

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

CHIEF CLERKS OFFICE

2004 SEP -8 PM 4:5-

09:00:00

September 8, 2004

LaDonna Castañuela
Chief Clerk, MC 105
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087


Re: Executive Director's Supplemental Response to Texas Disposal Systems Landfill, Inc.'s
Motion to Overturn
*In the Matter of the Authorization of Disposal of Waste as Special Waste Issued by the
Executive Director*
TCEQ Docket No. 2004-0984-IHW-E

Dear Ms. Castañuela:

Enclosed for filing is the original and eleven copies of the "Executive Director's Supplemental Response to Texas Disposal Systems Landfill, Inc.'s Motion to Overturn" in the above referenced matter.

If you have any questions or comments, please call me at (512) 239-2548.

Sincerely,



David Speaker
Attorney
Litigation Division

Enclosure

cc: Service List
John Steib, Deputy Director, Office of Compliance and Enforcement, MC 172

IN THE MATTER OF THE
AUTHORIZATION OF DISPOSAL OF
OF WASTE AS SPECIAL WASTE
ISSUED BY THE
EXECUTIVE DIRECTOR

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERK'S OFFICE
2004 SEP -8 PM 4:52

EXECUTIVE DIRECTOR'S SUPPLEMENTAL RESPONSE TO TEXAS DISPOSAL
SYSTEMS LANDFILL, INC.'S MOTION TO OVERTURN

COMES NOW, the Executive Director of the Texas Commission on Environmental Quality (TCEQ), by and through a representative of the Litigation Division, and files this his Supplemental Response to Texas Disposal Systems Landfill, Inc.'s (TDSL) Motion to Overturn. In support thereof, the Executive Director (ED) would show the following:

The ED's Decision is Correct

The ED reaffirms that his decision to approve Penske Truck Leasing Company, L.P.'s (Penske) proposal to dispose of commingled picture tube waste as special waste is correct. All of the available analytical evidence indicates that the waste is nonhazardous. TDSL's contention that the commingled waste must continue to be treated as hazardous is contrary to the applicable regulations. Where characteristically hazardous waste is mixed with a solid waste, the mixture is not hazardous if it does not exhibit any hazardous waste characteristics.¹ Given the analytical data, it is appropriate to treat the waste as special waste, and the ED's action in this matter was proper.² As such, the ED's decision should stand, TDSL's Motion to Overturn should not be granted.

The facts and data involved in this case clearly support the ED's decision. The waste in question is 99 roll-off boxes of municipal waste commingled with at most trace amounts of waste related to the October 9, 1997 traffic accident.

On the day of the accident, approximately 98 cubic yards of accident-related debris was deposited

¹ See ED's Response to TDSL's Motion to Overturn, p. 5-7.

² In his Response to Texas Disposal Systems Landfill, Inc.'s (TDSL) Motion to Overturn, the ED stated that a special waste may be disposed of at a municipal solid waste landfill if the landfill has an established, dedicated Class I industrial waste trench that can accept the special waste; and if the permit for the landfill has an approved waste acceptance plan that identifies the special waste offered for disposal. This is an accurate statement, but it is important to also point out that not all special wastes require disposal in a dedicated Class I industrial waste trench. The definition of "special waste" encompasses a wide variety of different types of waste. Depending on the type of special waste, a special waste may not necessarily have to be disposed of in a dedicated Class I industrial trench. See 30 TEX. ADMIN. CODE §§ 330.2(137), 330.136 and 330.137.

on the working face of the landfill.³ The 98 cubic yards of waste contained approximately 220 picture tubes.⁴ At the time of initial disposal, TDSL, in implementing its Standard Operating Procedure requirements to screen out unauthorized waste, nevertheless allowed the accident debris to enter the working face of the landfill. ~~The next day, approximately 80 cubic yards of accident debris was removed from the landfill, with the focus being the visible picture tube waste, and Penske disposed of the 80 cubic yards at an authorized landfill.~~ At present, 99 roll-off boxes containing approximately 1600 cubic yards of waste remain at the TDSL facility awaiting disposal.⁶ The vast majority of the waste in the 99 roll-off boxes is municipal solid waste disposed of at the landfill on the day of the accident, along with at most a very small portion of remaining accident debris.

To put this matter in context, it is informative to note that certain studies indicate that sample results from the waste in the 99 roll-off boxes are consistent with background lead levels in municipal solid waste landfills. In 1988, the EPA collected data on the character of leachate from municipal solid waste landfills.⁷ The EPA evaluated municipal solid waste leachate data from seven studies.⁸ The study found concentrations of lead ranged from 0.005 mg/L to a maximum of 1.6 mg/L, with a median of 0.063 mg/L and an average of 0.1616 mg/L.⁹ Also, the University of Central Florida Civil and Environmental Engineering Department has analyzed leachate levels found in municipal solid waste landfills in Florida, and has found similar results.¹⁰ The testing that has been performed on the waste in the roll-off boxes fits squarely within the ranges that could be considered background levels.¹¹

³ See Zenith Electronics Corporation's Response to Motion to Overturn, p.3; Exhibit ED-4 (6/23/04 letter from Penske to ED); Penske Truck Leasing Co., L.P.'s Response to Texas Disposal Systems Landfill, Inc.'s Motions to Overturn, p 2.

⁴ *Id.*

⁵ See Texas Disposal Systems Landfill, Inc.'s Brief in Support of Motion to Overturn, pp. 5-6; Penske Truck Leasing Co., L.P.'s Response to Texas Disposal Systems Landfill, Inc.'s Motions to Overturn, p 2.; Exhibit ED-2 (6/1/04 Penske letter); Exhibit ED-4 (6/23/04 letter from Penske to ED with attachment).

⁶ *Id.* See also Exhibit ED-1 (NOV), p.3.

⁷ See Exhibit ED-10 (Excerpts from EPA Background Document "Summary of Data on Municipal Solid Waste Landfill Leachate Characteristics," July 1988).

⁸ *Id.*, pp. 3-1 - 4-1.

⁹ *Id.*, Table B-3.

¹⁰ See Exhibit ED-11 (Excerpts from Analysis of Florida MSW Landfill Leachate Quality," University of Central Florida, July 1998), p. 10, Table 2.

¹¹ See Exhibit ED-6 (7/12/04 Sample Results). See also Exhibit ED-14 (Summary of Sampling Results).

When expressed in numerical terms, the actual amount of picture tube waste that could potentially be in the 99 roll-off boxes is extremely small. Assuming that 220 cathode ray tubes were disposed of in the landfill and that none of them were removed the day after the accident, then it is estimated that only 2.42 pounds of lead had the potential to leach into the landfill.¹² This estimate assumes that all of the picture tube waste that entered the landfill is still in the roll-off boxes; however, as noted above, 80 cubic yards of the original 98 cubic yards of waste, including the visible picture tube waste, was removed the day after the accident. Thus, the actual amount of leachable lead that could be present in the 99 roll-off boxes is likely dramatically lower than the estimate of 2.42 lbs because Penske disposed of the identifiable picture tube waste.

EPA's View of Waste Disposal

Since the filing of the ED's Response to TDSL's Motion to Overturn, the ED has received a letter from EPA Region 6 indicating that Region 6 interprets the applicable waste regulations in a manner that is consistent with the ED's position in this case. On September 2, 2004, the ED received a letter from EPA Region 6 responding to an inquiry from the ED regarding how the EPA interprets certain waste disposal requirements under the Resource Conservation and Recovery Act (RCRA).¹³ Regional Counsel Charles Sheehan noted that:

[u]nder federal law, a waste that is not a RCRA hazardous waste and that has hazardous waste levels below that of both RCRA characteristically hazardous waste levels and RCRA land disposal restrictions levels, does not require disposal in a RCRA subtitle C landfill.¹⁴

The letter goes on to note that a regulating agency may enforce against an entity under such circumstances if the entity improperly diluted a hazardous to avoid adequate treatment.¹⁵ This is consistent with the ED's position that while the act of diluting a waste to avoid adequate treatment is prohibited, the resulting waste itself may be classified as non-hazardous if it does not exhibit a hazardous characteristic. Thus, the ED's approval of Penske's proposal to manage the commingled picture tube waste as a special waste is consistent with both state and federal law and rules.

Conclusion

WHEREFORE, PREMISES CONSIDERED, the Executive Director submits his Supplemental Response to Texas Disposal Systems Landfill, Inc.'s Motion to Overturn, as more fully set forth

¹² See Exhibit ED-13 (Calculation Methodology and Assumptions).

¹³ See Exhibit ED-12 (September 2, 2004 letter from Charles Sheehan).

¹⁴ *Id.*

¹⁵ *Id.*

above, and for the reasons set forth in the ED's Response to TDSL's Motion to Overturn and this filing, and respectfully requests that the Commission deny TDSL's Motion to Overturn.

Respectfully submitted,

Glenn Shankle
Executive Director

Lydia González Gromatzky, Deputy Director
Office of Legal Services

Paul C. Sarahan, Director
Litigation Division

Stephanie Bergeron, Director
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by 

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2004, the original and 11 copies of the foregoing "Executive Director's Supplemental Response to Texas Disposal Systems Landfill, Inc.'s Motion to Overturn" was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing "Executive Director's Supplemental Response to Texas Disposal Systems Landfill, Inc.'s Motion to Overturn" was served on the parties in the following manner:

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CHIEF CLERKS OFFICE

2004 SEP -8 PM 4:52

09-08-2004 4:52 PM

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Thomas Edwards
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I further certify that on this day a true and correct copy of the foregoing "Executive Director's Supplemental Response to Texas Disposal Systems Landfill, Inc.'s Motion to Overturn" was hand-delivered to the Office of the Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.



David A. Speaker
Attorney
Litigation Division
Texas Commission on Environmental Quality