Enforcement Discretion

Finally, EPA appears to assume that the basis for TDSL's Petition was TCEQ's failure to enforce against a violator for improper dilution of hazardous waste. To the contrary, TDSL does not seek enforcement against any violator. Rather, TDSL's concerns lie with the proper treatment and disposal of hazardous wastes. TDSL operates a municipal solid waste landfill. It is neither authorized nor equipped to treat or dispose of hazardous waste. Indeed, disposal of hazardous waste at the TDSL landfill would likely lead to serious environmental consequences. This is particularly true when the hazardous waste at issue contains toxic constituents. In its Preamble to the rules,

[5]The non-detect TCLP data provided to EPA by the TCEQ and referred to in the EPA letter determination cannot be a basis for a LDR determination because it was for soil samples retrieved from the commingled exhumed waste, not the samples of toxic characteristic hazardous CRT waste. The samples were simply not the representative samples that EPA contemplated in promulgating its rules.

EPA recognized the serious risks and concerns associated with toxic characteristic hazardous waste, and accordingly, insisted on proper treatment of such waste and prohibited dilution.

TCEQ, on the other hand, has construed its rules to be more flexible with regard to toxic characteristic hazardous wastes. In contrast to EPA's rules, TCEQ appears to allow multiple points of generation and changes in the classification of waste once the form of the hazardous waste is altered in some manner, rather than cradle-to-grave regulation of the hazardous waste, as EPA intended. Moreover, although EPA has strictly prohibited dilution as a means for treating toxic characteristic hazardous waste, TCEQ has decided that in at least this instance, dilution may be a sufficient treatment for removing toxic constituents, and once diluted, the waste is deemed "newly generated" and may be land disposed as special waste. TCEQ has made no effort here to ascertain whether the toxic constituents have been stabilized in the D008 hazardous waste, and yet, it has allowed the waste to be re-classified as "special waste" and transported as such.

In sum, if Texas allows toxic characteristic hazardous waste to be re-classified as special waste simply by increasing the volume of such waste, then every toxic hazardous waste generator will have an incentive to dispose of their waste in Texas. And every municipal solid waste landfill operator will be at risk of liability for the consequences of accepting toxic characteristic hazardous waste. That is the basis of TDSL's Petition to EPA.

Conclusion: The EPA decision, if not withdrawn and corrected, will allow the disposal of toxic characteristic hazardous waste without the required treatment to eliminate the risks inherent in the waste – the toxicity to humans and wildlife. Moreover, the impact of EPA's decision will be far from a limited impact. It will allow risks of exposure to toxic materials that EPA's rules clearly found unacceptable. It will reduce the incentives for recycling and reuse of toxic materials. It will put all municipal solid waste landfills and other waste managers at risk.

EPA should withdraw its decision and reexamine the undisputed facts. There is no question about the generator of the hazardous CRT waste, when it was generated, whether the waste has been diluted or "amalgamated," or whether the D008 waste still exhibits the toxic characteristic that it did at the accident scene.

EPA has already ruled that the CRT lead waste and other underlying hazardous constituents present in the waste matrix must meet the LDRs before land disposal. (See the attached letter from Robert Dellinger.) EPA simply applied the law to the wrong facts.

EPA passed on an opportunity to reiterate what, until now, appeared to be a clear national policy: toxic hazardous waste cannot be converted to non-hazardous waste through commingling with non-hazardous waste in municipal landfills. Upon reevaluation, EPA should clarify that the hazardous CRT waste in the commingled stored waste must either be separated from the other waste matrix for treatment and disposal as D008 waste or the entire commingled or mixture of waste must be treated as a hazardous waste when removed from TDSL's property.

If you need any additional information, please contact me at anytime.

Sincerely,

Richard E. Lowerre
Lowerre & Frederick

cc: David Gillespie, EPA Region 6, Assistant Regional Counsel
Roger R. Martella, EPA General Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

Dr. Edward W. Repa, PhD
Director, Environmental Programs
National Solid Wastes Management Association
4301 Connecticut Avenue, N.W. Suite 300
Washington D.C. 20008

Dear Dr. Repa,

Thank you for your letter dated August 10, 2004 to Lillian Bagus regarding the status of a toxic characteristic hazardous waste if mistakenly sent to a non-hazardous waste landfill and inadvertently mixed with non-hazardous waste.

You first ask whether mixtures of characteristic wastes and non-hazardous wastes remain classified as hazardous waste. More specifically, we read your question as being whether a characteristic waste which loses its characteristic as a result of dilution remains a characteristic, so that any such diluted mixture would remain a hazardous waste. In fact, under the Federal Subtitle C rules, a characteristic waste can be decharacterized by any means (including dilution), and so long as the mixture does not exhibit a characteristic any longer, the mixture is no longer a hazardous waste. See 40 CFR section 261.3 (d)(1).

However, the treatment standards required by the land disposal restrictions would normally continue to apply. See the final sentence of section 261.3 (d)(1), which sets out the principle that wastes that exhibit a characteristic when generated must be treated to meet land disposal restriction treatment standards before they can be land disposed, even if they no longer exhibit a characteristic when they are disposed. See also, Chemical Waste Management v. EPA, 976 F. 2d 2, 6-14 (D.C. Cir. 1992) (upholding this principle). Thus, a characteristic hazardous waste that is mixed with a solid waste so that it no longer exhibits the characteristic is still subject to the land disposal restriction (LDR) treatment standards found at 40 CFR 268.20, even though the resulting mixture is no longer hazardous. The LDR requirements attach at the point of generation of the characteristic waste (i.e., before mixing).[1]

[1]As an aside, characteristic wastewaters (unlike nonwastewaters) may be mixed with solid wastes then injected into deep underground wells or placed in surface impoundments subject to

Therefore, such wastes are subject to the applicable treatment standards of 40 CFR 268.40, including the requirement to identify and treat underlying hazardous constituents (see 40 CFR 263.2(i) and 268.9(a)) prior to placement in a landfill. It should also be noted that dilution of a hazardous waste as a substitute for adequate treatment to achieve compliance with LDR treatment standards is considered a type of impermissible dilution.[2]

Your letter also mentions an ongoing case in Texas. This response to you is not meant in any way to comment specifically on that matter, although we understand from conversations with Texas State officials that they have taken the position that all hazardous waste has been removed from the municipal landfill and properly disposed of in a hazardous waste landfill. As you know, the hazardous waste program under the Resource Conservation and Recovery Act (RCRA) is implemented by authorized states, which have their own regulations and policies. Thus any issues regarding a specific case should be addressed through the appropriate state agency.

I hope you find this information useful. If you have any further questions, please contact Tracy Atagi of my staff at 703-308-8672.

Sincerely,

Robert Dellinger, Director
Hazardous Waste Identification Division

---

controls imposed by the Clean Water Act (CWA) without meeting 40 CFR 268.40 treatment standards. (40 CFR 268.1(c)(3) and (4)).

[2]For further discussion on the applicability of land disposal restrictions to characteristic wastes, see May 15, 2001 letter *Land Disposal Restriction Requirements for Characteristic Wastes* from James R. Berlow, Director, Hazardous Waste Minimization and Management Division to Mr. T. L. Nebrich, Jr, Waste Technology Services, available at http://www.epa.gov/rcraonline/.