

## Landfill is suing for toxic mistake

Top-rated site near Austin stuck with tons of lead-laden waste

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**CORRECTION:** A Saturday Page One article about a lawsuit involving hazardous waste sent to the Texas Disposal Systems landfill incorrectly stated that the suit was filed several years after the 1997 dumping incident. The lawsuit was filed in 1998.

Editor's note 07/25/2004

On April 24, the American-Statesman published a story under the headline "Landfill is suing for toxic mistake" that examined a legal dispute over a load of broken Zenith Electronics Corp. TV picture tubes deposited at a landfill in Creedmoor. Texas Disposal Systems, the landfill operator, contends the tubes are hazardous waste and that Penske Truck Leasing must remove them. Penske contends the Texas Natural Resource Conservation Commission gave the landfill permission to leave the tubes in place. Penske has raised a concern that the story failed to provide a balanced description of the issues in dispute.

A sentence in the story began, "Three hours after Zenith reminded Penske officials that the waste had to be handled as hazardous," Penske notified the landfill operator.

An internal Zenith memo in the court file says a company supervisor instructed another Zenith employee to notify Penske on the day of the accident "that if any of the tubes were broken, they must be considered hazardous."

Penske's position is that Zenith did not remind it "about anything regarding the nature of the CRTs in question, nor has any credible evidence to the contrary been introduced in the litigation to support such a statement," according to Michael A. Duff, senior vice president and general counsel for Penske.

Another sentence read that a state environmental inspector "verified that Penske was legally the generator of the hazardous waste and directed the company to arrange for proper disposal."

In a letter to Penske dated Nov. 5, 1997, the regional waste program manager for the environmental commission identifies the broken tubes as hazardous waste and notes that Penske is responsible for cleaning up the waste. It asks for a description of the incident, steps taken to remove the spill and documentation that the wastes were disposed of properly.

Penske's position is that "regulators neither determined Penske to be the generator of the hazardous waste nor directed Penske to arrange for the disposal of the waste," according to Duff. Further, Duff notes, an inspection report dated April 29, 1998, says that the state "allowed the spill waste that was inadvertently deposited in the landfill to remain there."

Fred Zipp, Managing editor

CREEDMOOR -- On prairie land 10 miles southeast of downtown Austin, 99 large containers filled with a festering mix of hazardous waste and household trash sit waiting for transport to a safe burial. With temperatures rising, so will the stench.

It's a surreal predicament for Bob Gregory. His Texas Disposal Systems landfill, where the sealed containers languish, is widely regarded as the best-designed, best-run municipal waste landfill in Texas. So say his neighbors, state regulators, environmental activists -- even the governor's office, which in 2002 honored the company with a Texas Environmental Excellence Award.

Gregory's only vocal detractors seem to be Zenith Electronics Corp. and Penske Truck Leasing Co., the companies he is suing because their lead-laden waste mistakenly was sent to Texas Disposal Systems after a 1997 truck wreck on Interstate 35.

Their lawyers, including legal powerhouse Baker Botts, are in state District Court in Hays County arguing that the two companies have no obligation to pay the \$400,000 it will cost to legally dispose of about 1,600 tons in a landfill designed to accept industrial hazardous waste.

At the heart of this case is a question with ramifications far beyond the financial issues: If state law makes at least Penske, if not Zenith, responsible for proper disposal -- as state environmental commission regulators determined in 1997 and 1998 -- why for the past six years hasn't the Texas Commission on Environmental Quality required either to have the remaining material sent to a hazardous waste landfill?

The commission's inaction has continued even after it promised in December to re-evaluate and improve its enforcement programs, which a state audit found to be too lax to deter polluters.

"We wouldn't be in court today if the commission had properly enforced the law," Gregory said. "The cost of pursuing this case, of asking a civil court to play the role of the Texas attorney general and the TCEQ, puts me at a financial disadvantage with competitors who may not always play by the rules.

"A half-million dollars here, a million there, and pretty soon I'll be out of business."

Commission officials say there are factual disputes, such as whether the waste was hazardous to begin with, that the trial will help resolve. And, they add, with no imminent threat of contamination, the commission has done everything necessary to protect human health and the environment.

"We have not punted any of our responsibilities," spokesman Andy Saenz said. "The issue is: Who should pay for it?"

The trial isn't going well for Gregory.

That's not because of the evidence the jury has heard, but because of the documents District Court Judge Gary Steel has tentatively decided that jurors won't see. Off limits are the regulations that designate what waste is hazardous and how it must be handled, and the letters in which the companies acknowledge the wreck created hazardous waste. It's still unclear the extent to which environmental commission staff will be allowed to testify when the trial continues this week.

"There are circumstances where bad things happen, and nobody is responsible under the law," Steel told Texas Disposal Systems lawyers this week during arguments about what evidence would be admitted. "Take it to Austin, take it to the TCEQ, take it through the EPA. But down here in . . . Hays County, south of Austin, it is not our responsibility to find somebody, regardless of negligence, to be responsible."

With the jury in the dark about why Gregory couldn't just allow the waste to remain in his landfill indefinitely, Penske and Zenith lawyers are arguing that what happened is much ado about nothing -- because there is no evidence any toxic materials have leaked into the environment. They're telling jurors that Gregory is trying to cash in on the courthouse lottery.

"What's the big deal," asked Phillip Comella, lawyer for Chicago-based Zenith. "This is a garbage dump. They take these materials all the time."

The saga of the orphaned waste began on I-35 near Buda on Oct. 9, 1997, when a Penske truck hauling Zenith TV picture tubes to a Mexican assembly factory overturned and split open. The 1,248 tubes, which each contained 3.5 pounds of lead, legally became hazardous waste once broken, as Penske acknowledged in its hauling contract with Zenith.

But the uninjured truck driver didn't know that; the manifest didn't acknowledge it, evidence shows. Emergency crews and state troopers scrambled to get the 41,000 pounds of shattered cargo cleaned up to reopen I-35, which had backed up to the Town Lake bridge. The Texas Department of Transportation arranged for the damaged tubes to be trucked to the nearby Texas Disposal Systems landfill, licensed to handle nonhazardous waste.

Three hours after Zenith reminded Penske officials that the waste had to be handled as hazardous, Penske notified Gregory's brother. He immediately radioed the landfill to stop the unloading, keeping most of it out of the landfill. But by that time, seven dump-truck loads had already been emptied and mixed with the household garbage.

Gregory contacted the state environmental commission, whose inspector verified that Penske was legally the generator of the hazardous waste and directed the company to arrange for proper disposal.

But Penske's shipments to a hazardous waste landfill included only the tubes still in dump trucks, at the scene and some that were removed from the surface of Gregory's landfill -- leaving the bulk of commingled waste in it.

After years of unsuccessful negotiations with Penske and Zenith, Gregory sued. His stakes are higher than just avoiding the cost of disposal and recovering hundreds of thousands of dollars in expenses for the measures, such as a waterproof landfill cap, that he used to keep the lead contained. If Gregory ships the waste for disposal, he legally becomes the generator and under the federal Superfund law could be liable for millions of dollars in cleanup costs if the landfill to which he sends it someday contaminates the environment.

Gregory again asked the environmental commission for advice this January and filed a formal complaint seeking enforcement action against both companies in early March. After a partial reply confirming he could remove the waste from his landfill and store it temporarily, Gregory in late January and early February had the 1,600 tons of commingled waste placed in the lined, covered trash containers.

In an April 8 letter, state Sen. Gonzalo Barrientos, D-Austin, asked environmental commission managers what, if anything, they have done to follow up after indicating in 1997 that Penske might have violated the law by leaving the waste at Texas Disposal Systems.

So far, Barrientos has not yet received an answer.

Lydia Gonzalez Gromatzky, the commission's deputy director for legal services, said Friday that agency staff would soon test the commingled waste at Texas Disposal Systems to determine if it leaches enough lead to meet the hazardous waste definition. If not, the waste might not need special disposal, she said.

That would reverse the agency's position over the past six years. As recently as Jan. 15, the commission's waste permits chief stated in a letter to Gregory that federal rules bar diluting hazardous waste with other materials as a way to avoid hazardous waste requirements.

Gromatzky said one of the companies argues the dilution was inadvertent, not an attempt to circumvent the rules.

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130:Texas Commission on Environmental Quality staff say they will soon test waste stored at Texas Disposal Systems near Creedmoor to see if it leaches enough lead to fit the definition of hazardous waste.