

**TCEQ DOCKET NO. 2007-1019-IHW**

**IN THE MATTER OF VIOLATIONS  
OF THE TEXAS SOLID WASTE  
DISPOSAL ACT AND TCEQ  
REGULATIONS BY PENSKE  
TRUCK LEASING CO., L.P. AND  
PENSKE LOGISTICS, INC.**

**§ BEFORE THE TEXAS  
§  
§ COMMISSION ON  
§  
§ ENVIRONMENTAL QUALITY  
§**

**NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION'S  
AMICUS BRIEF IN SUPPORT OF  
TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S  
PETITION TO REVIEW THE EXECUTIVE DIRECTOR'S ACTION  
AND ORDER PROPER DISPOSAL OF HAZAROUS WASTE**

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

COMES NOW The National Solid Wastes Management Association (NSWMA) and files this amicus brief in support of the Petition filed by Texas Disposal Systems Landfill, Inc. (TDSL), asking this Commission to review the Commission's Executive Director's (ED) failure to enforce applicable state and federal laws governing the proper management and disposal of hazardous waste, and requesting the Commission to order that certain waste materials on TDSL's property be removed, managed and disposed of by Penske Truck Leasing Company L.P. and Penske Logistics, Inc. (Penske) in compliance with applicable hazardous waste laws. As discussed below, NSWMA believes that the ED's refusal to clarify its direction to Penske and allow this now nearly 10 year old dispute to fester at TDSL's landfill in Austin is contrary to applicable law, bad public policy, and may encourage some hazardous waste generators and/or transporters to improperly characterize, manifest and manage their hazardous waste, and expose the state's municipal solid waste collectors and disposal facilities to improperly managed hazardous wastes.

## **INTEREST OF THE AMICUS CURIAE**

NSWMA is a non-profit trade association whose 1,700 member companies operate in all fifty states, including Texas. Collectively, these private sector companies engage in nearly every aspect of solid waste management. NSWMA members include collectors and transporters of solid waste; owners and operators of solid waste disposal facilities; recyclers; and firm's providing legal, financial and consulting services to the waste management industry. NSWMA's Landfill Institute develops industry positions on issues affecting landfills. NSWMA has numerous members who operate landfills in Texas and throughout the United States, including TDSL. NSWMA regularly represents its members in matters before the courts, Congress, and state and federal regulatory agencies.

NSWMA's members who own and/or operate landfills throughout the United States have a valid and justiciable interest in the resolution of this dispute concerning the placement of Penske's hazardous waste at TDSL's municipal solid waste landfill and the ultimate characterization and disposition of that waste. Because this high profile proceeding involves an interpretation of law that will likely be relied upon by future hazardous waste generators and transporters, it affects landfills throughout Texas, including those owned and/or operated by NSWMA's members.

## **BACKGROUND AND STATEMENT OF FACTS**

The almost decade-long dispute between TDSL and Penske has been well documented in numerous filings by the parties in this and related matters. NSWMA refers the Commission to TDSL's June 21, 2007 Petition (Background) for a review of the lengthy factual background and legal maneuvering associated with this dispute.

## ARGUMENT

### **The Continued Storage of the Hazardous CRT Waste by Penske at TDSL is Contrary To Federal Rules Governing Hazardous Waste**

NSWMA agrees with TDSL that the Commission should consider the CRT waste generated by Penske as a result of the October 9, 1997 accident, which is currently stored in 99 covered roll-off containers where it is commingled with municipal solid waste and clay (the Commingled CRT Waste) as hazardous waste under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. (RCRA), and order Penske to remove it from TDSL's property and manage it in accordance with applicable RCRA regulations and state laws. NSWMA believes it is reasonably clear that the Commingled CRT Waste is not a non-hazardous waste, and that the Commission should clarify that Penske is not authorized to remove and transport the Commingled CRT Waste to a non-hazardous waste disposal facility. The Commingled CRT Waste was classified as a regulated hazardous waste by Penske. The original waste generated by Penske and/or Zenith (the CRT Waste) was subject to specific classification and manifesting requirements at the point of waste generation -- the I-35 accident scene. A final decision by the Commission to allow the Commingled CRT Waste to be managed as a non-hazardous waste would be contrary to federal law governing the management of hazardous waste and with prior decisions and interpretations by the Commission under state laws and rules. Further, by reclassifying what was once indisputably hazardous waste (the original waste generated in the I-35 accident) as non-hazardous waste, the Commission will encourage improper hazardous waste management practices by generators and transporters, and expose landfills to unnecessary liability.

NSWMA remains concerned that the Commission may ratify the Executive Director's decision shifting the point-of-generation of hazardous waste from the I-35 accident scene in October 1997 to some other, more recent date and location, after it has been diluted with MSW and clay soil.

Once hazardous waste is generated, it does not lose its hazardous character simply because it changes form or is combined with other substances. *Chemical Waste Management, Inc. EPA*, 869 F.2d 1526, 1539 (D.C. Cir. 1989) (emphasis added). The Commission recognized the CRT Waste was hazardous as early as November 1997,<sup>1</sup> identified the Commingled CRT Waste as hazardous in its Notice of Violation in May 2004, and ruled on September 16, 2004 that the Commingled CRT Waste should be addressed as hazardous waste unless Penske could segregate all of the original CRT Waste from the municipal solid waste and clay soil that has been combined with it for the past nine and three-quarter years.<sup>2</sup> The ED has stated the Commingled CRT Waste “must be manifested as hazardous waste and disposed of at a permitted hazardous waste facility.”<sup>3</sup> Although nearly three years have passed since the Commission’s September 16, 2004 ruling that Penske was the generator of hazardous waste and that the waste needs to be removed from TDSL’s property, the 99 containers are still sitting out in the weather, deteriorating under the hot Texas sun. Penske cannot pretend that the hazardous waste it generated and that its hazardous waste remediation contractor confirmed was buried within the waste that is now containerized has miraculously disappeared simply because it was commingled with other material at TDSL’s landfill. Penske generated hazardous waste as a result of the October 1997 accident, and should be required to manage that waste consistent with federal and state law governing such waste, including applicable manifesting and disposal requirements at an authorized hazardous waste facility. TDSL is well justified in requiring standard hazardous waste manifests accompany each container of Commingled CRT Waste removed from its site.

In response to the Commission’s September 16, 2004 order, Penske offered to dispose of the containers of Commingled CRT Waste as non-hazardous, if a representative sampling of the entire

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<sup>1</sup> Letter from Chris Smith, Waste Program Manager, TCEQ, to Mark Althen, Penske Truck Leasing (Nov. 5, 1997).

<sup>2</sup> See Interim Order, TCEQ Docket No. 2004-0984-IHW-E (Sept. 16, 2004).

<sup>3</sup> Letter from Glenn Shankle, Executive Director, TCEQ to Mark Althen, Penske Truck Leasing (Sept. 24, 2004).

mass of waste contained in an individual container tested as characteristically non-hazardous. This would be contrary to well-settled RCRA principles, which do not authorize waste generators to mix a toxic characteristic hazardous waste with a non-hazardous waste and manage the resulting mixture as non-hazardous. See EPA's RCRA Land Disposal Restrictions, 40 C.F.R. § 261.3(d)(1). The federal RCRA rules expressly state that "[w]astes excluded under this section are subject to part 268 ... even if they no longer exhibit a characteristic at the point of land disposal." 40 C.F.R. § 261.3(g)(3). To put it simply, dilution is not a solution to pollution.

The federal courts have consistently held that the definition of "hazardous waste" under RCRA should be broadly interpreted. See, e.g., *Environmental Defense Fund v. EPA*, 210 F.3d 396, 397 (D.C. Cir. 2000). As the federal court of appeals in Washington, D.C. has noted, "a hazardous waste does not lose its hazardous character simply because it changes form or is combined with other substances." *Chemical Waste Management, Inc. EPA*, 869 F.2d 1526, 1539 (D.C. Cir. 1989) (emphasis added). Hazardous waste includes "not only those solid wastes that do pose hazards to human health or the environment, but also those that "may" do so. *American Chemistry Council v. EPA*, 337 F.3d 1060, 1064 (D.C. Cir. 2003). Treating the Commingled CRT Waste as non-hazardous, given the restrictive regulatory context provided by RCRA, the EPA's Subtitle C regulations and the federal courts, is unjustified.

Further, even if the ED's previous interpretation of and reliance upon the inapplicable Mixture Rule is somehow worthy of consideration, concluding that the Commingled CRT Waste is not hazardous simply because it was "sampled" would ignore the requirement under 40 C.F.R. § 261.24(a) and SW-846 that such sampling be representative of the waste to be disposed. Based on NSWMA's review of the record, the limited testing performed by the Commission on the Commingled CRT Waste in 2004 appears to have been inconsistent with SW-846. While NSWMA

has not extensively reviewed the precise scope of the Commission's testing of the Commingled CRT Waste and is, therefore, not in a position to determine whether it was "representative," it could not have been representative of the CRT Waste that entered the TDSL landfill, nor could it be representative of the mixture of the CRT Waste and the municipal solid waste contaminated by the CRT Waste before daily cover clay soils were added the next day. SW-846 requires the waste sampled to be homogeneous. See SW-846, Section 9.1.1.1. Since the Commingled CRT Waste stored in the transport containers is not homogeneous and is not representative of the CRT Waste, NSWMA is not sure how samples could be taken from the top of a portion of the loads of Commingled CRT Waste that accurately "represents" either waste.

EPA's Dilution Rule also appears to prohibit recharacterization of the Commingled CRT Waste as non-hazardous waste. Federal regulations state that no person shall in any way dilute a restricted waste as a substitute for adequate treatment." 40 C.F.R. § 268.3(a). The ED has previously asserted that because the dilution of the CRT Waste "inadvertently occurred", such dilution is "distinguishable from an act of purposeful dilution designed to avoid adequate treatment." RCRA and the federal regulations promulgated thereunder do not recognize an "inadvertent" exception to the Dilution Rule, and the ED did not cite any court decision or EPA memorandum, guidance document or interpretative letter in support of its position. Further, the required daily soil covering of the mixture of CRT Waste and MSW on October 10, 1997, following the refusal of Penske and Zenith to remove the CRT Waste, was certainly not an inadvertent dilution of either waste.

Finally, NSWMA is concerned that if the Commission authorizes Penske to manage the Commingled CRT Waste as non-hazardous, hazardous waste generators and/or transporters will have an added incentive to mislead disposal facilities concerning the toxic nature of their waste, as

the commingling of such waste with larger quantities of solid waste and daily soil cover at a landfill might render the resulting waste material non-hazardous. This is not only bad public policy, because it encourages hazardous waste generators and/or transporters to mislead disposal facilities, but also places an added burden on solid waste landfills to be even more vigilant against the supposedly “accidental” disposal of hazardous waste at their facilities. With the substantial difference in disposal costs for non-hazardous and hazardous waste in Texas,<sup>4</sup> there is already an ample financial motivation for hazardous waste generators and transporters to mislead disposal facilities. The Commission should not be providing additional incentives to such companies. With the ability to disguise or hide waste with hazardous characteristics in loads of municipal solid waste, hazardous waste generators and transporters must bear the burden of notifying disposal facility operators when regulated quantities of hazardous waste are included in a load. Disposal facility operators deserve the support of regulatory compliance agencies in delivering swift and certain enforcement against generators who knowingly mismanage regulated quantities of hazardous waste.

The Commission needs to bring closure to this lengthy episode. Comments that this dispute should be “left to the courts” ignore the Commission’s expertise and jurisdiction over the issues presented in this matter. Further, in the normal course, agencies make decisions and affected parties have the option of seeking judicial review of those decisions. The Commission should reject Penske’s invitation to abdicate its responsibility for interpreting and enforcing the hazardous waste management regulations, and issue a ruling that provides definitive guidance to the parties.

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<sup>4</sup> The median disposal cost of a ton of municipal solid waste in a Texas landfill is about \$24.00 per ton. Solid Waste Digest, Chartwell Solid Waste Group (Report 8 – 2006) at 29. By contrast, it costs about \$175.00 per ton to dispose of hazardous waste at the Texas Ecology waste disposal facility in Corpus Christi, the closest hazardous waste disposal facility to Austin.

## CONCLUSION

The National Solid Wastes Management Association urges the Commission to grant the Petition to Review the Executive Director's Action and Order Proper Disposal of Hazardous Waste.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

By my signature below, I certify that on the 19<sup>th</sup> day of July, 2007 a true and correct copy of the foregoing NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION'S AMICUS BRIEF IN SUPPORT OF TEXAS DISPOSAL SYSTEMS LANDFILL INC.'S PETITION TO REVIEW THE EXECUTIVE DIRECTOR'S ACTION AND ORDER PROPER DISPOSAL OF HAZARDOUS WASTE was served upon the parties identified below by first class mail.

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