

496 H

CITATION  
THE STATE OF TEXAS

Cause No. GN403519

PENSKE TRUCK LEASING CO., LP

Plaintiff

vs.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

DELIVERED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_  
Defendant

10-29-04  
BRUCE ELFANT  
CONSTABLE, PREC. 5 TRAVIS COUNTY TEXAS

To: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, BY  
SERVING ITS EXECUTIVE DIRECTOR,  
GLENN SHANKLE, AT  
12100 PARK 35 CIRCLE  
AUSTIN, TEXAS 78753

BY \_\_\_\_\_

DEPUTY

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 22nd day of October, 2004, in the 345TH Judicial District Court of Travis County, Austin, Texas.

ISSUED AND GIVEN UNDER MY HAND AND SEAL of said Court at office, this the 22nd day of October, 2004.

REQUESTED BY:

ERIK R. McDONALD  
8 SAN JACINTO BLVD. #1600  
AUSTIN, TEXAS 78701  
(512) 322-2500



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

By \_\_\_\_\_  
SAMUEL MARTINEZ, 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: \$ \_\_\_\_\_

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

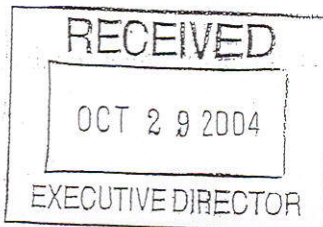
Sworn to and subscribed before me this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

BY: \_\_\_\_\_

NOTARY PUBLIC, THE STATE OF TEXAS  
Service Copy

Constable Precinct 5

PRINTED NAME OF SERVER  
\_\_\_\_\_  
County, Texas  
GN403519-001



Cause No. GN403519

PENSKE TRUCK LEASING CO., L.P,  
Plaintiff,

v.

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
Defendant.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

345th JUDICIAL DISTRICT

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 decision by the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission") requesting that Penske remove certain waste stockpiled at Texas Disposal Systems Landfill, Inc. ("TDSL") using a hazardous waste manifest for ultimate disposal at another facility. A copy of the Executive Director's letter as attached as Exhibit A.

2. Penske has filed a Motion to Overturn with the Commission seeking to overturn the September 24, 2004 decision that is the subject of this appeal. Penske filed its Motion to Overturn out of an abundance of caution and subject to and without waving its argument that no law or rule authorizes the filing of a Motion to Overturn by TDSL or Penske over the Executive Director's actions in this matter. The Commission's deadline to act on Penske's Motion to Overturn is on or about November 7, 2004. Penske files this appeal now in order to comply with the 30-day deadline for appealing the Executive Director's September 24, 2004 decision.

*Ursula Rodriguez*

DISTRICT CLERK  
TRAVIS COUNTY, TEXAS

## II. Discovery Control Plan

3. 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

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

5. 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.

## IV. Jurisdiction and Venue

6. 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 the decision by the Executive Director of TCEQ requesting that Penske remove certain waste stockpiled at TDSL using a hazardous waste manifest for ultimate disposal at another facility. Penske files this appeal to set aside, modify, and/or suspend the Executive Director'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

7. 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.

8. 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.

9. 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**

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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**

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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**

25. 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.

26. 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.

27. 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.

28. 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.

29. 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**

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

31. 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."

32. 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."

33. 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**

34. 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.

35. 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.

36. 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**

37. 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.

38. 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.

39. 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.

40. 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 for lead 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.

41. 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**

42. 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.

43. 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.

44. 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. On October 15, 2004, Penske filed an appeal of the Commission's September 16, 2004 decision.

45. On September 24, 2004, the Executive Director issued a letter to Penske requesting that it remove the material using a hazardous waste manifest and dispose of the material at another facility.<sup>1</sup> The Executive Director requested that Penske either dispose of the material at a permitted hazardous waste facility or conduct additional assessment and characterization of the material and dispose of it accordingly. Under either option, the Executive Director requested that Penske remove the material using a hazardous waste manifest and conduct all further assessment, characterization, and ultimate disposal of the waste at a separate facility from TDSL.

46. The Executive Director's decision on September 24, 2004, has a direct effect on Penske.

#### **VI. Error of Defendant**

47. Neither the facts nor the law require removal of the material from TDSL's landfill using a hazardous waste manifest. Testing by both the Commission and Penske has unequivocally confirmed that the waste at issue does not even approach the hazardous thresholds for lead. To the contrary, TDSL may safely dispose of the non-hazardous, non Class 1, material in its landfill in accordance with its permit. The law is clear that a waste (other than a listed waste) is only hazardous if it exhibits a hazardous characteristic. The material at issue does not exhibit a hazardous characteristic.

48. Penske objects to removing the non-hazardous material using a hazardous waste manifest and objects to conducting further testing at another facility. In sum, the Defendant erred by issuing the September 24, 2004 letter because: (a) the facts confirm that the material at TDSL's landfill is not hazardous; (b) the law compels that the material at TDSL's landfill is not hazardous; and (c) the Commission failed to refer this matter to a contested case hearing for resolution of relevant disputed facts.

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<sup>1</sup> A copy of the Executive Director's letter as attached as Exhibit A.

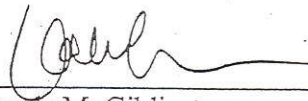
VII. Prayer

Penske, therefore, respectfully requests that the Court:

- Reverse the Executive Director's decision of September 24, 2004;
- Grant such further relief at law or in equity to which Plaintiffs may show themselves entitled.

Dated: October 22, 2004

Respectfully submitted,



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Pamela M. Giblin  
State Bar No. 07858000  
Derek R. McDonald  
State Bar No. 00786101  
William P. Johnson  
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Counsel for Penske Truck Leasing Co., L.P.

Exhibit A

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



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

September 24, 2004

Mr. Marc E. Althen  
 Senior Vice President  
 Penske Truck Leasing  
 P.O. Box 563  
 Reading, Pennsylvania 19603-0563

Dear Mr. Althen:

On May 13, 2004, the Texas Commission on Environmental Quality (TCEQ) issued Penske Truck Leasing (Penske) a Notice of Violation (NOV) in connection with the spill investigation at IH-35 South near Exit 221 in Buda, Hays County. This NOV required Penske to take certain corrective actions. On June 18, 2004, on my behalf, John Stcib, Deputy Director for the Office of Compliance and Enforcement, approved your proposed plan for removal and disposal of the waste located at the Texas Disposal Systems Landfill (TDSL) as special waste. TDSL filed a Motion to Overturn my decision in this matter. On September 16, 2004, the Commission issued an order overturning my decision and remanding this matter.

I now exercise my authority to act in this matter, and by this letter, I am requiring the following actions of Penske. No later than October 27, 2004, Penske must remove all of the waste currently stored in the 99 roll-off containers at the TDSL facility. This waste must be manifested as hazardous waste and disposed of at a permitted hazardous waste facility. Alternatively, Penske may pursue the actions discussed at the September 16<sup>th</sup> hearing relating to the assessment and any necessary extraction of the waste in the roll-off containers. If Penske pursues this approach, all activities associated with the assessment, characterization and extraction of the contents of the roll-off containers must be conducted at a separate authorized facility in a manner that ensures protection of human health and the environment. Specifically, Penske must ensure compliance with all RCRA requirements, including land disposal restrictions for any D008 waste triggering those requirements. In any case, the roll-off containers must be removed from the TDSL facility by October 27, 2004, and the waste manifested as hazardous waste until such time as it is conclusively determined that no D008 waste at the level that is characteristically hazardous remains.

Mr. Marc E. Althen  
Penske Truck Leasing  
Page 2  
September 24, 2004

Upon completion of this activity, but no later than 90 days from the date of this letter, please submit all documentation necessary to demonstrate that the waste was properly disposed of in accordance with all applicable rules and regulations. Please submit this information to:

Ms. Anna Rodriguez, Special Assistant  
Office of Compliance and Enforcement  
Texas Commission on Environmental Quality  
P.O. Box 13087, MC 163  
Austin, Texas 78711-3087

If you have any questions, please feel free to contact Mr. John F. Steib, Jr., Deputy Director, Office of Compliance and Enforcement at (512) 239-5718.

Sincerely,



Glenn Shankle, Executive Director  
Texas Commission on Environmental Quality

cc: Ms. Pam Giblin, Baker Botts, LLP  
Mr. John F. Steib, Jr., Deputy Director, TCEQ Office of Compliance and Enforcement  
Mr. Robert Gregory, Texas Disposal Systems