

**TCEQ COMMISSIONER'S AGENDA MEETING**  
**December 1, 2004**  
**TDSL'S MOTION TO OVERTURN**

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<b>BARRIENTOS</b>	Senator Gonzalo Barrientos, Travis County
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<b>MARQUEZ</b>	Ralph Marquez, TCEQ Commissioner
<b>SOWARD</b>	Larry Soward, TCEQ Commissioner
<b>RUSSELL</b>	Kerry Russell, TDSL Counsel
<b>GIBLIN</b>	Pam Giblin, Penske Counsel
<b>WILLIAMS</b>	Marcia Williams, EPA Expert for Penske
<b>GROMATZKY</b>	Lydia Gonzalez-Gromatzky, TCEQ ED Legal Counsel
<b>GOLEMON</b>	Kinnan Golemon, TDSL Counsel

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[Oral discussion begins at 17 minutes and 30 seconds out of a total of 1 hour, 5 minutes and 34 seconds]

**WHITE:** Good afternoon. This is the meeting of the Texas Commission on Environmental Quality. The day is Wednesday, December 1<sup>st</sup>. The time is 2:15. I apologize for the delay if any of you had the pleasure of this morning's agenda. It was somewhat unavoidable, but I do apologize for the delay. I am Kathleen Hartnett White, Chairman. Present also for the record are Commissioner Ralph Marquez and Commissioner Larry Soward. I, for some reason, the words of a song keep jumping in my head as I thought about this agenda; Together Again. And in my opinion, it is regrettable that we must be here together again on this matter. It is very exceptional, as far as a matter for Commission review, but to me, very necessary. And I feel, in part, responsible that we are here again because in review of the record from the initial Motion to Overturn, I think I perhaps contributed to some of the actions which fall from the agenda because I did not sufficiently articulate the legal basis for my reasons for upholding the TDS Motion to Overturn at the September agenda and because I was, in retrospect, overly hesitant in clarifying what actions could or could not follow from the determination. It is my intention that the Commission's consideration of this second MTO could be really quite clean and clear. I doubt if Agency action of any wrinkle can finally resolve this complex lengthy matter. And I think it might be best for all parties for there to be a clean and clear Agency position and actions which follow from that. I know I speak only for myself at this point. I, as I believe we have said in communications to the parties, we do not anticipate taking oral argument and will ask you to refrain from speaking unless in answer to any questions any of the Commissioners may have. It's our custom though always to welcome comments by elected officials. And I know that Senator Barrientos is here and has indicated a desire to speak and we would welcome that at this point. I also recognize Representative Warren Chisum, and anyone else who I may have here and any of those representatives who desire to speak, excuse me, we welcome so.

**BARRIENTOS:** May it please the Commission, my name is Gonzalo Barrientos. I am the State Senator from the district of Travis 14. I will in the spirit of your statements just awhile ago, keep my comments very, very brief. I did not intend to speak at all. I think my communications with the Agency probably suffice. There is a room full of attorneys here today. I am not one of them, but I wanted to ask a question. The letter that you sent out November 17<sup>th</sup>, regarding Motions to Overturn concerning the Executive Director's decision September 24<sup>th</sup>, etcetera, etcetera. At the bottom it states, "The

1 Commission does not seek any additional briefs from the parties.” It further states, “No oral arguments  
2 will be entertained on this item.” Yet I understand that about 200 pages of briefs were turned in from  
3 the Penske side and I would like to know what the intentions of the Commission are as it appears to be  
4 that this points to intentions of subsequent litigation in just today’s proceedings. Thank you very much.  
5 Any questions I can answer?  
6

7 **WHITE**: You mean what are the Commission’s intentions? I didn’t quite understand Senator  
8 Barrientos.  
9

10 **BARRIENTOS**: All right. Let me go back over this again. I was trying to hurry. The letter states, “The  
11 Commission does not seek any additional briefs from the parties on this matter, but will consider the  
12 Executive Director’s September 24<sup>th</sup> letters. No oral arguments will be entertained on this item.” I am  
13 advised that about 200 pages of briefs, the day, yesterday, the day before this hearing were turned in,  
14 even though you said that you did not want anymore. And I would like to ask what are the intentions of  
15 the Commission regarding this item...this issue.  
16

17 **WHITE**: Well I have not seen them. So they are not at issue as part of the record upon which I am  
18 considering this matter today.  
19

20 **NORTON**: And I will be happy to step up and address this issue as well Chairman and Senator  
21 Barrientos. I, uh, there were some documents filed yesterday by Penske and Zenith. And I, I think prior  
22 to that there were several other items that were in the form of written documents that were received by  
23 the Agency. During the time after the last Commission consideration and today and that would include a  
24 letter that you sent in on November 17<sup>th</sup>. In an effort to provide the Commission with what they might  
25 need in this, I have packaged all that material up and made each Commissioner aware of its existence  
26 together. And that would include your letter and TDS’ November 16<sup>th</sup> letter ...  
27

28 **BARRIENTOS**: May it please the Commission Madam Chairwoman, I was specifically asking about  
29 the statements that were put out by the Agency saying, “No more...do not seek any additional briefs.” I  
30 am talking to the briefs, period. And how 200 pages of those briefs were still turned into you. It’s kind  
31 of like the Legislature. We have 5,000 bills introduced. We don’t have time to read them. I don’t know  
32 you are going to read those 200 pages to consider that. It seems that it’s pointed to more litigation. And  
33 after 7 years, there are a good number of people who are quite frustrated on this issue. I’ll drop that. I  
34 am not an attorney. I was asking a question on the briefs. Thank you very much.  
35

36 **WHITE**: And I’ll just repeat what I said. I have not seen them. So I mean they are not a part of my  
37 consideration of this issue today. So it’s as if, as far as this decision maker is concerned, they weren’t  
38 submitted.  
39

40 **BARRIENTOS**: Thank you ma’am. I shall move over and let the more learned attorneys in these areas  
41 discuss that issue. Thank you very much.  
42

43 **NORTON**: Commissioners, I would also, while we have a brief interlude here, I just do want to make it  
44 clear for the record because there are so many attorneys involved in this matter, that we are here to  
45 consider the MTO filed by TDSL regarding the ED’s September 24<sup>th</sup> letter to Penske regarding the

1 handling of commingled cathode ray tube waste at a facility in Travis County. Just for the record, I  
2 wanted to make sure we complied with our Open Meetings requirements on caption and readings.

3  
4 **WHITE**: Thank you Duncan. Well, then I will just offer, as I initially said, a restatement because I  
5 think that it's the same issue in the second MTO as it was in the first. I move to uphold the first Motion  
6 to Overturn that TDS submitted challenging the Executive Director's characterization of the CRT waste  
7 at issue in the 99 roll-off containers at the TDS facility as mixed special waste. Because, and I upheld  
8 that Motion to Overturn because I was persuaded by that MTO that on the basis of the facts and the  
9 controlling RCRA law that the waste at issue is D008 waste. It is characteristically hazardous waste as  
10 determined at the point of generation. It retains that characteristic throughout its life in a commingled or  
11 not in a commingled fashion. Without going into details, the dilution or the mixture rule is not  
12 applicable to alteration of the characteristic hazardous waste label of the D008 CRT waste and that  
13 waste characterization, that waste classification subjects it to the Land Disposal Restrictions in RCRA  
14 which is the 40 CFR 268.40 which dictates, as far as the facts of this matter in my opinion, one of two  
15 disposal alternatives. One is the entire commingled D008 CRT waste must all be disposed of as  
16 hazardous; or, the CRT portion of the commingled loads in the 99 roll-off containers must be physically  
17 separated in entirety. The legal decision that I thought I was making then and again that I think is  
18 identical to that at issue today is that that waste classification as characteristically hazardous waste,  
19 commingled or not commingled precludes any kind of sampling or testing for hazardous waste levels  
20 which I think was the issue in the second MTO in the portion of the Executive Director's letter which  
21 says that the loads must be manifested as hazardous until such time as it is conclusively determined that  
22 no D008 waste at the level that is characteristically hazardous remains. It is my assessment that because  
23 this is, however commingled, D008 CRT waste, characteristically hazardous, that there is, it is not an  
24 option to test, to transport it as hazardous and then to test at what level of lead, a lead constituent that is  
25 hazardous, the entire commingled load retains the characteristically hazardous classification and that  
26 puts it under the relevant RCRA Land Disposal Restrictions. And that to me was the decision that I  
27 made, but did not clarify although that was the body, that was the substance of the MTO I was  
28 upholding in the first MTO and that is to me the same issue in this second MTO. But because I didn't  
29 clarify the first time, perhaps I have no partners in my position. But that was my position and is my  
30 position.

31  
32 **MARQUEZ**: Are you making a Motion to Overturn?

33  
34 **WHITE**: What would lead from that for me quite easily to uphold the TDS' Second Motion to  
35 Overturn.

36  
37 **SOWARD**: Let me ask a question or clarification of what you said Madam Chairman. Are you, are you  
38 saying that it was your analysis then and it's your analysis and view now that the entire contents of all  
39 99 roll-off bins is hazardous waste?

40  
41 **WHITE**: That's not the way that I would say it. I would say when you have, whether it's in a cup  
42 container or a 99 roll-off containers, if you know that there is characteristic hazardous waste in that  
43 commingled portion, that you have one of two options according to RCRA. You can dispose of the  
44 entire commingled load as if all of it was characteristically hazardous, or you can physically separate the  
45 characteristically hazardous portion from the other.

1 **SOWARD**: And I note that you started that by saying, “If you know”. And one way to know is to  
2 follow proper protocol of sampling to determine if there is CRT waste in that commingled contents.  
3

4 **WHITE**: I think that you would have to physically separate it to know that and not to test a level of a  
5 constituent.  
6

7 **SOWARD**: I agree that that is one way to do it and probably the most definitive. Would you also agree  
8 though, that there are accepted protocols of testing to determine the existence of waste that could also be  
9 used to determine if there is any CRT waste in a roll-off bin?  
10

11 **WHITE**: In principal, yes, but in terms of the facts of this matter as they were presented in the initial  
12 briefs of this, I think that there are more than sufficient facts to persuade me that there is whatever  
13 amount; it’s not relevant, that there is D008 CRT waste in the 99 roll-off containers. If you didn’t know  
14 that, if you didn’t have sufficient facts to even know that, that that waste, the waste was generated at the  
15 accident scene. And that CRT waste, to me there are sufficient facts to say at what amount is to me not  
16 relevant.  
17

18 **SOWARD**: Well, on September the 16<sup>th</sup>, here’s what, here’s what I said after listening to all of the  
19 argument and reviewing all the documents, and I am quoting from a transcript that was prepared and I  
20 am sure that it’s not a certified transcript, but never the less I think it’s accurate. It says, and this is me  
21 talking, “I mean again to me there is a clear cut way to resolve this. Go sample each of the 99 roll-off  
22 bins using the appropriate and approved EPA sampling and testing protocol. If there is any measurable  
23 amount of D008 waste in that bin as a result of that sampling, handle it appropriately under the  
24 regulations. If there is no measurable amount of D008 waste in that bin based on that proper sampling,  
25 put it back in the landfill.” I subsequently again said, “I guess it’s very fundamental. Go out to each one  
26 of the 99 roll-off bins; take samples pursuant to the approved protocol established by EPA for this type  
27 of heterogeneous waste. Test those samples. If there are detectable levels of CRT waste in that particular  
28 bin, then handle it accordingly. If there is no detectable level of CRT D008 waste in the samples taken  
29 from that bin, put it back in Mr. Gregory’s landfill.” Then Mr. Russell, who at the very end, who’s  
30 counsel for TDS says, “I understand that against his better wishes, as he seconded the Motion, he was  
31 asked...” and he being me, “...he was asked to say what he would suggest in directions to the ED that  
32 every roll-off out there be sampled in accordance with SW-846 procedures for heterogeneous mixtures  
33 and if any D008 waste from those CRT tubes is identified in that roll-off, then that be handled  
34 appropriately. If a roll-off, if it is not identified with any D008 CRT waste, then it would go back to the  
35 landfill as regular municipal solid waste. The rest of it, obviously, would be manifested as hazardous  
36 waste. That’s what TDSL has been trying to get all along. That’s why I wanted to make it clear that we  
37 agree with what you suggested.” So, I thought I was very clear in what I said that day. And I think that  
38 the Executive Director’s letter of September 24<sup>th</sup> echoes that.  
39

40 **WHITE**: Commissioner Soward, I have some questions because how is what you just read describing  
41 that sampling in determining different than the way you would treat mixed waste in testing for a level of  
42 lead by the whatever the appellation is on the protocol. That seems to me that, if you are looking for the  
43 physical presence of CRT waste, it to me is different than if you’re looking for a level of lead in a mixed  
44 load. You are looking for a level of lead in a mixed load, that seems to me what the Executive Director  
45 was allowing in a waste characterization as mixed that is not allowed of waste considered

1 characteristically hazardous. It seems as if what you read is the way you would treat mixed waste, which  
2 is what had been the Executive Director's decision.

3  
4 **SOWARD**: No, what I read was the accepted protocol for testing heterogeneous waste to determine  
5 what is in that heterogeneous waste. It's an approved scientific method, short of going in and taking a  
6 sifter and sifting through every pound of 99 roll-off bins of dirt and garbage and perhaps CRT waste. It's  
7 an acceptable scientific method to determine what is in a heterogeneous mixture of waste.

8  
9 **WHITE**: By determining the level of the hazardous constituent?

10  
11 **SOWARD**: I would assume that's one of the components that would determine it. It would also  
12 determine what's in there.

13  
14 **WHITE**: And I would like, I will ask the parties to respond to this issue and I would like the Movant to  
15 speak first. Because it is my understanding that that sort of sampling testing protocol is relevant to one,  
16 if you don't know what is in the load. If you have no factual basis for knowing that there are, of what are  
17 the constituents in the mixed load and two is for the way you would treat what was mixed waste. You  
18 identify it by its presence by a chemical level of the hazardous constituent rather than by the physical  
19 presence of the waste itself.

20  
21 **RUSSELL**: Thank you Madam Chairman. For the record I am Kerry Russell. Commissioner Soward.  
22 Commissioner Marquez. Counsel Norton. And since I was quoted by Commissioner Soward, quite  
23 accurately, let me say that I agree with what you are saying, but my comments were based on your  
24 predicate earlier in your comments when you made your second to the Motion that I thought we were  
25 talking about exactly the way this waste was handled by Penske's hazardous waste remediation  
26 contractor in 1998 where you had earlier said, "...handle it as you would have handled it in January and  
27 February of 1998." That you did a physical separation and once you did your physical separation, the  
28 stuff, which was a negative sort, if it was obviously not D008 waste, and was not contaminated with  
29 D008 waste, you put that in a nonhazardous pile. The rest of it that you couldn't tell for sure you use  
30 your SW-846 sampling protocol for heterogeneous mixtures and do exactly what you were talking about  
31 there, Commissioner Soward. And I believe Chairman White, you were exactly on point, that would  
32 uphold, and I believe that it would bring sense to the Land Ban Standard that we were talking about,  
33 especially in the facts of this situation that the point of generation was the truck accident. The D008  
34 waste was generated and then it was commingled. At this point, you are looking at the way to handle the  
35 D008 waste as Commissioner Soward said.

36  
37 **WHITE**: As commingled?

38  
39 **RUSSELL**: As commingled, but it's the D008 waste that we are looking at treating properly under the  
40 Land Ban and the two ways you mentioned were the two ways to do it, as we've discussed. And I  
41 believe that you do have to have the initial physical separation, but then when you get passed that  
42 physical separation, because you obviously have that large volume of MSW and cover soil, then  
43 anything that is questionable after that, you have no choice but to do the SW-846 protocol.

44  
45 **WHITE**: But you don't determine the presence of D008...  
46

1 **RUSSELL**: No ma'am. The presence...

2

3 **WHITE**: ...by the sampling protocol...

4

5 **RUSSELL**: ...the presence is a...SW-846 is designed primarily for waste characterization purposes.  
6 And that's the problem we have here is that this is not a waste characterization situation. This waste was  
7 characterized at the scene of the accident by the Generator as D008 waste. Now we are looking at how  
8 to handle it the best that we can under obviously not totally clear regulatory system. But at the same  
9 time, it's clear there is D008 waste there. We have examples of it that was pulled out when it was put in  
10 the 99 containers; physical samples. So it's there, and you can separate out, as Code 3 did, Penske's  
11 contractor, physically separate out a certain amount of that, as either contaminated or clearly not  
12 contaminated. But think Commissioner Soward that when it gets back to that which you can't physically  
13 tell. You have to fall back on something and I think you are exactly right. SW-846 protocol for  
14 heterogeneous waste, and to be more specific for waste pile sampling, I think is how generally the auto  
15 shredder residue industry does it, that I have some familiarity with from the past days, on lead. That's  
16 how you would have to do it. But there obviously is a considerable amount physical volume that can be  
17 separated out first. And I think Chairman White has hit the nail on the head. If we didn't know anything  
18 was there, we might be looking at it different. But clearly we know from Penske's contractor's own  
19 records that there were 200 and something CRTs that remain in the landfill just from the bands and from  
20 glass that's been identified. We know it's there and it seems like the sensible way to do it is to do your  
21 physical separation, which is obviously possible to start with, and then to handle that as heterogeneous  
22 waste under the SW-846 protocols that the auto shredder residue industry has to do. You mix it into a  
23 more homogeneous mixture and then you do your samples. That's...

24

25 **WHITE**: But you don't sort by using initially...

26

27 **RUSSELL**: You don't sort initially by SW...

28

29 **WHITE**: ...SW-846 protocol?

30

31 **RUSSELL**: No. No.

32

33 **WHITE**: ...that's appropriate for...

34

35 **RUSSELL**: Physical sort...

36

37 **WHITE**: ...for a waste load identified as mixed?

38

39 **RUSSELL**: Yes ma'am, and that was what Code 3, the Penske contractor did in 1998. They did the  
40 physical sort and then after they had sorted the other stuff you could look at that and then determine  
41 what it in fact had hazardous constituents in it. The CRT constituents.

42

43 **SOWARD**: But under completely different circumstances, completely different circumstances?

44

45 **RUSSELL**: No.

46

1 **SOWARD**: Yes. You didn't have 1,900 cubic, oh excuse me, 1,600 cubic yards of dirt, municipal solid  
2 waste, and CRT waste. You had a very isolated segment. This 1,900...we keep...this 1,600 cubic yards  
3 represents the entire cell of that landfill for that day.

4  
5 **RUSSELL**: No it does not.

6  
7 **SOWARD**: That's what the record says.

8  
9 **RUSSELL**: No, it represents a portion of that waste for that day. It was an isolated portion of the  
10 landfill for that day because as soon as they were notified of it, they immediately moved to another area  
11 and isolated that portion. If you will look back at what was sent to TECO, you will see that 70% of it  
12 was soil. 30% of it, and that is on the record, so we're talking about not an exactly similar situation, but  
13 not a totally dissimilar situation. It is in fact, has more soil, cover soil in it than MSW, but what was also  
14 picked off, hand-picked off was MSW. If you go back through the pictures and everything that was done  
15 at the time Code 3 separated and in Code 3's report, that's how they looked at it. They looked at the  
16 particular pieces that they would pick out and if appeared that it had glass slivers or if they couldn't tell  
17 it went in the hazardous side. That went to TECO. If it was obviously a coke can or something that was  
18 obviously not contaminated in any way, that went in the MSW side. That's the facts of how it was  
19 handled and I mean we have people here who were there at the time. I was not there at the time. I am  
20 going by what I read in the record and what I've seen in the pictures. But the key thing to me was when I  
21 looked at the TECO report of what actually went to TECO and it was 70% soil and 30% other, that's  
22 what gave me the similarity if you do the mathematics, which you can do better than I can, of the  
23 volumes compared to what's still out there. It's not as easy now and you recognized that on September  
24 16<sup>th</sup>. We all recognize that. But it is still certainly physically possible to do the physical sort, the initial  
25 elimination, and then handle the rest.

26  
27 **SOWARD**: And I don't disagree that a physical sort is a way to go about this. I don't disagree with that  
28 at all. I don't think it's the only way under approved sampling techniques.

29  
30 **RUSSELL**: I would choose to differ with you on that. I hate to have to say that, but I will stand up and  
31 say that I choose to differ because SW-846, which I've dealt with for quite a few years now, is designed,  
32 like I say, for waste characterization purposes, primarily. And we are not looking at waste  
33 characterization here to determine a hazardous level. We're looking to determine the physical presence  
34 of that CRT waste in a form of glass slivers, pieces of the TV tubes, the bands, and what have you.

35  
36 **WHITE**: And if you know it's there, at least under what I think is a very credible reading of RCRA,  
37 you can't test for a level of it. You have to identify it and it's subject to the Land Disposal Restriction...

38  
39 **RUSSELL**: That's clearly the way we read the Land Disposal Restrictions. We went all through that on  
40 the 16<sup>th</sup> that if the toxic characteristic hazardous waste is there, it has to be treated as such by an ultimate  
41 treatment disposal facility, under proper hazardous waste manifest like the original part was. The  
42 problem we get into is, as Commissioner Soward has said more than once, we are dealing with the  
43 physical reality of this situation. And that's where we are and I think at this point, you have to do what  
44 we talked about, is some combination of the methodology that brings some reason and rationality to it.

45  
46 **WHITE**: Is that combination in your opinion a sequence, where you do a negative sort first?

1 **RUSSELL**: It's just like Code 3 did it in '98. You do a negative sort first and get out as much as you  
2 can and then anything else...

3  
4 **WHITE**: You have two piles...

5  
6 **RUSSELL**: You got two piles and the cover soil and those sorts of things, and then you actually have  
7 the pile that will fit right into the SW-846 waste pile sampling protocol. To me that's really the only  
8 reasonable way to get us out of this dilemma.

9  
10 **WHITE**: Thank you. Let's hear...

11  
12 **RUSSELL**: Thank you.

13  
14 **WHITE**: ...from the other party.

15  
16 **GIBLIN**: For the record I'm Pam Giblin and I have the privilege of representing Penske in this  
17 proceeding. The plan that was submitted by Penske to the Executive Director pursuant to the remand  
18 which is what would happen on the 16<sup>th</sup>, a remand rather than a reversal and rendition, absolutely nails  
19 the question of whether, because we don't know whether there is CRT D008 in there. And 846 is  
20 actually a better way than the sorting and I would like for ya'll to hear from Marcia Williams who is the  
21 leading authority in the United States on this issue. She headed up EPA's office of Solid Waste  
22 Management during and was there during the time that these rules were written. And she has looked at  
23 this particular plan, and the phenomenal thing about this plan is that it is better than any other way to  
24 determine exactly what you all wanted the Executive Director to do which is to find out if there is any  
25 D008 CRT material and to handle it appropriately. And like I said, she is the...

26  
27 **WHITE**: But this is a qualification. I don't. I am not. I am persuaded that there does exist D008 CRT in  
28 the 99 roll-off containers. And as you just said, this is a good way to determine if it's there.

29  
30 **GIBLIN**: And it will confirm, if you are correct Chairman White, this will confirm it in a better way.  
31 The methodology was prepared to be better than a subjective sifting where somebody has to go through  
32 syringes and all of the other stuff that is in there.

33  
34 **WHITE**: But I...

35  
36 **GIBLIN**: This is a better way to do this.

37  
38 **WHITE**: But I believe that it is in there and that it needs to be sorted first. And that which is not CRT  
39 waste is the pile that should be addressed by that protocol.

40  
41 **GIBLIN**: I would like Ms. Williams to talk to that because I think this area is one that just cries for  
42 people that have had, that were right there when 846 was being developed and the rules were being  
43 developed.

44  
45 **SOWARD**: Well, we had Ms. Horinko that was right there the last time. We have battling ex-EPA  
46 employees.



1 **GIBLIN**: Right.

2  
3 **WHITE**: And I'll be glad to hear her but I really hope that all of the parties will assist the Commission  
4 in not having six representatives from both sides speak today. Thank you. We welcome you here today.

5  
6 **WILLIAMS**: Thank you very much. I will just take a minute to tell you. I was at the EPA from 1970 to  
7 1988 and was heading the office of Solid Waste during the period between 1985 and 1988 when the  
8 Land Disposal Restrictions were first developed and we were dealing when the TCLP test was first  
9 developed and a lot of these issues. So, I am probably one of the few people in the room that actually  
10 enjoys dealing with these types of RCRA issues. I have been doing it for a very long time and I know  
11 that makes me kind of an odd duck, but at any rate. RCRA is a very complex set of regulations. A lot of  
12 people have compared it to the tax code in its complexity and many times it doesn't make intuitive  
13 sense. But I would tell you that with regard to this particular issue of the 1,660 or thereabout cubic  
14 yards, RCRA really is quite clear. The point of generation of this waste stream is as it's been generated  
15 right now from the landfill. And the best way to understand whether that waste is hazardous is to do the  
16 kind of testing that's been proposed. Now, I mean, again, I would tell you, having looked at this, I think  
17 having looked at all of the test data that's already been generated on the 99 roll-offs, this waste is clearly  
18 not a hazardous waste. But to try and address the questions that you're raising, RCRA does not require  
19 for a characteristic, a potentially characteristic waste, it does not require you to go back and do sorting  
20 stuff. It says at the point that the waste is generated, which in this case, is when it has been removed  
21 from the burrito that has been in the landfill for the last six years, you need to figure out whether or not  
22 the lead is above the characteristic trigger level which is a leachate test of 5 milligrams per liter. And if  
23 it is, then all of that waste is hazardous. And if that is true, the LDR, the Land Ban would apply at that  
24 time. But we're not; RCRA does not require one to go back to the initial point of generation in trying to  
25 determine what the current status of this is. And I would tell you that when we developed these  
26 characteristics, the way we defined characteristically hazardous waste, that was all a risk based decision.  
27 We did risk analysis. We looked at if you took material that was below the characteristic and you  
28 managed it in a landfill that was not anywhere near as good as the landfill at TDS, a landfill that had no  
29 leachate collection. If you managed material that was below 5 milligrams per liter leachate, in that  
30 situation, would we expect to have a risk? And so, that's where that number comes from. Now, I think,  
31 the other couple of points that I think are really important is, I have looked at this and I think that there  
32 has been a tremendous amount of confusion between the way the Land Disposal Restriction applies and  
33 what is a hazardous waste. They are two discrete parts of the RCRA regulations. And, if when you first  
34 generate the waste it is hazardous, yes, the Land Disposal Restrictions apply. But the waste that we  
35 would be addressing there is the waste back at the time of the accident that was picked up and put into  
36 roll-off boxes. We actually can't today answer that question because it isn't the waste, it isn't the CRTs;  
37 it's the accident debris waste. And because there was no representative sampling at that time of all the  
38 accident debris waste, we actually don't know if that was hazardous. What we do know is that after  
39 people went in and tried to sort that material and by the contractors after the fact, and that was sent to  
40 TECO, and there was testing of a representative sample at that point. That waste was not hazardous. It  
41 was managed as hazardous, but it did not test hazardous under the RCRA regulations. So if you look at  
42 it today, what the regs would tell you is that the waste today, from all of the testing that has been done,  
43 the 1,660 cubic yards is not hazardous. But one could do additional testing to make yourself even more  
44 confident in that. The waste that went to TECO, which was supposedly the worst of the accident waste,  
45 was not hazardous at the time it went to TECO. And from everything that we have, if you look at what

1 that mixture was at the time of the actual accident, it probably was not hazardous either. But there is no  
2 test data that can absolutely confirm it.

3  
4 **WHITE:** Thank you very much. And I don't want to rebut anyone's questions, but I am going to  
5 reiterate what I said to begin with. I think that this issue begs for clean, clear Agency action, and I just  
6 have no faith that the Agency will resolve these issues, all this difference of credible difference of legal  
7 analysis and opinion between the parties is not something that I think this agency can ultimately solve  
8 and that will be in a court. I consider this, we are in the middle of an enforcement action; a Notice of  
9 Violation issued against Penske. And it came to the Commission first in terms of facts and legal analysis  
10 in the first MTO. I am persuaded on that basis that legally and factually that the point of generation is  
11 the accident scene and that factually we know that D008 CRT waste is in there. That is the basis upon  
12 which I assessed all the rest. And for that reason, I don't think that we can consider the point of  
13 generation the TDS Landfill. That I think would factually follow, I think, from what you were saying  
14 and therefore determine whether this mixed waste has lead levels sufficient to consider it hazardous. I  
15 can follow that line, but that is not what I am persuaded with at this time. To me, if you consider it  
16 characteristically hazardous waste, if you know it's in those mixed loads; there is only one of two ways  
17 to handle it. One is, just as I said, it all has to be disposed of as hazardous, or you do a physical sort,  
18 have your pile of the CRT waste, and your question pile. The CRT waste comes under the Land Ban and  
19 the remainder could be subject to the protocol for sampling. That's just, obviously credible difference of  
20 opinions. But that's my position.

21  
22 **SOWARD:** Well, I whole-heartedly agree with you that we are not going to resolve this at this agency.  
23 We are wasting oxygen, because the only way that this is going to get resolved is in the courts of this  
24 state. Both sides of this issue have significant positions that they will not depart from in order to allow  
25 this matter to be handled appropriately under waste management. So, we are wasting our time trying to  
26 craft a solution when the only solution is going to be in the courts of this state. There's four lawsuits  
27 pending right now on this very issue. I say let's get on with the litigation and find out who's right. This  
28 agency cannot resolve it because the parties do not want this agency to resolve it.

29  
30 **WHITE:** Well, I agree in part, but not entirely. All the part about the ultimate resolution in courts and it  
31 needs to proceed efficiently towards that forum. But we are in the middle of any enforcement action that  
32 the Agency has initiated which I think is appropriate again, from the limited information that we have  
33 had because of the first MTO and I am persuaded by the information that we do have that we should  
34 proceed with a consideration, just as I have said. I hate to repeat myself three times. And it's credibly  
35 legal and to me there's sufficient facts to persuade us that there are, in that the ED has given a Notice of  
36 Violation to Penske, that he is responsible for the disposal of this waste. Is that fair to say?

37  
38 **GROMATZKY:** The Notice of Violation has asked, requested that Penske take corrective action to  
39 resolve the issue of the Notice of Violation.

40  
41 **WHITE:** So back to the issue of manner in which this agency dictates that he does so and that to me we  
42 really have only one, there are really two options. One is this kind of sampling where you look for levels  
43 and if you don't find those levels, then it does not come under RCRA Land Disposal Restrictions. And  
44 that which dictates physically sorting the CRT waste. To me, we don't have any, and I am willing to  
45 proceed with, and I thought that was the Motion that I made originally, but did not specify with a clear

1 characterization of the CRT waste in the commingled loads as characteristically hazardous and the Land  
2 Disposal Restrictions that fall from that involving a physical sort initially. But we may be a hung jury.

3  
4 **MARQUEZ**: Make a Motion.

5 **WHITE**: Then I would make a Motion to uphold the Motion to Overturn that came to us from TDS  
6 which has issue with that part of the Executive Director's letter. I can't regard the date. That required  
7 Penske to manifest these disposal loads of the waste in the 99 roll-off containers as hazardous until such  
8 time as it was conclusively determined that no D008 waste that is characteristically remains. So we  
9 would be overturning that, the Motion would be overturning that aspect of the Executive Director's  
10 directive to Penske and in its place, requiring Penske to initiate some sort of physical sort of those loads,  
11 the 99 roll-off containers and separate, physically separate the CRT waste and that waste would be  
12 subject to the RCRA Land Ban and the remainder of the waste could be assessed according to the SW-  
13 846 protocols. And, or dispose of the entire 99 roll-off containers as hazardous.

14  
15 **[Long pause, 15 seconds]**

16  
17 **WHITE**: So I guess that we have no second. What is the result if we do nothing? If we take no action?

18  
19 **NORTON**: Commissioners, there is a prior order that has been entered dated September 16<sup>th</sup>, and I, that  
20 order has been voted on and passed by the Commission and it is still effective.

21  
22 **WHITE**: It leaves all consideration of this matter to the Executive Director.

23  
24 **NORTON**: I believe that is correct.

25  
26 **WHITE**: In an open-ended manner because it doesn't specify any...

27  
28 **NORTON**: Correct.

29  
30 **WHITE**: Ok, any recommended alternatives from the parties?

31  
32 **GIBLIN**: I do, on behalf of Penske want to say that we have tried to work and resolve this matter. I  
33 think that just leaving it to the Executive Director is perhaps the best, most appropriate way and we will  
34 continue to work with this agency to resolve this matter.

35  
36 **GOLEMON**: Well, since we are dealing with...I am Kinnan Golemon for the record with Brown  
37 McCarroll firm representing TDSL. Since we are dealing with the 15 or 20% of the waste mixed with  
38 municipal solid waste, mixed with clay, just like the other 80% of the waste or there about. That was  
39 mixed with municipal solid waste and clay. I don't see, how as a matter of public policy, one can expect  
40 that they don't handle the waste the same way they handle the other 80% of the waste. It's pure and  
41 simple. It may be a ratio difference, but there is not a new constituent in there. You're only dealing with  
42 some clay, some municipal waste and a certain amount of D008 waste. It seems to me that the public of  
43 this state, TDSL and Penske ought to be able to handle it the same way that it was handled in 1998. I  
44 thought that was basically the substance of Mr. Soward's second last time. Apparently it wasn't, and  
45 maybe I was confused. And it just seems like taking that course of action, a finality and a clear

1 definition along that line, would at least move the ball forward as opposed to leaving it where the parties  
2 have brought it to you today. Thank you very much.

3  
4 **WHITE**: Well, I regret very much for both parties that, and for the public, that the Agency cannot more  
5 clearly act on this. So I guess, that's it. We are unable to act.

6  
7 **DUNCAN**: And if there are no further comments Commissioners, then that concludes our afternoon  
8 agenda and we stand adjourned.

9  
10 **[End at 1:05:16]**