

CITATION
THE STATE OF TEXAS

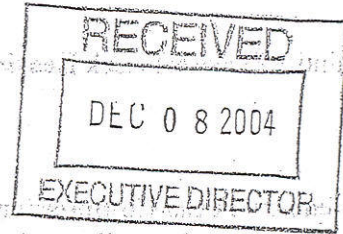
Cause No. GN403900

PENSKE TRUCK LEASING CO., L.P.

, Plaintiff

vs.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Defendant



To: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY BY
SERVING ITS EXECUTIVE DIRECTOR GLENN SHANKLE
MC 109, P.O. BOX 13087
AUSTIN, TEXAS 78711-3087

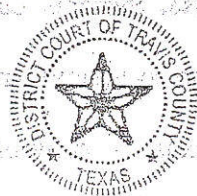
Defendant, in the above styled and numbered cause:

YOU HAVE BEEN SUED. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 A. M. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.

Attached is a copy of the ORIGINAL PETITION of the PLAINTIFF in the above styled and numbered cause, which was filed on the 30th day of November, 2004, in the 201ST Judicial District Court of Travis County, Austin, Texas.

ISSUED AND GIVEN UNDER MY HAND AND SEAL of said Court at office, this the 2nd day of December, 2004.

REQUESTED BY:
WILLIAM P. JOHNSON
98 SAN JACINTO BLVD.
AUSTIN, TEXAS 78701
(512) 322-2665



AMALIA RODRIGUEZ-MENDOZA
Travis County District Clerk
Travis County Courthouse
1000 Guadalupe, P.O. Box 1748
Austin, Texas

By: *[Signature]*
MICHAEL HARGIS, Deputy

RETURN

Came to hand on the ___ day of ___ at ___ o'clock ___ M., and executed at ___ within the County of ___ on the ___ day of ___ at ___ o'clock ___ M., by delivering to the within named

each in person, a true copy of this citation together with the accompanying pleading, having first attached such copy of such citation to such copy of pleading and endorsed on such copy of citation the date of delivery.

Service Fee: \$ _____

Sworn to and subscribed before me this the ___ day of _____

NOTARY PUBLIC, THE STATE OF TEXAS

Service Copy

Constable Precinct 5

BRUCE ELFANT
CONSTABLE PREC. 5, TRAVIS COUNTY, TEXAS
SHERIFF/CONSTABLE BY AUTHORIZED PERSONS

BY: _____

PRINTED NAME OF SERVOR

County, Texas

GN403900-001

MAILED THIS ___ DAY OF _____
BRUCE ELFANT
CONSTABLE, PREC. 5, TRAVIS COUNTY, TEXAS
BY: *[Signature]*
DEPUTY

DEC 06 2004

Cause No. GN403900

Plaintiff Penske Truck Leasing Co., L.P,

§
§
§
§
§
§

201 Judicial District Court

v.

Defendant Texas Commission on Environmental Quality

Travis County, Texas

Plaintiff's Original Petition

Plaintiff Penske Truck Leasing Co., L.P. ("Penske" or "Plaintiff") files this original petition seeking judicial review of the actions of Defendant Texas Commission of Environmental Quality ("TCEQ" or "Commission") as follows:

I. Case Overview

1. Penske appeals the Commission's Ruling on September 16, 2004 granting the Motions to Overturn filed by Texas Disposal Systems Landfill, Inc. ("TDSL") regarding the approval by the Executive Director of a plan to remove and dispose of certain waste currently stored at TDSL's landfill in Creedmoor, Texas. A copy of the Commission's Interim Order is attached as Exhibit A.

2. Penske filed a Motion for Rehearing with the Commission seeking to overturn the September 16, 2004 decision that is the subject of this appeal. The Commission's deadline to act on Penske's Motion for Rehearing was on or about November 1, 2004.

3. On November 1, 2004, the Commission's deadline to act on Penske's Motion for Rehearing passed without further action by the Commission. As such, pursuant to Tex. Gov't. Code § 2001.146(c), Penske's Motion for Rehearing was "overruled by operation of law" due to the Commission's inaction as of November 1, 2004.

FILED

04 NOV 30 PM 3: 07

Ursula Rodriguez
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

4. Thus, Penske has exhausted all of its administrative remedies and is entitled to judicial review of the Commission's Ruling on September 16, 2004 granting the Motions to Overturn filed by TDSL. See Tex. Gov't. Code § 2001.171.¹

II. Discovery Control Plan

5. This case is an appeal of an action of an administrative agency that occurred outside of the contested case process of Chapter 2001, TEX. GOV'T CODE. The case, therefore, should be controlled by a Level 3 order, and Penske may need to conduct discovery pursuant to the Texas Rules of Civil Procedure. TEX. R. CIV. P. 190.4.

III. Parties

6. Plaintiff Penske Truck Leasing Co., L.P. is a Delaware limited partnership that conducts business in Texas.

7. Defendant TCEQ is an agency of the State of Texas. Defendant TCEQ can be served with citation by registered or certified mail, return receipt requested, through Executive Director Glenn Shankle, at MC 109, P.O. Box 13087, Austin, TX 78711-3087, or by hand delivery through Executive Director, Glenn Shankle, at 12100 Park 35 Circle, Austin, TX 78753. A copy of this petition will also be forwarded to Cynthia Woelk, Assistant Attorney General, Natural Resources Division, Office of Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548.

¹ From abundance of caution, Penske filed an original appeal and petition on October 15, 2004 in order to comply with the 30-day deadline pursuant to Texas Water Code, § 5.351 (if applicable) for appealing the Commission's September 16, 2004 decision. That appeal is docketed as Cause No. GN4-03433. Penske files this original appeal out of an abundance of caution to comply with the deadline pursuant to Tex. Gov't. Code § 2001.176 (if applicable) for appealing the Commission's September 16, 2004 decision within 30 days of the denial by operation of law of Penske's Motion for Rehearing. For judicial efficiency, Penske will move to consolidate its two appeals of the Commission's September 16, 2004 order at a later date.

IV. Jurisdiction and Venue

8. Jurisdiction of this action lies in this Court pursuant to Section 5.351, TEX. WATER CODE, and Section 361.321, TEX. HEALTH & SAFETY CODE. Penske is a person affected by Commission's September 16, 2004 ruling overturning the Executive Director's approval of Penske's plan to remove and dispose of waste stockpiled at TDSL as non-hazardous, special waste. Penske files this appeal to set aside, modify, and/or suspend the Commission's act. Venue is proper in this Court under Section 5.354, TEX. WATER CODE, and Section 361.321, TEX. HEALTH & SAFETY CODE. Jurisdiction and venue are also proper in Travis County, Texas because all or parts of the acts and omissions complained of occurred in Travis County and Defendant TCEQ is located in Travis County.

V. Factual Background

1997 Accident

9. On October 9, 1997, a Penske truck that was transporting new television picture tubes owned by Zenith braked and swerved to avoid a car that had crossed the median from northbound to southbound I-35 near Buda, Texas. The Penske truck tipped over and slid down an exit ramp. There is no dispute that the driver who crossed the median, not Penske, caused the accident. In fact, after the accident the driver who crossed the median ran over and hugged the Penske driver and thanked him for saving his life.

10. It is not clear if any tubes were broken as a result of the accident itself. It is clear that cleanup contractors not hired by or affiliated in any way with Penske caused the picture tubes to spill from the truck and waste to be generated during the course of uprighting the truck and clearing the debris from the accident scene.

11. Penske played no role in the clean-up of the accident, the selection of the transporter, or the decision to send the accident debris to TDSL. Penske did not hire the wrecker service, the cleanup contractors that loaded some of the accident debris into dump trucks, or the dump truck operators that decided to send the accident debris to TDSL.

Disposal of the accident debris at TDSL

12. On the day of the accident, Penske worked diligently to assess the damage at the accident scene and take appropriate action. Before cleanup contractors not hired by Penske destroyed many of the television tubes by improperly uprighting the truck and loading the debris into dump trucks, the Penske driver correctly responded to DPS personnel that the intact television picture tubes that Penske was transporting for Zenith were not hazardous materials.

13. At 3:38 p.m., Penske personnel spoke with Zenith personnel and learned that broken television tubes were possibly hazardous waste. At 4:03, Penske contacted the Texas Natural Resources Conservation Commission ("TNRCC") (predecessor to the Texas Commission on Environmental Quality ("TCEQ")) and informed it that the tubes contained lead and could be hazardous waste.

14. At 4:08, the first dump trucks arrived at TDSL. At 4:33, Penske spoke with Jim Gregory at TDSL and informed him that the load could be hazardous waste. If TDSL had required a manifest or had inspected or held the loads for twenty-five minutes in order to contact Penske, Zenith, or state regulators, it could have avoided disposing of any accident debris into its landfill. TDSL, however, accepted the accident debris for disposal without any contract, manifest, shipping document, or communication whatsoever with or from Penske or Zenith.

15. In addition, at the time it accepted the accident debris, TDSL knew the debris contained broken television picture tubes (among other debris) and that television tubes contained lead. Significantly, TDSL knew that it could accept television tubes in small quantities, but not larger quantities.

16. Notwithstanding this knowledge, TDSL did not pass that information along to any of its employees. Furthermore, TDSL failed to hold the accident debris in order to contact Penske, Zenith, or state regulators before allowing the accident debris past its gatehouse. Instead, TDSL rushed seven dump-truck loads (98 cubic yards) of undocumented accident debris into its landfill.

17. TDSL did not attempt to speak with Penske, Zenith, DPS, the Buda Fire Department, or the TNRCC about the characteristics of the undocumented waste before accepting the waste for disposal.

Removal of the accident debris from TDSL

18. On the day of the accident, TDSL disposed of an estimated 98 cubic yards of accident debris consisting of television picture tubes, packaging materials, soils, and other materials from the scene of the accident. In other words, the 98 cubic yards did not consist purely of damaged tubes; rather, the waste was a mixture of broken tubes and all of the other debris and materials generated at the scene of the accident.

19. After Penske told TDSL to stop dumping the accident debris into the landfill's working face, Code 3 (a company specializing in emergency response and environmental remediation) was hired to complete the clean-up process and remove all remaining debris from the accident scene. Code 3 removed the remaining debris from the accident scene and placed the

debris into four lined roll-off containers. The four roll-offs were stockpiled (not disposed of) at TDSL awaiting further instructions.

20. On October 10, 1997 (the day after the accident), TDSL removed at least two roll-off boxes (80 cubic yards) of television-tube glass and waste mixed with the television-tube glass from its working face. Code 3's records indicate that TDSL removed three roll-off boxes (120 cubic yards) of television-tube glass and waste mixed with the television-tube glass from its working face.

21. TDSL used both heavy machinery and hand-picked out the television-tube glass. TDSL placed the 80 to 120 cubic yards of television-tube glass debris that it removed from its landfill into roll-off containers and stockpiled the roll-offs with the four other roll-offs from the accident scene that were never disposed of into TDSL's landfill.

22. After TDSL's removal of all visible glass, it is highly questionable whether any appreciable amount of accident debris remained disposed of in TDSL's landfill on the day after the accident. In particular, because TDSL removed all visible television-tube glass and waste mixed with television-tube glass from its working face, it is highly questionable whether any leaded glass remained in the working face of TDSL's landfill. TDSL has never proved, or even tried to prove, that any appreciable lead remained after its excavation the day after the accident.

23. It is clear that on the day after the accident, the overwhelming majority of the accident debris was stockpiled (not disposed of) in seven roll-off containers (approximately 280 cubic yards) at TDSL awaiting final disposal.

24. In February 1998, Code 3 was hired to separate the potentially "hazardous" portion of the accident debris waste stockpiled in the roll off containers from the non-hazardous portion. It

separated two roll-offs of what it conservatively labeled "hazardous" waste, including glass-containing soil. The five remaining roll-offs contained the "non-hazardous" accident debris.

25. On March 23, 1998, the two roll-offs containing the television-tube glass were shipped to Texas Ecology ("TECO") for disposal. The remaining roll-offs were sent to a municipal solid waste facility for disposal.

26. On April 2, 1998, TECO tested a representative sample of the television-tube glass and soil-glass mixture using the Toxicity Characteristic Leaching Procedure ("TCLP") method. It detected no leachable lead in the sample at a reporting level of 0.1 ppm. To reiterate, TECO conducted the test on the "worst" part of the accident debris that was collected in two roll-offs. Thus, the only data on the accident debris itself (in fact, the worst part of the debris) shows that the material TDSL accepted for disposal was not a hazardous waste.

TNRCC Inspection

27. The TNRCC was responsive and involved in the appropriate disposal of the accident debris from day one. On November 5, 1997, the TNRCC requested that Penske provide a description of the incident and documentation of the proper disposal of the waste generated.

28. On December 2, 1997, Marc Althen, Senior Vice President at Penske, wrote a letter to Chris Smith at the TNRCC detailing Penske's plan to remove the "stockpiled waste" stored at TDSL's landfill. As stated, Penske's contractor removed the stockpiled waste contained in the seven roll-off containers on March 23, 1998.

29. On May 20, 1998, Marc Althen informed Ben Milford that the stockpiled waste had been removed from TDSL and provided Mr. Milford with copies of the transportation manifests. Penske took all precautions and removed and disposed of the stockpiled waste as if it were

hazardous. Later testing by the disposal facility, TECO, confirmed that the waste was in fact non-hazardous.

30. On May 21, 1998, TNRCC Regional Inspector Ben Milford issued an inspection report to TDSL stating that: "The TNRCC allowed the spill waste that was inadvertently deposited in the landfill to remain there." Ben Milford testified that the report meant that TDSL could permanently dispose of the tubes, not simply temporarily store the tubes.

31. On June 10, 1998, the TNRCC issued a spill report that stated that "the TNRCC allowed them [TV tube debris] to remain in the landfill." Again, Ben Milford testified that the TNRCC "allowed it [the waste] to stay there just like any other waste."

TDSL agreed that the waste could remain at its landfill.

32. Like the TNRCC, TDSL agreed in 1998 that the waste could remain at its landfill.

33. On January 28, 1998, Mr. Gary Newton (TDSL's general counsel) sent Mr. Gerald Bolmer (TNRCC Waste Evaluation Section) a draft request to classify the waste as Class 1, non-hazardous waste and permanently dispose of the waste in TDSL's landfill. Mr. Newton testified that he spoke with the TNRCC and they "didn't have any problem" with the material remaining in the landfill. Bob Gregory agreed that TDSL could permanently dispose of the waste with special authorization from the TNRCC, and that the TNRCC "would and could allow them [the waste] to remain if we requested it."

34. On February 3, 1998, TDSL wrote Penske a letter stating that "[n]ow it appears that the TNRCC is willing to allow the tubes to remain in the TDSL landfill without further testing."

35. While all parties agreed that the debris could remain disposed of at TDSL with TNRCC authorization, TDSL decided instead to sue Penske, Zenith, the Penske driver, and the driver of the car that caused the accident in Hays County District Court in February, 1998.

Excavation and testing of municipal solid waste

36. In early 2004, over six years after TDSL removed possibly all of the accident debris from its landfill, TDSL chose to excavate approximately 1600 cubic yards of waste from the landfill and placed it into 99 roll-offs. TDSL excavated all the waste it had received on October 9, 1997 even though there was no indication that any leaded glass from the accident remained in the landfill after TDSL's removal of all visible glass the next day.

37. While it was being removed from the landfill, it was sampled by Penske's contractor SKA Consulting LP ("SKA"). The result of the sampling performed by SKA, as well as the sampling later performed by the Executive Director, confirm that the waste is non-hazardous. In fact, out of the numerous representative samples tested, none detected leachable lead greater than 0.1 mg/L.

38. The waste has remained in the roll-offs at the landfill since that date as TDSL made no arrangements for its disposal. TDSL alleges that Penske and Zenith must remove all 1600 cubic yards as hazardous waste, despite the testing results to the contrary from TECO, SKA, and the Executive Director.

TDSL holds the excavated municipal solid waste hostage

39. Although Penske continues to believe that it did not violate any rule and that the material does not need to be removed from TDSL's landfill — a fact borne out by the TNRCC's conclusion years ago that the material could remain in the TDSL landfill and the results of recent

testing by Penske and the TCEQ — on June 1, 2004, Penske proposed a plan for the removal and disposal of the waste from the TDSL landfill as a non-hazardous waste at another permitted municipal solid waste landfill in accordance with the actions requested of it by the Executive Director on May 13, 2004.

40. That plan was approved by the Executive Director on June 18, 2004, and specific authorization was granted by the Executive Director for disposal of the waste as a special waste in any one of seven permitted landfills on June 30, 2004.

41. Penske's efforts culminated in final preparations for the pick up of the waste by its contractor USA Environment on July 7, 2004. TDSL, however, refused to allow access to the landfill for removal of the waste unless the waste was managed as a hazardous waste.

42. In response to TDSL's refusal to allow Penske to remove the waste, the TCEQ performed independent representative sampling and testing of the waste. On July 12, 2004, the Executive Director collected 20 representative samples of the waste in the roll-offs. The testing of those samples by MicroLife Laboratories, Ltd. further confirms the non-hazardous character of the stored waste, with no TCLP result exceeding 0.092 mg/L. TDSL, however, again refused to allow Penske to remove the waste unless the waste is managed as a hazardous waste.

43. Pursuant to Section 361.003(12), TEX. HEALTH & SAFETY CODE, sections 335.504 and 330.2(55), Title 30, TEX. ADMIN. CODE, and 40 C.F.R. Part 261, this waste is not a hazardous waste.

TDSL sues the TCEQ

44. Instead of rejoicing that the waste is non-hazardous and facilitating the removal of the waste, on July 9 and July 22, 2004, TDSL filed motions to overturn the Executive Director's

decisions on the classification of the waste. In addition, on July 19, 2004, TDSL appealed the Executive Director's classification of the waste and sued the TCEQ in Travis County District Court. TDSL took no action to prosecute its judicial appeal while its motions to overturn were pending before the Commission.

45. On September 16, 2004, the Commission, by a two-to-one vote, granted TDSL's Motions to Overturn and issued an Interim Order remanding the matter to the Executive Director for further consideration. The Commission did not make any rulings regarding the classification of material at TDSL's landfill and did not give any specific instructions to the Executive Director. A copy of the Commission's Interim Order is attached as Exhibit A.

46. On October 6, 2004, Penske filed a Motion for Rehearing requesting that the Commission rehear and reverse its September 16, 2004 decision and instead affirm the Executive Director's actions in approving Penske's plan to remove and dispose of the material at TDSL's landfill as non-hazardous, special waste. Pursuant to Tex. Gov't. Code § 2001.146(c), Penske's Motion for Rehearing was "overruled by operation of law" due to the Commission's inaction as of November 1, 2004.

47. The Commission's decision on September 16, 2004, has a direct effect on Penske. The Commission overruled the Executive Director's approval of a special waste authorization submitted by Penske and prevented Penske from taking the corrective action requested by the Executive Director.

VI. Error of Defendant

48. Defendant erred by granting the Motions to Overturn filed by TDSL. The Executive Director correctly approved a plan to remove and dispose of certain waste currently stored at TDSL's landfill in Creedmoor, Texas as non-hazardous, special waste.

49. The Defendant erred by granting TDSL's Motions to Overturn because: (a) TDSL's Motions to Overturn were procedurally defective; (b) the facts confirm that the material at TDSL's landfill is not hazardous; and (c) the law compels that the material at TDSL's landfill is not hazardous.

50. The Defendants' reversal of the Executive Director's approval of classification of the material as non-hazardous, special waste was contrary to applicable law, arbitrary and capricious, an abuse of discretion, and not supported by the evidence properly before the Commission.

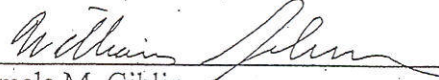
VII. Prayer

Penske, therefore, respectfully requests that the Court:

- Reverse the Commission's decision on September 16, 2004 granting the Motions to Overturn filed by TDSL and instead affirm the Executive Director's approval of a plan to remove and dispose of certain waste currently stored at TDSL's landfill in Creedmoor, Texas as non-hazardous, special waste; and,
- Grant such further relief at law or in equity to which Plaintiffs may show themselves entitled.

Dated: November 30, 2004

Respectfully submitted,



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Counsel for Penske Truck Leasing Co., L.P.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN INTERIM ORDER

concerning Motions to Overturn regarding the Executive Director's June 18, 2004 and June 30, 2004 letters allowing Penske Truck Leasing Co., L.P. to dispose of commingled picture tube waste as municipal solid waste special waste; TCEQ Docket No. 2004-0984-IHW-E.

On September 16, 2004, the Texas Commission on Environmental Quality (Commission) evaluated during its public meeting the Motions to Overturn filed by Texas Disposal Systems Landfill, Inc. concerning the Executive Director's June 18, 2004 and June 30, 2004 letters allowing Penske Truck Leasing Co., L.P. to dispose of commingled picture tube waste as municipal solid waste special waste. The Commission also considered responses/briefs to the motions and replies/briefs to those responses.

After considering the written filings, oral argument, and responses to questions during the public meeting, the Commission determined that the Motions to Overturn should be granted and that the matter should be remanded to the Executive Director.

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

1. The Motions to Overturn filed by Texas Disposal Systems Landfill, Inc. are GRANTED; and
2. This matter is hereby REMANDED to the Executive Director.

Issue date: SEP 16 2004

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Handwritten signature of Kathleen Hartnett White in cursive script.
Kathleen Hartnett White, Chairman

EXB "A"