

TCEQ DOCKET NO. 2004-0984-IHW-E

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

BRIEF OF CLEAN WATER ACTION, SIERRA CLUB, TEXAS CAMPAIGN
FOR THE ENVIRONMENT, TEXAS PUBLIC INTEREST RESEARCH GROUP, AND
THE WALNUT PLACE NEIGHBORHOOD ASSOCIATION
IN SUPPORT OF
TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S MOTIONS TO
OVERTURN THE EXECUTIVE DIRECTOR'S DECISIONS

Clean Water Action, Sierra Club, Texas Campaign for the Environment, Texas Public Interest Research Group, and Walnut Place Neighborhood Association ("Amici Curiae") file this their brief in support of the motions to overturn filed by Texas Disposal Systems Landfill, Inc. ("TDSL") to reverse the decisions of the Executive Director of the Texas Commission on Environmental Quality ("TCEQ") to allow Penske Truck Leasing Co., L.P. ("Penske") to dispose of hazardous wastes as non-hazardous wastes, and, in support thereof, would respectfully show the following:

I. SUMMARY

When, as here, TCEQ has "bright line" tests to resolve disputes, TCEQ should apply them. Blurring the lines to make exceptions based on the intent of the generator, as Penske proposes here, would greatly complicate future agency decisions. It would create unnecessary risks to public health.

In this case, one of the bright line tests involves the point of generation of the hazardous wastes. The legal test is clear; the hazardous wastes here were generated at the time and location of the highway accident. Given the type of hazardous waste, the legal test for disposal is also clear. Certain requirements then apply at the time of generation and those requirements cannot be eliminated by mixing or dilution of the waste, intentionally or by accident.

Moreover, blurring the clear legal tests in this case would set very bad precedent. The decisions of the Executive Director, if allowed to stand, will encourage the types of sham disposal practices that

this agency fought hard to stop in the 1970s and 1980s. The precedent would create new risks at and stronger opposition to municipal solid waste landfills.

The analysis required under the basic hazardous waste rules is straightforward and clear. There are no exceptions and no provisions for waiver.

First, when were the wastes generated?

The law is clear. The wastes were generated at the time of the accident.

Second, were the wastes hazardous wastes at the time of generation?

Again, the law is clear. The wastes were properly determined to be hazardous.

Third, can any subsequent mixing or dilution change the requirements that the wastes be disposed of as hazardous wastes?

Just as clearly, the answer is "No." The mixing with other solid waste cannot change the classification of characteristically toxic hazardous waste. There has been no proper treatment that would allow the wastes here to be managed as non-hazardous wastes.

Even if the facts of this case indicated that there would not likely be any harm to the environment or public health from the decisions of the Executive Director, the decisions would still be very dangerous. The decisions of the Executive Director would set precedent that creates new and unnecessary risks to public health and the environment at municipal waste landfills and elsewhere.

As a result, Amici Curiae file this brief in support of TDSL's motions to overturn. Amici Curiae urge this Commission to grant those motions and reverse the Executive Director's decisions.

The result here should not be based on whether Penske or TDSL acted properly. Any TCEQ decisions on the appropriateness of the actions by Penske or TDSL, once the hazardous waste was generated, belong in enforcement proceedings. This appeal involves only the question of how the waste must be managed under state and federal law.

II. INTERESTS OF AMICI CURIAE

Clean Water Action (CWA), Sierra Club, Texas Campaign for the Environment (TCE) and Texas Public Interest Research Group (TexPIRG) are non-profit corporations operating as environmental and conservation membership organizations with members and offices in Texas. CWA and the Sierra Club are national organizations; TCE and TexPIRG are statewide organizations. Walnut Place Neighborhood Association is a non-profit corporation with members who are homeowners, residents and/or landowners who have property interests in residential land in Northeast Travis County near the location of several municipal waste landfills. Members of these five organizations include individuals who live, own land, work or enjoy outdoor and sporting activities near municipal solid waste landfills, including the landfills authorized by TCEQ for disposal of the types of wastes in question here. Such members will be directly and adversely affected by the decisions of the Executive Director of TCEQ.

Amici Curiae have valid justiciable interests in the resolution of the specific dispute that has arisen out of the placement of Penske's hazardous wastes in TDSL's municipal solid waste landfill. Transportation of such characteristically toxic hazardous wastes, here wastes with lead, to non-hazardous waste landfills will create risks of accidents and exposure to the residents near the landfills, including members of Amici.

Amici Curiae also have valid interests in the broader issue of proper interpretation of Texas law. The decisions of the Executive Director, if not reversed, could allow other hazardous wastes currently stored in other municipal solid waste landfills, such as one of the landfills in Northeast Travis County, to remain there. The decisions would allow hazardous waste to be transported through neighborhoods to landfills despite the fact that the neighbors understood that the landfills could not receive such wastes.

The decisions of the Executive Director, if not reversed, will also create a significant precedent that goes well beyond the disposal of hazardous wastes in non-hazardous waste landfills. The decisions of the Executive Director involve interpretations of the basic laws that sought to stop the illegal dumping of hazardous waste through the sham recycling and the false claims of accidental disposal of the past, practices that will affect members of Amici.

Finally, the decisions of the Executive Director involve interpretations that are contrary to the hazardous waste laws and rules that several Amici have spent time and resources helping to develop. In fact, even in the present case, key agency experts in the waste management programs were applying the laws and rules as Amici and TSDL argue they must be read.

III. STATEMENT OF THE FACTS

There does not appear to be any significant dispute over the basic facts involved in this proceeding. The facts will not be discussed in detail here. In brief, on October 9, 1997, a highway accident involving a truck owned by Penske resulted in the generation of solid wastes. The wastes were comprised of cathode ray tubes. All parties have taken the position that the wastes were legally hazardous wastes with toxic characteristics when generated at the scene of the accident.¹

Some of these hazardous wastes were placed in the landfill owned by TDSL in Travis County, Texas and commingled with municipal solid wastes. On June 18, 2004, the Executive Director attempted to authorize the transport and disposal of the resulting mixture of wastes as non-hazardous wastes that could be taken to a number of municipal or industrial non-hazardous solid waste landfills. On June 30, 2004, the Executive Director reaffirmed that decision.

¹ For example, on May 13, 2004, the Executive Director issued two violations to Penske under the TCEQ's hazardous waste regulations. One, stated that "the CRT waste was hazardous" and that "Penske caused, suffered, or permitted waste to be disposed of at an unauthorized facility." The second was based on Penske's "failure to determine if a generated waste was a hazardous waste." Letter from the Acting Executive Director, TCEQ, to Mr. Brian Hard, President, Penske Truck Leasing (May 13, 2004), on Summary of Investigation Findings. In his letter of May 25, 2004, the Executive Director added, "Penske generated the hazardous CRT waste," and that "TSDL is not the generator...."

The decisions of June 18, 2004² and June 30, 2004³ create unnecessary and unjustified risks to the environment and to public health.

IV. ARGUMENT

The Executive Director erred by determining that the Penske hazardous wastes can be managed as non-hazardous wastes. That determination is contrary to the laws and the rules of TCEQ and EPA. The matter has been briefed correctly by TDSL. Penske, Zenith and the Executive Director urge this Commission to apply analyses that are contrary to the law.

It is the position of Amici Curiae that:

1. The wastes at issue here were generated at the time of the accident on the highway;
2. The wastes at issue here were hazardous wastes under state and federal law at the time of generation;
3. Dilution of these hazardous wastes, even by accident, is not authorized treatment and cannot change the legal status of the wastes;
4. Allowing dilution to change the hazardous wastes to non-hazardous wastes would create a loophole that encourages sham activities to avoid proper management of hazardous wastes, a result rejected by the rules defining hazardous wastes.

Amici Curiae also take the position that, even if sampling of the waste as it now exists could change the waste to non-hazardous, the sampling and analysis done by the Executive Director, Penske and Zenith did not meet the regulatory requirements

Creating exceptions to the clear standards of state and federal rules for disposal of hazardous wastes would also create unreasonable risks to the public health and the environment. Thus, Amici Curiae support reversal of the decisions of the Executive Director.

² Letter from John F. Steib, Jr., Deputy Director, Office of Compliance and Enforcement, TCEQ, to Marc E. Althen, Vice President, Penske Truck Leasing (June 18, 2004).

³ Letter from Wade M. Wheatley, Waste Permits Division, TCEQ, to Marc E. Althen, Vice President, Penske Truck Leasing (June 30, 2004).

If not reversed, the decisions of the Executive Director also create the risk that the U.S. Environmental Protection Agency will have to withdraw authorization of the Texas hazardous waste program. The Executive Director's decisions here are so clearly contrary to federal law that the risk is real.

The original positions taken by Texas in seeking authorization for the federal RCRA programs were provided by the Governor of Texas in the Texas application. Those positions are set forth in a statement by the Texas Attorney General, the program description prepared by a predecessor of TCEQ and the memorandum of agreement between TCEQ's predecessor and EPA.

In the application Texas filed with EPA, Texas alleged that the State's laws and regulations were and would remain as stringent as the requirements established by EPA for state authorizations. Texas argued that its laws and rules classify as hazardous wastes all wastes that would be classified as hazardous wastes under federal law. Texas also represented that its program would require the management of hazardous wastes to be at least as stringent as that required under federal law.

While Amici Curiae prefer that Texas implements federal environmental programs, such as the hazardous waste program, they do so only if the Texas programs meet and maintain the minimum standards for all states. Amici Curiae and others have had to challenge decisions by EPA that Texas programs meet federal minimum standards. As a result, EPA has repeatedly required Texas to revise its programs to obtain or maintain authorization. Such efforts have been successful from the perspective of Amici Curiae, but they have required significant resources from all participants.

In 1986, for example, the Sierra Club filed an appeal in the Fifth Circuit Court of Appeals to challenge EPA's decision to authorize the Texas hazardous waste program. The dispute settled when Texas agreed to revise its rules and make other changes. In 1998, Sierra Club and Clean Water Action took similar actions, with similar results on the Texas water pollution program. In 1996,

Environmental Defense petitioned EPA to withdraw its authorization for the Underground Injection Control program. Because of the extent of the problems that EPA found in the Texas program, EPA required TCEQ to submit a whole new application for authorization, as if the state had never qualified for authorization. Significant revisions to TCEQ rules and the program were then made by TCEQ.

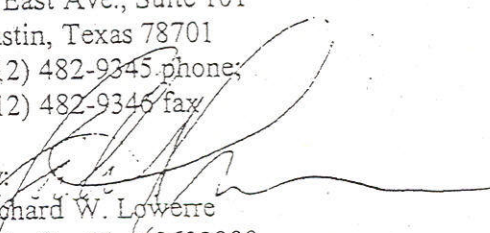
Amici Curiae urge this Commission to avoid the need for any review of the Texas hazardous waste program by EPA. Here, both federal and state laws are clear, and the legal standards are supported by sound public policies. The Executive Director's decisions are contrary to the law and the public policies.

V. PRAYER

WHEREFORE, Clean Water Action, Sierra Club, Texas Campaign for the Environment, TexPIRG, and Walnut Place Neighborhood Association urge the Commission to grant the motions to overturn filed by Texas Disposal Systems Landfill, Inc. and reverse the decisions of the Executive Director as reflected in the letters of June 18, 2004 and June 30, 2004, cited above, that purport to allow the removal, transport and disposal of the Penske hazardous wastes as non-hazardous wastes.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief has been sent on this the 8th day of September 2004 by fax and U.S. mail to the following:

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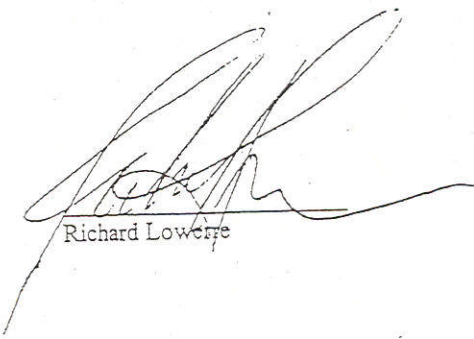
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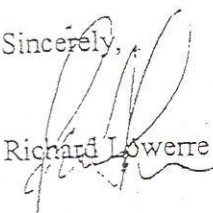
RE: TCEQ Docket No. 2004-0984-IHW-E; In the Matter of the Authorization of
Disposal of Wastes as Special Wastes Issued By the Executive Director to Penske
Truck Leasing CO., L.P.

Dear Ms. Castañuela:

Enclosed for filing, please find the original and thirteen copies of the Brief of Clean
Water Action, Sierra Club, Texas Campaign for the Environment, Texas Public Interest
Research Group, and the Walnut Place Neighborhood Association in Support of Texas
Disposal Systems Landfill, Inc.'s Motions to Overturn the Executive Director's Decisions
in the above-referenced matter. Please file stamp the thirteenth copy and return it to my
courier.

If you have any questions, please feel free to contact me.

Sincerely,


Richard Lowerre

Enclosure

XC: Service List