



NATIONAL SOLID WASTES  
MANAGEMENT ASSOCIATION

September 7, 2004

VIA OVERNIGHT MAIL

Docket Clerk  
TCEQ Office of Chief Clerk (MC-105)  
12100 Park 35 Circle, Building F  
Austin, TX 78753

Dear Sir or Madam:

Enclosed are an original and 12 copies of the National Solid Wastes Management Association's Amicus Brief in Support of Texas Disposal Systems Landfill, Inc.'s Motions to Overturn the Executive Director's Decision.

Please date stamp the extra copy and return it to me in the enclosed, self-addressed, stamped envelope. Thank you.

Sincerely,

*David Bidelman*  
David Bidelman  
General Counsel

DB:clb

Enclosures

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IN THE MATTER OF THE	§	BEFORE THE TEXAS
AUTHORIZATION OF DISPOSAL	§	
OF WASTE AS SPECIAL WASTE	§	COMMISSION ON
ISSUED BY THE EXECUTIVE DIRECTOR	§	
TO PENSKE TRUCK LEASING CO., L.P.	§	ENVIRONMENTAL QUALITY

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**THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION  
AMICUS BRIEF IN SUPPORT OF  
TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S  
MOTIONS TO OVERTURN THE EXECUTIVE DIRECTOR'S DECISION**

The National Solid Wastes Management Association (NSWMA) hereby files this amicus brief in support of the motions to overturn filed by Texas Disposal Systems Landfill Inc. (TDSL), seeking reversal of the June 2004 decision by the Texas Commission on Environmental Quality's Executive Director (ED) authorizing Penske Truck Leasing Company L.P. (Penske) to dispose of certain waste materials as a non-hazardous waste. As set forth in further detail below, NSWMA believes that the ED's decision is contrary to applicable law and will almost certainly 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 the ED's decision 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

There does not appear to be any significant dispute over the basic facts involved in this proceeding. On October 9, 1997, a truck owned by Penske was involved in an accident on I-35 south of Austin. The Penske truck was carrying a load of Zenith Electronics Corporation (Zenith) owned cathode ray tubes (CRT's) to a Zenith assembly plant. Some of the broken and discarded CRT's that resulted from the accident (the CRT Waste) were sent to TDSL's landfill, based on an initial, and erroneous, designation by Penske, despite the lead content of the CRT's, that the material qualified as a non-hazardous waste. After TDSL was notified -- by Penske -- that the CRT Waste was in fact hazardous, TDSL immediately refused to accept additional CRT Waste from the accident scene and isolated the CRT Waste that had been placed into the working face of the landfill. This waste, which had become commingled with municipal solid waste (MSW) delivered to the TDSL landfill by other customers, and clay cover soils (Commingled CRT Waste), has been stored by TDSL for nearly seven years, pending removal and proper disposal by Penske and/or Zenith. The Commingled CRT Waste is now stored in 99 roll-off transport containers. TDSL's Brief in Support of Motions to Overturn sets forth, in great specificity, the actions by Penske, Zenith, TDSL, the Texas Commission on Environmental Quality (the Commission) and others following the initial generation of the hazardous waste at the accident scene and the initial placement of the CRT Waste in the TDSL landfill, and NSWMA incorporates that section into this brief by reference.

On June 18, 2004, the ED issued a letter (through Mr. John F. Steib) approving Penske's request that the Commingled CRT Waste stored at TDSL be transported and disposed as non-hazardous special waste. On June 30, 2004, the ED issued a letter (through Mr. Wade Wheatley) confirming that approval but identifying only landfills with Class 1 cells as potential recipients. On July 9, 2004, TDSL filed a Motion to Overturn the June 18, 2004 action by the ED. On July 22, 2004, TDSL filed a Motion to Overturn the June 30, 2004 action by the ED and filed a lengthy brief

in support of both its motions. On August 27, the Commission issued a letter directing that ~~supplemental briefs in this matter be filed by September 3, 2004. The Commission subsequently~~ extended the deadline for the submission of such briefs to September 8, 2004. Although NSWMA is not a party to this proceeding and has not previously filed a brief in the case, NSWMA considers this matter to be of great importance to landfill owners and operators, both in Texas and throughout the United States, and appreciates the opportunity to file this brief.

## ARGUMENT

### The Executive Director's Decision is Contrary To Federal Rules Governing Hazardous Waste

NSWMA agrees with TDSL that the Commission should not treat the Commingled CRT Waste as non-hazardous Special Waste and should revoke the ED's authorization to Penske to remove and transport the Commingled CRT Waste to a non-hazardous waste disposal facility. The CRT Waste was a regulated hazardous waste generated by Penske and/or Zenith and 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 CRT Waste, which is contained within the Commingled CRT Waste, or the Commingled CRT Waste, to be managed as a non-hazardous waste is contrary to federal law governing the management of hazardous waste and with prior decisions and interpretations by the Commission under state laws and rules.<sup>1</sup> Further, by reclassifying what was once indisputably hazardous waste (the CRT Waste) as non-hazardous waste, the Commission will encourage improper hazardous waste management practices by generators and transporters, and expose landfills to unnecessary liability.

NSWMA is very concerned that the ED is seeking to shift 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

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<sup>1</sup> See TDSL's Brief in Support of Motions to Overturn at 2, n. 2 (identifying deposition testimony by Commission staff)



November 1997,<sup>2</sup> and confirmed that position as recently as May 2004, when the ED issued a notice of violation to Penske<sup>3</sup> and sent a letter to TDSL clarifying that "Penske generated the hazardous CRT waste and is responsible for the proper disposal of the waste." (emphasis added).<sup>4</sup> That hazardous waste still exists, and Penske cannot pretend that it 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.

The ED argues that because "recent sampling" of the Commingled CRT Waste was below the lead leachate threshold for characteristic hazardous waste, see ED's Response to TDSL's Motion to Overturn at 5, such waste is no longer hazardous under the federal Resource Conservation and Recovery Act (RCRA). It is contrary to well-settled RCRA principles that a characteristic hazardous waste may be mixed with a non-hazardous waste and the resulting mixture be classified as non-hazardous and not subject to the Land Disposal Restrictions set forth in 40 C.F.R. Part 268. 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).

In support of its interpretation of the federal Environmental Protection Agency's (EPA) Mixture Rule, the ED cites to three "FAXBACK guidance documents" issued by the EPA Office of Solid Waste. See ED's Response to TDSL's Motion to Overturn at 6. The ED's reference to the Mixture Rule and these documents is misguided for several reasons. First, the Mixture Rule only applies to mixtures of listed hazardous waste and solid waste, see 66 Fed. Reg. 27,268 (May 16, 2001), and is not applicable to the commingled characteristic hazardous waste and non-hazardous MSW at issue here. Second, even if the Mixture Rule were relevant, two of these documents are more than seventeen years old, and one of them is more than twenty-three years old. All three of the documents significantly pre-date the current EPA Mixture Rule, which was published on May 16, 2001 (see 66 Fed. Reg. 27,266), and therefore have very limited, if any, applicability to current federal requirements governing the commingling of CRT Waste, municipal solid waste and clay

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<sup>2</sup> Letter from Chris Smith, Waste Program Manager, TCEQ, to Mark Althen, Penske Truck Leasing (Nov. 5, 1997).

<sup>3</sup> Letter from Glenn Shankle, Acting Director, TCEQ, to Brain Hard, President, Penske Trucking Leasing (May 13, 2004).

<sup>4</sup> Letter from Glenn Shankle, Acting Director, TCEQ to Bob Gregory, President, Texas Disposal Systems, Inc. (May 25, 2004).



landfill cover soils. The ED also cites a single, unreported 1997 federal district court decision (from Indiana) that purportedly supports its position. See ED's Response to TDSL's Motion to Overturn at 7. Again, this decision pre-dates the current EPA Mixture Rule and the language relied upon by the ED is dicta.

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). The ED's decision to treat 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 interpretation of and reliance upon the inapplicable Mixture Rule were somehow worthy of consideration, the statement that the Commingled CRT Waste is not hazardous simply because the Commission "sampled" it ignores 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 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 the ED's recharacterization of the Commingled CRT Waste as non-hazardous waste. As the ED candidly acknowledges, federal regulations state that no person "shall in any way dilute a restricted waste ... as a substitute for



adequate treatment.” ED’s Response to TDSL’s Motion to Overturn at 7 (citing 40 C.F.R. § 268.3(a)). The ED asserts 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.” ED’s Response to TDSL’s Motion to Overturn at 8. RCRA and the federal regulations promulgated thereunder do not recognize an “inadvertent” exception to the Dilution Rule, and the ED does 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.

NSWMA is concerned that if the Commission upholds the ED’s decision, 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 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>5</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.

Finally, NSWMA is concerned that if the ED’s decision is upheld by the Commission, hazardous waste generators 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 at a landfill might render the resulting waste material non-hazardous, and result in an excuse for such generators to not remove and properly dispose of their illegally disposed hazardous wastes. Solid waste landfills would have to bear the added burdens that would be imposed by such generators, who will be financially motivated to mislead disposal facilities, given the substantial difference in disposal costs for non-hazardous and hazardous waste in Texas.

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<sup>5</sup> The average disposal cost of a ton of municipal solid waste in a Texas landfill is \$20.70 per ton. Solid Waste Digest, Chartwell Information at VIII (Dec. 2003). 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.

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**CONCLUSION**

The National Solid Wastes Management Association urges the Commission to grant the motions to overturn filed by Texas Disposal Systems Landfill, Inc. and reverse the decision of the Executive Director as reflected in the letters of June 18, 2004 and June 30, 2004, to the extent they authorize the removal, transport and disposal of the CRT Waste and/or the Commingled CRT Waste as non-hazardous waste.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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