

IN THE MATTER OF THE
EXECUTIVE DIRECTOR'S
DECISION TO REQUIRE CERTAIN
ACTIONS OF PENSKE TRUCK
LEASING CO., L.P.

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S MOTION TO OVERTURN
PORTIONS OF THE EXECUTIVE DIRECTOR'S SEPTEMBER 24, 2004 DECISION

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

COMES NOW, Texas Disposal Systems Landfill, Inc. ("TDSL"), and hereby files this, its *Motion to Overturn Portions of the Executive Director's September 24, 2004 Decision*, as set out in the Executive Director's ("ED") September 24, 2004 letter,¹ to the extent that such letter allows Penske Truck Leasing Co., L.P. ("Penske") to conduct further tests of the commingled mass of waste comprised of cathode ray tube ("CRT") waste generated by Penske, municipal solid waste ("MSW"), and clay landfill cover soils (collectively referred to hereinafter as "commingled CRT/MSW waste"), as opposed to physical removal and proper disposal of all D008 CRT waste that is contained in the ninety-nine roll-off containers of commingled CRT/MSW waste, and would respectfully show the Honorable Commissioners as follows:

I. BACKGROUND AND ARGUMENT

TDSL believes that certain portions of the ED's September 24, 2004 letter clearly follow the guidance provided to the ED by Chairman White and Commissioner Soward at the September 16, 2004 hearing on TDSL's Motions to Overturn the ED's June 18, 2004 and June 30, 2004 decisions. The first portion of the ED's September 24 decision requires Penske to remove the ninety-nine containers being stored by Penske at the TDSL Landfill by hazardous

¹ Letter from Mr. Glenn Shankle, Executive Director, TCEQ, to Mr. Marc E. Althen, Senior Vice President, Penske Truck Leasing (Sept. 24, 2004), attached hereto and incorporated herein as Exhibit A.

waste manifest and dispose of the waste at a permitted hazardous waste facility in accordance with established hazardous waste protocols. This portion of the ED's order to Penske clearly implements the intent of Chairman White and Commissioner Soward as expressed at the September 16 hearing.

The second portion of the ED's September 24 letter appears to contradict the first portion of the letter and to run afoul of the Commission's intent as expressed by Chairman White and Commissioner Soward. As an alternative to disposal of the entirety of the waste contained in the ninety-nine roll-off containers as hazardous waste, the ED's September 24 decision also allows the physical extraction of the D008 CRT material from each of the ninety-nine containers prior to final disposal of all of the waste as hazardous and non-hazardous waste, as appropriate. This requirement also follows the guidance voiced at the September 16 hearing. However, the ED's September 24 decision then states: "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."² TDSL moves to overturn this part of the ED's September 24 decision. As demonstrated by a letter dated October 17, 2004, Zenith and Penske apparently believe that this portion of the ED's decision provides Zenith and Penske the option of simply conducting additional testing of the entire waste volume of the commingled CRT/MSW waste, without physical separation and extraction of the D008 CRT waste, and then reclassifying some or all of the diluted D008 CRT waste as non-hazardous.³ This is exactly the same approach previously approved by the ED which the Commission rejected in granting TDSL's Motions to Overturn.

² *Id.* at 1.

³ See Letter from Mr. Michael A. Duff, Senior Vice President and General Counsel, Penske Truck Leasing, to Mr. Gary T. Newton, General Counsel, Texas Disposal Systems, Inc., (Oct. 17, 2004), attached hereto and incorporated herein as Exhibit B.

Such conduct would be directly contrary to Chairman White's and Commissioner Soward's stated guidance on September 16, 2004, as well as contrary to the federal Third Third Land Ban restrictions found at 40 C.F.R. § 268.3.

As clearly expressed at the September 16 hearing, the wastestream that is the focus of this matter is the D008 CRT waste generated by Penske at the time of the traffic accident on October 9, 1997. Because the D008 CRT waste was hazardous at the point of generation, testing of commingled CRT/MSW waste that is presently stored in ninety-nine roll-off containers at any later date is not relevant to the hazardous waste determination.⁴ To the extent the ED's September 24 letter authorizes Penske to conduct further testing of the commingled CRT/MSW waste before removal of the D008 CRT waste from the commingled CRT/MSW waste in accordance with applicable regulations, the ED's decision should be overturned.

TDSL has a justiciable interest in the ED's September 24 decision because the ED's decision, in part, authorizes an action which is in conflict with TDSL's Type I MSW permit and could lead to the further mismanagement of this waste and resultant long-term liability to TDSL and its customers. TDSL's Commission-issued MSW permit does not allow it to treat or dispose of hazardous waste.⁵ The alternative described in the ED's September 24 decision appears to allow Penske to conduct more non-representative sampling of the commingled CRT/MSW waste, and then dispose of the entire volume, including the approximately 6,000 to 10,000

⁴ At the September 16 hearing, Chairman White stated:

I don't think that the law takes me to testing, I mean this is how I am putting this together today, to testing what is in any of the 95 rolloff containers now, at a certain level, and that is what determines how it can be disposed. That's not how I am putting it together.

* * *

If it was, then I would be very interested in the protocols of testing and all of that, I'm not, I, you know, at this point I have concluded that that's not relevant to the decision here today.

Transcript of September 16, 2004 Commissioners' Agenda at 29.

⁵ Permit No. MSW-2123, Att. 12, Site Operating Plan, at ATT-12-39 (Apr. 21, 1997).

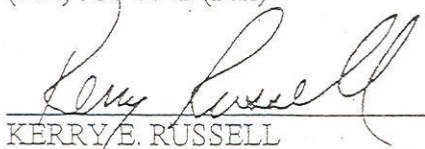
pounds of D008 CRT waste, as non-hazardous waste based on such testing. TDSL has the responsibility to ensure that federal and State law and its permit terms are not violated and to further ensure that TDSL's customers are not subjected to potential Superfund liability, by virtue of their MSW waste being commingled with the D008 CRT waste and then being removed and disposed of offsite as non-hazardous waste. To allow Penske to dispose of the entire volume as non-hazardous waste, when it is clear that D008 CRT waste is contained within the commingled CRT/MSW waste; would further harm TDSL and its customers.

II. CONCLUSION AND PRAYER

WHEREFORE PREMISES CONSIDERED, Texas Disposal Systems Landfill, Inc. respectfully requests that the portions of the Executive Director's September 24, 2004 decision that allow Penske Truck Leasing Co., L.P. to conduct further tests of the commingled CRT/MSW waste, as opposed to physical removal and proper disposal of the D008 CRT waste that is contained in the commingled CRT/MSW waste, be overturned by the Commission. TDSL has presented sufficient evidence to demonstrate that it has a justiciable economic and regulatory interest in having that specified portion of the Executive Director's September 24 decision overturned.

Respectfully submitted,

RUSSELL, MOORMAN & RODRIGUEZ, L.L.P.
102 West Morrow Street, Suite 103
Georgetown, Texas 78626
(512) 930-1317
(512) 930-7742 (Fax)



KERRY E. RUSSELL
State Bar No. 17417820

CERTIFICATE OF SERVICE

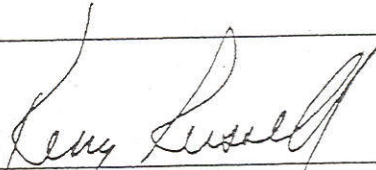
I hereby certify that on this the 18th day of October, 2004, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, Federal Express overnight delivery, or hand delivery to the following:

<p>Mr. Duncan C. Norton General Counsel (MC-101) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (mail) Telephone: (512) 239-5525 Fax: (512) 239-5533</p>	<p>General Counsel of the Texas Commission on Environmental Quality</p>
<p>Mr. David Speaker Texas Commission on Environmental Quality MC-175 P.O. Box 13087 Austin, Texas 78711-3087 Telephone: (512) 239-3400 Fax: (512) 239-3434</p> <p>Mr. John Steib Texas Commission on Environmental Quality MC-172 P.O. Box 13087 Austin, Texas 78711-3087 Telephone: (512) 239-5100 Fax: (512) 239-0532</p>	<p>Representing the Executive Director, Texas Commission on Environmental Quality</p>
<p>Mr. Blas Coy Office of the Public Interest Counsel Texas Commission on Environmental Quality MC-103 P.O. Box 13087 Austin, Texas 78711-3087 Telephone: (512) 239-6363 Fax: (512) 239-6377</p>	<p>Representing the Office of Public Interest Counsel, Texas Commission on Environmental Quality</p>

<p>Ms. Jody Henneke Office of the Public Assistance Texas Commission on Environmental Quality MC-108 P.O. Box 13087 Austin, Texas 78711-3087 Telephone: (512) 239-4000 Fax: (512) 239-4007</p>	<p>Representing the Office of Public Assistance, Texas Commission on Environmental Quality</p>
<p>Mr. Kyle Lucas Alternative Dispute Resolution Texas Commission on Environmental Quality MC-222 P.O. Box 13087 Austin, Texas 78711-3087 Telephone: (512) 239-4010 Fax: (512) 239-4015</p>	<p>Representing Alternative Dispute Resolution, Texas Commission on Environmental Quality</p>
<p>Docket Clerk TCEQ Office of Chief Clerk (MC-105) P.O. Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building F Austin, Texas 78753 (delivery) Fax: (512) 239-3311</p>	<p>For the Office of the Chief Clerk</p>
<p>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) 775-6330</p>	<p>Penske Truck Leasing Co., L.P. and Penske Logistics, Inc.</p>
<p>Ms. Pam Giblin Mr. Derek McDonald Baker Botts, L.L.P. 1500 San Jacinto Center 98 Jacinto Blvd. Austin, Texas 78701-4039 Fax: (512) 322-8308</p>	<p>Representing Penske Truck Leasing</p>

Ms. Beverly Wyckoff General Counsel Zenith Electronics Corporation 2000 Millbrook Drive Lincolnshire, IL 60069 Fax: (847) 941-8001	Zenith Electronics Corporation
Mr. David Donaldson Graves, Dougherty, Hearon Moody 401 Congress, Suite 2200 Austin, Texas 78701 Fax: (512) 480-5760	Representing Texas Disposal Systems Landfill, Inc.
Mr. Douglas Y. Christian Rees Smith, L.L.P. 2500 One Liberty Place Philadelphia, PA 19103-7301 Fax: (215) 851-1420	Representing Penske Truck Leasing
Mr. Philip Comella Seyfarth Shaw 55 East Monroe Street, Suite 4200 Chicago, IL 60603-5803 Fax: (312) 269-8869	Representing Zenith Electronics Corporation
Mr. Gary Newton Texas Disposal Systems Landfill, Inc. P.O. Box 17126 Austin, Texas 78760-7126 Fax: (512) 243-4123	Texas Disposal Systems Landfill, Inc.
David Waddell Seyfarth Shaw LLP 700 Louisiana, Suite 3850 Houston, Texas 77002-2731 Fax: (713) 225-2340	Representing Zenith Electronics Corporation
Richard Lowerre Lowerre & Kelly 44 East Avenue, Suite 101 Austin, Texas 78701 Fax: (512) 482-9346	Representing Texas Disposal Systems Landfill, Inc.

Thomas Edwards Cynthia Woelk Office of Attorney General P.O. Box 12548 Austin, Texas 78711-2548	
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KERRY E. RUSSELL

Kathleen Harlnett 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 Stoib, 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,



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



MICHAEL A. DUFF
SENIOR VICE PRESIDENT AND GENERAL COUNSEL

October 17, 2004

VIA FACSIMILE--(512) 243-4123

Gary T. Newton, Esquire
General Counsel
Texas Disposal Systems, Inc.
P.O. Box 17126
Austin, Texas 78760-7126

Dear Gary:

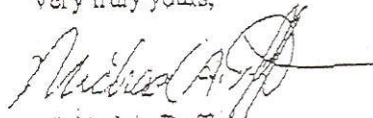
I am writing to inform you that Penske intends to begin the removal of the roll-offs stockpiled at your facility on October 25, 2004. Penske intends to remove the material using a Texas Uniform Hazardous Waste Manifest and then test and dispose of the material at another facility in accordance with the test results as requested by the Executive Director.

Our contractor, USA Environment, L.P., will need access to the roll-off containers, use of a staging area, and use of TDSL's scale to comply with DOT regulations. USA Environment will not require use of TDSL's personnel or equipment.

Regarding your question of liability for TDSL's roll-off containers, the containers will be fully insured by our transporter during transportation, and Penske will further indemnify TDSL for any damage to the roll-off containers while they are in the possession of Penske or its contractors, or in the possession of the disposal facility.

We hope you will cooperate with Mr. Shankle's directive.

Very truly yours,



Michael A. Duff

cc: Glenn Shankle
John F. Steib, Jr.

PENSKE TRUCK LEASING / RT 10 GREEN HILLS / P.O. BOX 583 / READING, PA 19603-0583
TELEPHONE: 610-775-6292 / FAX: 610-775-6320 / EMAIL: mike.duff@penske.com

Exhibit B