4964

CITATION

THE STATE OF TEXAS

Cause No. GN402245

RECEIVED
JUL 22 2004
EXECUTIVE DIRECTOR

TEXAS DISPOSAL SYSTEMS LANDFILL, INC., AND TEXAS CAMPAIGN FOR THE ENVIRONMENT, Plaintiff

vs.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Defendant

To: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
BY SERVING ITS ACTING EXECUTIVE DIRECTOR,
MARK VICKERY
12100 PARK 35 CIRCLE
AUSTIN, TEXAS

Defendant, in the above styled and numbered cause:

DELIVERED THIS 7-22-04 DAY OF

BRUCE ELFANT
CONSTABLE PRECINCT 5 TRAVIS COUNTY TEXAS

BY _____ DEPUTY

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 19th day of July, 2004, in the 200TH Judicial District Court of Travis County, Austin, Texas.

ISSUED AND GIVEN UNDER MY HAND AND SEAL of said Court at office, this the 20th day of July, 2004.

REQUESTED BY:
RICHARD W. LOWERRE
44 EAST AVE., SUITE 101
AUSTIN, TEXAS 78701
(512)482-9345

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

DISTRICT COURT OF TRAVIS COUNTY TEXAS

By _____
THERESA TRAN, 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:$ _____

CONSTABLE PRECINCT # 5
TRAVIS COUNTY, TEXAS
SHERIFF/CONSTABLE/AUTHORIZED PERSON

Sworn to and subscribed before me this the _____ day of _____, _____.

BY: _____

PRINTED NAME OF SERVOR

_____
NOTARY PUBLIC, THE STATE OF TEXAS

_____ County, Texas

Service Copy Constable Precinct 5 GN402245-001

CAUSE NO. GN402245

TEXAS DISPOSAL SYSTEMS LANDFILL, INC. AND TEXAS CAMPAIGN FOR THE ENVIRONMENT	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	TRAVIS COUNTY, TEXAS
v.	§	
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY	§	
Defendant.	§	200 — JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION,

COME NOW Texas Disposal Systems Landfill, Inc., and Texas Campaign for the Environment (referred to hereafter as "Plaintiffs") and file this their original action seeking judicial review of actions of Defendant, the Texas Commission on Environmental Quality ("TCEQ") and, in support thereof, would respectfully show the following.

I. CASE OVERVIEW

1. Plaintiffs seek an order from this Court reversing the actions of Defendant that purport to authorize the management and disposal of regulated hazardous wastes in violation of state law. More specifically, Plaintiffs appeal the decisions of Defendant on June 18, 2004, and June 30, 2004, as reflected in attached documents of Defendant.

2. Plaintiff, Texas Disposal Systems Landfill, Inc., has filed a motion with Defendant seeking to overturn the decision of June 18, 2004, that is a subject of this appeal. Plaintiff, Texas Campaign for the Environment, did not have notice of the action in time to file such a motion, but intends to support the Motion to Overturn filed by Texas Disposal Systems Landfill, Inc. Thus, Plaintiffs are filing this appeal now only to assure that they meet the 30 day deadline in Texas law for such an appeal should Defendant not grant the motion to overturn and/or reverse

its decision. Plaintiffs intend to provide Defendant the time necessary to respond to the motion filed with the agency before proceeding with this appeal.

II. DISCOVERY

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

III. JURISDICTION AND VENUE

4. Jurisdiction of this action lies in this Court pursuant to §§5.351 and 5.352, TEX. WATER CODE. Venue is proper in this court under §5.354, TEX. WATER CODE. Jurisdiction and venue are also proper in Travis County, Texas, because all or part of the acts and omissions complained of occurred in Travis County. Defendant is located in Travis County.

IV. PARTIES

5. **Plaintiff Texas Disposal Systems Landfill, Inc.** ("TDSL") is a Texas Corporation duly formed and operating under the laws of the State of Texas, which owns and operates a Type I municipal solid waste landfill facility in Travis County, Texas, for the management and disposal of municipal solid wastes pursuant to authorizations granted by Defendant including MSW Permit No. 2123. The decisions of Defendant that are the subject of this appeal will have direct and adverse impacts on TDSL.

6. **Plaintiff Texas Campaign for the Environment** ("TCE"), is a non-profit corporation operating as an environmental and conservation membership organization with offices in Austin, Texas. TCE has members who live or own land in many areas of Texas, including areas near municipal solid waste landfills. Members of TCE will be directly and adversely affected by the

decisions of Defendant that are the subject of this appeal.

7. **Defendant Texas Commission on Environmental Quality** ("TCEQ") is an agency of this State responsible for, *inter alia*, implementation and administration of certain laws of Texas, including Chapter 361 of the Texas Health and Safety Code, which provides for regulation of the hazardous and municipal solid wastes that are the subject of the challenged actions of Defendant, and the Texas Water Code, which provides TCEQ with the authority to enforce against entities that violate its rules and State statute. Defendant TCEQ can be served with citation by serving its Acting Executive Director, Mark Vickery, at 12100 Park 35 Circle, , AustinTexas.

V. FACTUAL BACKGROUND

8. On October 9 1997, a highway accident involving a truck owned by Penske Truck Leasing Co., L.P. and operated by Penske Logistics, Inc. ("Penske"), resulted in the generation of a waste comprised of broken and discarded cathode ray tubes ("CRTs"). These CRTs were owned by Zenith Electronics Corporation ("Zenith"). Because of the nature of the broken and discarded CRTs, the resulting waste (the "CRT Waste") was and remains a hazardous waste.

9. Instead of taking the CRT Waste to a facility authorized to accept hazardous wastes, Penske or Zenith initially designated the CRT Waste as non-hazardous waste and authorized the CRT Waste to be taken to the municipal solid waste landfill operated in Travis County by TDSL. Upon later notification by Penske that the CRT Waste was in actuality a hazardous waste, TDSL refused to accept additional loads of CRT Waste and isolated the hazardous CRT waste that had been commingled in the working face with municipal solid waste. TDSL does not have authorization from the Texas or Federal Government to accept hazardous waste. The CRT Waste that was accepted by TDSL prior to Penske and/or Zenith correctly identifying the CRT Waste as hazardous waste is currently stored at the TDSL landfill awaiting proper removal and

disposal by Penske and/or Zenith.

10. Penske corrected its original classification of the CRT Waste, identifying it as hazardous waste, before all the CRT Waste was delivered to the TDSL landfill. All or much of the remainder of the CRT Waste was then managed as a hazardous waste and shipped to a facility with a permit to accept hazardous waste.

11. Defendant's regulatory waste classification system does not include an exclusion for hazardous CRT waste. Municipal solid waste landfills are not authorized to accept such waste, except in small quantities, such as from individual homeowners. Landfills authorized to accept municipal wastes and non-hazardous industrial wastes are not designed or operated in a manner required for landfills or other facilities authorized to accept hazardous wastes. Transport to and management of hazardous wastes at landfills authorized for municipal or non-hazardous industrial wastes creates unreasonable risks to the landfill operators, to surrounding residents and businesses, and to the environment.

12. Defendant originally took the correct action under Texas law, determining that the CRT Waste was a hazardous waste. Defendant issued a notice of violation to Penske for the failure to take proper actions under the hazardous waste laws of Texas. Defendant has now reversed its position without statutory or regulatory authority to support is new position that CRT Waste can be disposed as non-hazardous special waste without treatment to neutralize the toxic characteristic of the waste.

13. On June 18, 2004, Defendant authorized the transport and disposal of the CRT Waste in a manner that is inconsistent with the requirements in Texas law for transport, management, and disposal of hazardous wastes. See Exhibit 1 to this Petition. On June 30, 2004, Defendant reaffirmed that decision. See Exhibit 2 to this Petition. One or both of those decisions

constitutes a final agency action subject to appeal under Texas law.

14. Defendant's decisions of June 18, 2004, and June 30, 2004, regarding the CRT Waste, if upheld, would set a precedent that creates new risks to the environment and to the public, including members of TCE who live, work or own land near facilities, such as municipal solid waste landfills and non-hazardous industrial landfills. Individuals who live or work near such landfills had been assured by Texas law and Defendant that hazardous wastes, such as the CRT Waste, could not be accepted at such landfills. Many such individuals have participated in decisions of Defendant on such landfills in large part to assure that the prohibitions for shipment of hazardous wastes to such landfills were clear and enforceable in agency-issued permits.

15. Defendant's decisions of June 18, 2004, and June 30, 2004, on the CRT Waste, if upheld, would also create risks to TDSL and its employees. The risks include possible accidents that could result if the waste is not removed and managed as a hazardous waste at an appropriate hazardous waste landfill. TDSL would potentially face increased risk that its competitors would have new sources of waste and revenues. TDSL's agency-issued permit does not allow TDSL to treat or dispose of hazardous waste , thus, TDSL faces future economic liability under various environmental statutes for the hazardous waste if Defendant's decision to identify the CRT Waste as hazardous waste at the time it entered the TDSL landfill and then to identify it as non-hazardous waste when it is shipped to another disposal facility is not reversed.

VI. ERROR OF DEFENDANT

16. Defendant erred by determining that the CRT Waste can be managed as a non-hazardous waste. That determination is contrary to State law and Defendant's regulations. That determination was arbitrary and capricious, an abuse of discretion and not supported by the evidence available to Defendant. This error was made in the decisions of Defendant reflected in

Defendants letters of June 18, and June 30, 2004, which are attached to this petition.

VII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this Court:

1. Reverse the decisions of Defendant of June 18, 2004, and June 30, 2004, to the extent that such actions authorize the management of "CRT Waste" as a non-hazardous or municipal waste that can be managed by removal from the TDSL landfill and shipped to a solid waste management facility in Texas that is not authorized to accept hazardous waste from others.

2. Grant such further relief at law or in equity to which Plaintiffs may show themselves entitled.

Respectfully Submitted,

LOWERRE & KELLY
Attorneys at Law
44 East Ave., Suite 101
Austin, Texas 78701
(512) 482-9345 phone; (512) 482-9346 fax

By: L. Kayla Aflatooni FOR
Richard W. Lowerre
State Bar No. 12632900

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Original Petition has been sent by U.S. Mail, postage prepaid, on this the 19th day of July 2004 to the following:

Mr. Mark Vickery Texas Commission on Environmental Quality MC-109 P.O. Box 13087 Austin, Texas 78711-3087 Telephone: (512) 239-3900 Fax: (512) 239-3939	Representing the Executive Director, Texas Commission on Environmental Quality
Mr. Michael Duff Assistant General Counsel Penske Truck Leasing Route 10 Green Hills P.O. Box 563 Reading, PA 19603-0563 Telephone: (610) 775-6258 Fax: (610) 775-6000	Penske Truck Leasing Co., L.P. and Penske Logistics, Inc.
Sherena Shawrieh Baker Botts, L.L.P. 1500 San Jacinto Center 98 Jacinto Blvd. Austin, Texas 78701-4039 (512) 322-2501	
Beverly Wyckoff General Counsel Zenith Electronics Corporation 2000 Millbrook Drive Lincolnshire, IL 60069 Fax: (847) 941-8001	Zenith Electronics Corporation
David Donaldson Graves, Dougherty, Hearon Moody 515 Congress, Suite 2300 Austin, Texas 78701 Fax: (512) 480-5760	Representing Texas Disposal Systems Landfill, Inc.

Douglas Y. Christian
Rees Smith, L.L.P.
2500 One Liberty Place
Philadelphia, PA 19103-7301
Fax: (215) 851-1420

Representing Penske Truck Leasing Co., L.P.
and Penske Logistics, Inc.

Phillip Comella
Seyfarth Shaw
55 East Monroe Street, Suite 4200
Chicago, IL 60603-5803
Fax: (312) 269-8869

Representing Zenith Electronics Corporation

L. Layla Aflatooni
FOR
Richard Lowerre

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 18, 2004

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

Dear Mr. Althon:

We have received your recent letter describing your proposed plan for removal and disposal of waste located at the Texas Disposal Systems Landfill (TDSL). This waste was generated as result of emergency response cleanup activities related to an accident involving a Penske Truck Leasing (Penske) truck carrying Zenith picture tubes. Penske submitted the plan in response to a Notice of Violation issued by the Texas Commission on Environmental Quality (TCEQ) dated May 13, 2004.

According to your letter, Penske proposes the following actions:

- Transfer the contents of the 99 roll-offs to 30-yard end dump transportation vehicles over a two-day period in June 2004,
- Transfer and dispose of the waste as Municipal Solid Waste in the Class I cell at the BFI Tessman Road Landfill,
- Submit written documentation of completion of removal and disposal activities to TCEQ by July 13, 2004.

Please note that, based on our discussions, we understand that you are proposing to dispose of the waste as a special waste. We have reviewed your plan and approve your approach of transferring the waste from the TDSL facility and disposing of it as special waste. We also understand that you will ensure that the wastes are disposed of at a facility authorized to accept special waste. Before the waste can be disposed of as a special waste, you must receive approval from the TCEQ. To receive authorization for disposal, please complete TCEQ Form 0152 (Request for Authorization for Disposal of a Special Waste) and submit it to the MSW Permits Section, Waste Permits Division, TCEQ, P.O. Box 13087, MC 124, Austin, Texas 78711-3087. You may also fax the completed form to (512) 239-6000.

Please also note that regarding the transfer of roll-off contents, we do have concerns about the potential for odors and particulates generated as a result of transfer of the materials from the roll-offs to the 30 yard end dump transportation vehicles. Removal of the roll-offs in their current state would address this concern. An alternative approach would entail Penske achieving consent from TDSL for the unloading and transfer of the waste on its site and we would expect that appropriate measures to mitigate odors and particulates would be undertaken.

We look forward to receiving your completion report by July 13, 2004 as required in the May 13, 2004 Notice of Violation. Please feel free to contact me at (512) 239-5100 if you have any questions.

Sincerely,

John F. Stamb, Jr., Deputy
Office of Compliance & Enforcement
Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 30, 2004

Mr. Marc E. Althen
Penske Truck Leasing Co., L.P.
Route 10 Green Hills
P.O. Box 563
Reading, PA 19603-0563

Re: Notice of Violation
Proposed Removal Plan dated May 13, 2004

Dear Mr. Althen:

This letter is in response to your letter of June 28, 2004 requesting acknowledgment of the approval given by the Texas Commission on Environmental Quality (TCEQ) in a letter dated June 18, 2004, signed by Mr. John Steib, Deputy Director, for disposal of the above waste material as a special waste and to concur that the landfills listed in your letter meet the requirements of that letter. The landfills listed below have Class 1 industrial non-hazardous waste cells and are authorized to accept municipal solid waste (MSW) special waste.

1. Covel Gardens Landfill, San Antonio TX - MSW permit 2093
2. Atascocita Landfill, Humble, TX - MSW permit 1307
3. Itasca Landfill, Itasca TX - MSW permit 241
4. U.S. Ecology Landfill, Robstown TX - Industrial Hazardous Waste permit 50052
5. Newton County Landfill, Mauriceville TX - MSW permit 2242
6. Safety Kleen Landfill, Altair TX - MSW permit 203
7. CSC Disposal and Landfill, Avalon TX - MSW permit 1209

The Brazos County Landfill in College Station, Texas, MSW permit 1444C is not listed because it does not have a cell to accept Class 1 industrial non-hazardous waste.

Although the above cited landfills meet the criteria of the June 18, 2004 TCEQ letter the landfills are not required to accept the waste. Please be reminded that each landfill may require additional information before acceptance.

For any questions concerning this authorization, you may call (512) 239-2334. Mailing address: Municipal Solid Waste, MC-124, P.O. Box 13087, Austin, TX 78711-3087.

Sincerely,

Wade M. Wheatley, P.E., Director
Waste Permits Division

WMW/ETB