

496H

CITATION
THE STATE OF TEXAS

Cause No. GN403551

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

Plaintiff

vs.

DELIVERED THIS

DAY OF

10-29-04

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Defendant

BRUCE ELFANT
CONSTABLE, PREC. 5, TRAVIS COUNTY, TEXAS

BY

DEPUTY

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

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.

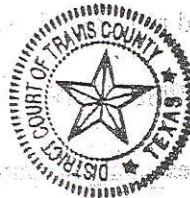
Attached is a copy of the ORIGINAL PETITION

of the PLAINTIFF in the above styled and numbered cause, which was filed on the 25th day of October, 2004, in the 126TH Judicial District Court of Travis County, Austin, Texas.

ISSUED AND GIVEN UNDER MY HAND AND SEAL of said Court at office, this the 26th day of October, 2004.

REQUESTED BY:

RICHARD W. LOWERRE
44 EAST AVENUE, SUITE #101
AUSTIN, TEXAS 78701
(512) 482-9345 FAX: (512) 482-9346



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

By

ELLIE CASTRO, 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

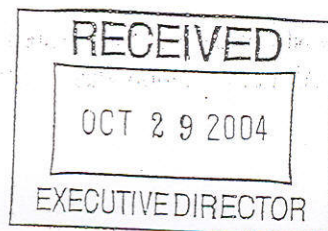
BRUCE ELFANT
CONSTABLE, PREC. 5, TRAVIS COUNTY, TEXAS

BY:

PRINTED NAME OF SERVOR

County, Texas

GN403551-001



2. Plaintiff, Texas Disposal Systems Landfill, Inc., has filed a motion with Defendant seeking to overturn that aspect of the decision of September 24, 2004 that is the subject of this action. 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 the challenged aspect of its September 24, 2004 decision.

3. An appeal of the original decisions of the Executive Director of TCEQ on June 18, 2004 and June 30, 2004 was filed on July 19, 2004 by Plaintiffs as Cause No. GN402245, 200th Judicial District, Travis County, Texas. Plaintiffs have not, to date, prosecuted that appeal because the Commissioners of TCEQ reconsidered those decisions and reversed them on September 16, 2004. The part of the decision of the Executive Director of September 24, 2004, which is challenged here, appears to reinstate the decisions originally appealed. Thus, Plaintiffs again intend to allow Defendant the opportunity to reverse or clarify its decision of September 24, 2004 to assure that it is consistent with the decision of September 16, 2004 and with state and federal law.

II. DISCOVERY

4. 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

5. Jurisdiction of this action lies in this Court pursuant to §§5.351 & 5.352, TEX. WATER CODE and §361.321, TEX. HEALTH & SAFETY CODE. Venue is proper in this court under

§5.354, TEX. WATER CODE and §361.321, TEX. HEALTH & SAFETY 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

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

7. 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.

8. 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 action of Defendant. Defendant TCEQ can be served with citation by serving its Executive Director, Glenn Shankle, at 12100 Park 35 Circle, Austin, Texas.

V. FACTUAL BACKGROUND

9. On September 16, 2004, the Commissioners of Defendant reversed a decision of the Executive Director based on motions to overturn that decision, which were filed by TDSL. The decision of Defendant on September 16, 2004 appeared to Plaintiffs to comply with state and federal law. That decision is reflected in Defendant's Interim Order granting TDSL's Motions to Overturn. In implementing that order, however, the Executive Director appears to have provided an option for management of the hazardous waste that is inconsistent with the decision of September 16, 2004 and with state and federal law.
10. The underlying dispute began on October 9, 1997, with a highway accident involving a truck owned by Penske Truck Leasing Co., L.P. and operated by Penske Logistics, Inc. ("Penske"). As a result of the accident and at the time of the accident Penske generated solid waste comprised of broken and discarded cathode ray tubes ("CRTs"). The 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 classified as a hazardous waste.
11. Instead of taking the CRT Waste to a facility authorized to accept hazardous wastes, the Penske driver initially represented that the CRT Waste was non-hazardous 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 or Zenith that the CRT Waste was a hazardous waste, the waste that had not been taken to TDSL was managed by Penske as a hazardous waste. TDSL isolated the hazardous CRT waste that had been taken to its landfill and that had been commingled in the working face with municipal solid waste. The portion of the CRT

Waste that could be identified at the working face was removed and stored for Penske. The rest of the waste in the working face was left and covered with soil materials. Much of the CRT Waste, which was sent by Penske to TDSL and placed in the landfill before the waste was identified as hazardous waste, is still stored at the TDSL landfill site.

12. Municipal solid waste landfills, such as the landfill operated by TDSL, are not authorized to accept regulated quantities of hazardous waste. Landfills that are authorized to accept municipal wastes and non-hazardous industrial wastes are not designed or operated to the specifications required for acceptance or management of hazardous wastes, other than small quantities, such as hazardous wastes generated in homes. Thus, transport to and management of regulated quantities 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.

13. Defendant has made a number of decisions that Plaintiffs support, including its original determination that Penske had properly designated the CRT Waste as a hazardous waste. For example, Defendant issued a letter properly clarifying its position on rules dilution of hazardous wastes on January 15, 2004. Defendant also issued a notice of violation to Penske on May 13, 2004 for its failure to take proper actions under the hazardous waste laws of Texas.

14. On June 18, 2004, however, the Executive Director of Defendant issued a letter purporting to authorize the transport and disposal of the CRT Waste in a manner that, if such were to occur, would have been inconsistent with the requirements in Texas law for transport, management, and disposal of hazardous wastes. On June 30, 2004, Defendant's Executive

Director reaffirmed that decision. Those decisions of June 18 and 30, 2004 are the subject of Plaintiffs prior appeal in Cause No. GN402245. These decisions were reversed by the Commission of Defendant on September 16, 2004. In that September 16, 2004 decision, it appeared that Defendant had made the correct legal decision to require Penske to manage the CRT Waste properly under state and federal laws and rules.

15. On September 24, 2004, in implementing the decision of September 16, 2004, the Executive Director appears to have returned, in part, to the decisions of June 18, 2004 and June 30, 2004. If so, the decision of September 24, 2004 could again 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 or non-hazardous industrial waste landfills.

16. The decision of the Executive Director of Defendant of September 24, 2004, regarding the CRT Waste, to the extent it authorizes the management of the CRT waste in a manner contrary to state and federal law, would also create risks to TDSL. For example, TDSL would face future economic liability under environmental laws on hazardous waste and hazardous materials; if the CRT Waste was disposed of in a municipal solid waste landfill.

VI. ERROR OF DEFENDANT

17. Defendant, through its Executive Director, erred in so far as the decision of September 24, 2004 allows the CRT Waste to be managed as a non-hazardous waste and/or contrary to state and federal laws and rules. Such a determination would be arbitrary and capricious, would be an abuse of discretion and would not be supported by the evidence available to Defendant.

VII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this Court:

1. Reverse the decision of Defendant of September 24, 2004 to the extent that such action authorizes the management of "CRT Waste" as a non-hazardous waste or in a manner inconsistent with state and federal laws and rules, and
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: 

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 25th day of October 2004 to the following:

Glenn Shankle
TCEQ, MC-109
P.O. Box 13087
Austin, TX 78711-3087
Fax: (512) 239-3939

For Defendant

Michael Duff
Assistant General Counsel
Penske Truck Leasing
P.O. Box 563
Reading, PA 19603-0563
Fax: (610) 775-6000

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

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

Pamela Giblin
Derek R. McDonald
Sherena Shawrieh
Baker Botts, L.L.P.
1500 San Jacinto Center
98 Jacinto Blvd.
Austin, TX. 78701-4039
Fax: (512) 322-2501

Beverly Wyckoff, General Counsel
Zenith Electronics Corporation
2000 Millbrook Drive
Lincolnshire, IL 60069
Fax: (847) 941-8001

For Zenith Electronics Corporation

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



Richard Lowerre

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shunkle, *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 Steib, 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 16th 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,



Glen 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

