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September 8, 2004

## VIA HAND DELIVERY

Ms. LaDonna Castañuela  
Office of Chief Clerk (MC-105)  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

CHIEF CLERKS OFFICE

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TEXAS  
COMMISSION ON  
ENVIRONMENTAL  
QUALITY

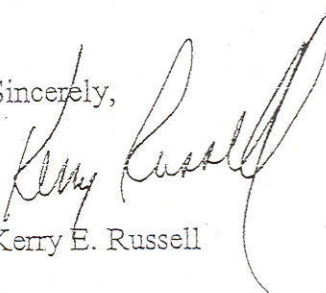
Re: Texas Disposal Systems Landfill, Reply Brief, *In the Matter of the Authorization of Disposal of Waste as Special Waste Issued by the Executive Director to Penske Truck Leasing, TCEQ Docket No. 2004-0984-IHW-E.*

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced proceeding is an original and eleven copies of Texas Disposal System Landfill, Inc.'s ("TDSL") *Reply to the Executive Director's Response to Motion to Overturn, Zenith Electronics Corporation's Response to Motion to Overturn, and Penske Truck Leasing Co., L.P.'s Response to Motion to Overturn.* At this time facsimile copies of the signature pages of reports prepared by Ms. Marianne Lamont Horinko and Mr. Robert Zoch, Jr., have been provided. The original signature pages will be substituted as soon as possible.

If you have any questions, please telephone me or Ms. Angela Moorman at the above number.

Sincerely,



Kerry E. Russell

## ENCLOSURE

cc: TCEQ Service List  
Mr. Bob Gregory  
Mr. Kinnan Golemon

TCEQ DOCKET NO. 2004-0984-IHW-E

IN THE MATTER OF THE  
AUTHORIZATION OF DISPOSAL OF  
WASTE AS SPECIAL WASTE ISSUED  
BY THE EXECUTIVE DIRECTOR TO  
PENSKE TRUCK LEASING CO., L.P.

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BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY

REPLY BRIEF

OF

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

CHIEF CLERK'S OFFICE

2004 SEP -8 PM 4:29

OFFICE OF ENVIRONMENTAL QUALITY

SEPTEMBER 8, 2004

IN THE MATTER OF THE  
AUTHORIZATION OF DISPOSAL OF  
WASTE AS SPECIAL WASTE ISSUED  
BY THE EXECUTIVE DIRECTOR TO  
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BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY

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IN THE MATTER OF THE  
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BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S REPLY TO THE  
EXECUTIVE DIRECTOR'S RESPONSE TO MOTION TO OVERTURN,  
ZENITH ELECTRONICS CORPORATION'S RESPONSE TO  
MOTION TO OVERTURN, AND PENSKE TRUCK LEASING CO., L.P.'S  
RESPONSE TO MOTION TO OVERTURN

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

COMES NOW Texas Disposal Systems Landfill, Inc. ("TDSL"), and presents this, its  
*Reply to the Executive Director's Response to Motion to Overturn, Zenith Electronics  
Corporation's Response to Motion to Overturn, and Penske Truck Leasing Co., L.P.'s Response  
to Motion to Overturn*, in the above-referenced proceeding, and would respectfully show the  
Honorable Commissioners as follows:

I. INTRODUCTION.

While the Executive Director ("ED") of the Texas Commission on Environmental  
Quality (the "Commission" or "TCEQ"), Zenith Electronics Corporation ("Zenith"), and Penske  
Truck Leasing Co., L.P. ("Penske") have filed responses to TDSL's Motions to Overturn<sup>1</sup> and  
*Brief in Support of Motions to Overturn*,<sup>2</sup> such responses do not provide assistance to the

<sup>1</sup> *Texas Disposal Systems Landfill, Inc.'s Motion to Overturn, In the Matter of the Authorization of Disposal of Waste as Special Waste Issued by the Executive Director to Penske Truck Leasing Co., L.P.*, TCEQ Docket No. [2004-0984-IHW-E] (July 9, 2004); *Texas Disposal Systems Landfill, Inc.'s Motion to Overturn the Executive Director's June 30, 2004 Decision, In the Matter of the Authorization of Disposal of Waste as Special Waste Issued by the Executive Director to Penske Truck Leasing Co., L.P.*, TCEQ Docket No. [2004-0984-IHW-E] (July 22, 2004).

<sup>2</sup> *Texas Disposal Systems Landfill, Inc.'s Brief in Support of Motions to Overturn, In the Matter of the Authorization of Disposal of Waste as Special Waste Issued by the Executive Director to Penske Truck Leasing Co., L.P.*, TCEQ Docket No. [2004-0984-IHW-E] (July 22, 2004).

Commissioners in ruling on the Motions to Overturn. Instead, the pleadings filed by all three parties fail to accurately acknowledge the role played by the Land Disposal Restrictions ("LDRs"), and specifically the dilution prohibition, imposed pursuant to the Resource Conservation and Recovery Act ("RCRA"), in the determination that the commingled D008 waste generated by Penske/Zenith and currently stored at the TDSL Landfill remains a hazardous waste and must be treated and disposed of properly as a hazardous waste as required by RCRA.

While TDSL is not replying individually to each of the responsive briefs filed by the ED, Zenith, and Penske, this Reply Brief will address the main issues involved in this case. Specifically, this Reply Brief will address the issues raised in the ED's Response. Zenith and Penske, in their responsive briefs, have fallen back on a tried and true tactic of those who do not have the law or the facts on their side: obfuscate the truth and point the finger at everyone else. This tactic is certainly exemplified in Zenith's *Supplemental Brief in Opposition to TDSL's Motion to Overturn*,<sup>3</sup> where Zenith's veracity-challenged Counsel fails to point out that the waste in question is leachable lead contained in the broken, shattered, and discarded cathode ray tubes ("CRTs") that were previously classified by his client, based on process knowledge, as being characteristically toxic D008 waste.<sup>4</sup> Thereafter, he attempts to argue, without any citation of authority, that such toxic characteristic can be commingled with other waste and not be subject to the hazardous waste regulations promulgated pursuant to RCRA (more fully described subsequently in the arguments presented herein and the reports of former U.S. Environmental Protection Agency ("EPA") Acting Administrator Marianne Lamont Horinko and Robert Zoch, Jr., all of which provide citation to relevant sources). Throughout this process, Zenith and Penske have blamed everyone from the emergency responders to TDSL for the current status of

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<sup>3</sup> *Zenith Electronics Corporation's Supplemental Brief in Opposition to TDSL's Motion to Overturn, In the Matter of the Authorization of Disposal of Waste as Special Waste Issued by the Executive Director to Penske Truck Leasing Co., L.P.*, TCEQ Docket No. 2004-0984-IHW-E (Sept. 7, 2004).

<sup>4</sup> See Letter from Ms. Suzanne Marcel, Director, Environmental Health & Safety, Zenith Electronics Corp., to Mr. Tim J. Herman, Executive Vice President, Texas Disposal Systems, Inc., and attachments (Jan. 6, 1998), attached hereto and incorporated herein as Exhibit A.



the commingled D008 waste and both entities still fail to take responsibility as generators of the commingled D008 waste. TDSL supports its position in this case with both facts and law, as noted in the attached expert reports.<sup>5</sup>

Based on the facts and the law, TDSL again respectfully urges the Commission to overturn the ED's original decision dated June 18, 2004 (issued in the absence of any filing of a "Request for Authorization for Disposal of Solid Waste" form), and confirmed in the ED's June 30, 2004 letter (premised upon the defective filing of an out-of-date "Request for Authorization for Disposal of Solid Waste" form), authorizing Penske's removal of the commingled D008 waste from the TDSL landfill as non-hazardous special waste.

## II. BACKGROUND AND CHRONOLOGY

For a complete review of the background and chronology of the events that have led to TDSL's Motions to Overturn, please see TDSL's *Brief in Support of Motion to Overturn*.<sup>6</sup>

## III. THE COMMINGLED D008 WASTE CONTINUES TO BE A HAZARDOUS WASTE PURSUANT TO THE DILUTION RULE.

The ED continues his mistaken reliance on 40 C.F.R. § 261.3 to the exclusion of the LDRs and the Dilution Rule,<sup>7</sup> insisting that the commingled D008 waste is not a hazardous waste. This reliance ignores the undisputed fact that the color television CRT waste resulting from the accident was a hazardous waste at the point of generation, *i.e.*, the time of the accident,<sup>8</sup>

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<sup>5</sup> See Marianne Lamont Horinko, "Report of Marianne Lamont Horinko" (Sept. 8, 2004) [hereinafter "Report"], attached hereto and incorporated herein as Exhibit B; Robert M. Zoch, Jr., P.E., "Technical Evaluation of the TCEQ Mixed Waste Characterization Program Conducted at the Texas Disposal Systems Landfill" (Sept. 8, 2004) [hereinafter "Technical Evaluation"], attached hereto and incorporated herein as Exhibit C.

<sup>6</sup> See *TDSL's Brief in Support of Motions to Overturn*, *supra* note 2, at pt. II at 4-10. For a brief summary of the relevant dates and events, see "TDSL Landfill/TDSL Non-Landfill Storage," attached hereto and incorporated herein as Exhibit D.

<sup>7</sup> 40 C.F.R. § 268.3.

<sup>8</sup> The hazardous CRT waste was generated on October 9, 1997, at the time of the accident when the Penske truck overturned on Interstate Highway 35 spilling and breaking the CRTs. See Three Photographs of Accident Site (Oct. 9, 1997), attached hereto and incorporated herein as Exhibit E.



since it exhibited the toxicity characteristic for lead, as determined by Zenith, based upon process knowledge, and later acknowledged by Zenith and Penske.<sup>9</sup> The Dilution Rule prohibits the dilution of hazardous waste to meet treatment standards for land disposal.<sup>10</sup> EPA at the time of promulgation of the Dilution Rule identified specific circumstances when a dilution prohibition is important to ensure actual treatment of the waste.<sup>11</sup> This is particularly true of toxic characteristic hazardous wastes, since such wastes normally bioaccumulate.<sup>12</sup>

The purpose, as identified by Congress, of the LDRs is to ensure that hazardous waste is treated to minimize threats to the environment prior to land disposal.<sup>13</sup> Mixing hazardous waste

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<sup>9</sup> The ED in issuing the Notice of Violation ("NOV") to Penske also identified that the CRT waste was a hazardous waste at the time of the accident. See Letter from Mr. Glenn W. Shankle, Acting Executive Director, TCEQ, to Mr. Brian Hard, President, Penske Truck Leasing (May 13, 2004), Summary of Investigation Findings, attached hereto and incorporated herein as Exhibit F.

<sup>10</sup> Section 268.3 states:

Except as provided in paragraph (b) of this section, no generator, transporter, handler, or owner or operator of a treatment, storage, or disposal facility shall in any way dilute a restricted waste or the residual from treatment of a restricted waste as a substitute for adequate treatment to achieve compliance with subpart D of this part, to circumvent the effective date of a prohibition in subpart C of this part, to otherwise avoid a prohibition in subpart C of this part, or to circumvent a land disposal restriction imposed by RCRA section 3004.

40 C.F.R. § 268.3.

<sup>11</sup> See Land Disposal Restrictions for Third Third Scheduled Wastes, 55 Fed. Reg. 22,520, 22,651 (June 1, 1990) (to be codified at 40 C.F.R. pts. 148, 261, 262, 264, 265, 268, 270, 271, & 302).

<sup>12</sup> Toxicity restrictions are based on bioaccumulation of certain harmful characteristics in the environment. Specifically, the possibility of bioaccumulation remains even when lead waste is diluted with other waste to reduce the overall percentage of the lead constituent level in the diluted mixture. EPA acknowledged the bioaccumulative effects of constituents such as lead when it promulgated the Dilution Rule, noting: "[S]imple dilution is not effective treatment for toxic constituents. Dilution does not itself remove or treat any toxic constituent in the waste. Accordingly, EPA believes that a dilution prohibition for characteristic wastes is important for purposes of the treatment requirements and carries a significant benefit." 55 Fed. Reg. at 22,656. TDSL notes that lead has become one of the most heavily regulated toxic constituents in EPA and TCEQ's regulatory systems. The issue regarding the significant quantities of lead associated with color television CRTs and other electronics industry production is the subject of a long-standing EPA rule proposal. See Hazardous Waste Management System; Modification of the Hazardous Waste Program; Cathode Ray Tubes and Mercury-Containing Equipment, 67 Fed. Reg. 40,508-28 (June 12, 2002) (to be codified at 40 C.F.R. pts. 260, 261, 264, 268, 270, & 273).

<sup>13</sup> For additional information, see the attached Report of former Acting Administrator of U.S. EPA and Assistant Administrator of the Office of Solid Waste and Emergency Response at EPA. Horinko, "Report," *supra* note 5.



with municipal solid waste ("MSW") in an attempt to eliminate the characteristic that made the waste hazardous is illegal pursuant to RCRA and the LDRs.<sup>14</sup> Mixing or commingling the hazardous waste with MSW and clay cover soil to dilute the hazardous waste is not a proper or legal substitute for the treatment of the hazardous waste as required by the LDRs. RCRA explicitly states that treatment is necessary to "substantially reduce the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized."<sup>15</sup> EPA has identified: "Such dilution could be in lieu of treatment or a specified method and would not fulfill the goals of section 3004(m) [of RCRA]. In many cases, dilution simply increases the volume of a waste without reducing or immobilizing the mass of hazardous constituents in the waste."<sup>16</sup>

This case is about improper dilution of D008 hazardous waste. Zenith/Penske through their misrepresentations to emergency responders and TDSL regarding the proper characterization of the CRT waste allowed D008 hazardous waste to be commingled and diluted with MSW.<sup>17</sup> This dilution would not have occurred but for Zenith's and Penske's misrepresentations regarding the CRT waste.<sup>18</sup> As identified in the expert report prepared by Ms. Horinko, former Acting Administrator of the U.S. EPA and Assistant Administrator of the Office of Solid Waste and Emergency Response ("OSWER") at EPA, Penske's assertion that the

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<sup>14</sup> RCRA regulations make no distinction between inadvertent and intentional dilution, both are prohibited.

<sup>15</sup> 42 U.S.C.A. § 6924(m)(1), RCRA § 3004(m)(1).

<sup>16</sup> 55 Fed. Reg. at 22,652.

<sup>17</sup> Zenith and Penske further exacerbated the problem by not immediately removing the D008 hazardous waste. Isolation of the commingled D008 waste required the use of significant quantities of clay cover material.

<sup>18</sup> Although neither RCRA nor its implementing regulations distinguish between intentional and inadvertent dilution, the ED seems to believe there is a legal distinction. There is not. In any event, Zenith's and Penske's actions clearly demonstrate there was no "inadvertent" dilution in this case. Zenith consistently disposed of broken and discarded CRTs as D008 hazardous waste. Zenith's contract with Penske required Penske to dispose of broken CRTs as hazardous waste. Both Zenith and Penske ultimately relied on Zenith's process knowledge and prior testing to classify the broken and discarded CRTs as D008 hazardous waste. This was not a case of inadvertent dilution. It was a case of negligent misrepresentation.



emergency coordinator and receiving facility were responsible for the hazardous waste designation runs counter to RCRA, which relies upon generator testing and knowledge.<sup>19</sup> Ms. Horinko notes that "Penske is irresponsible in not managing the mixture of municipal solid waste and hazardous waste as D008 hazardous waste."<sup>20</sup> It is astonishing that Zenith and Penske now argue that the D008 CRT waste is no longer hazardous because of their misdeeds and that the ED uses Zenith's and Penske's spurious argument as the legal basis for his decision.

The ED correctly notes that the Dilution Rule does not redefine a waste as hazardous if it would not otherwise be identified as a hazardous waste pursuant to RCRA. But here, the CRT waste was correctly identified by Zenith/Penske and later by the ED as a characteristically hazardous waste due to the toxicity of the lead included in the CRTs.<sup>21</sup>

The ED also correctly notes that the CRT waste was a hazardous waste at the time of the accident, which was the legal and factual point of generation. In addition, in his May 13 Notice of Violation ("NOV") letter, the ED determined that Penske, at least, was a generator of the waste.<sup>22</sup> At the point of generation, the CRT waste became subject to RCRA's LDRs. The ED also determined in the May 13 NOV issued to Penske that the CRT waste was hazardous when it

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<sup>19</sup> Horinko, "Report," *supra* note 5, at 6.

<sup>20</sup> *Id.* at 7.

<sup>21</sup> It should be noted that EPA has also identified that CRTs are a hazardous waste. In a pending rulemaking, EPA has written: "CRT glass often exhibits the toxicity characteristic (TC) for lead because this constituent is used to make most CRT glass." 67 Fed. Reg. at 40,511. EPA continued:

If a non-household entity decides to send used or unused CRTs directly to a landfill or an incinerator for disposal, that entity would be considered the generator of a solid waste. . . . When a decision is made to dispose of hazardous waste CRTs, the non-residential user, reseller, or manufacturer must comply with all applicable hazardous waste generator requirements of 40 CFR part 262, including packaging and labeling, 90-day accumulation requirements, use of the hazardous waste manifest, and recordkeeping and reporting . . . .

. . . Used CRTs generated by a non-residential facility that fail the TC for lead must meet applicable land disposal restrictions (LDRs) before being placed in a land-based unit, such as a landfill. To meet LDRs, the CRT glass must be *treated* so that the TCLP lead concentration does not exceed 0.75 mg per liter.

*Id.* at 40,511-12 (emphasis added).

<sup>22</sup> Letter from Mr. Glenn W. Shankle to Mr. Brian Hard, *supra* note 9.

entered the TDSL Landfill,<sup>23</sup> and in a May 25, 2004 letter to TDSL, the ED identified that "Penske generated the hazardous CRT waste and is responsible for the proper disposal of the waste."<sup>24</sup>

*Thus, contrary to the ED's current claims, TDSL is not relying on the Dilution Rule to "redefine" the waste as hazardous. The D008 CRT waste has been hazardous since the time of the accident and, pursuant to RCRA and specifically the LDRs, cannot be re-defined at the ED's discretion as a non-hazardous special waste.*<sup>25</sup>

As discussed at length in TDSL's *Brief in Support of Motions to Overturn*, and in the Horinko Report, once the hazardous waste characteristic attaches at the point of generation of a hazardous waste destined for land disposal, that waste code carries through until the waste is treated to remove the hazardous waste characteristic and to meet the LDR requirements.<sup>26</sup> Neither Penske nor Zenith claimed any exclusion from the Dilution Rule at the point of generation or immediately thereafter. In fact, they handled the majority of the D008 CRT waste that was not commingled with MSW at the TDSL Landfill working face as hazardous waste.<sup>27</sup> Pursuant to 40 C.F.R. § 268.3, there is no applicable exception under RCRA for exclusion of the D008 CRT waste generated at the scene of the accident from the regulatory prohibition against

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<sup>23</sup> *Id.* In the Summary of Investigation Findings attached to the NOV letter, the ED alleged that Penske had violated 30 TEX. ADMIN. CODE § 335.43(a) "No person shall store, process, or dispose of hazardous waste without first having obtained a permit from the Texas Commission on Environmental Quality." *Id.*, Summary of Investigation Findings at 1.

<sup>24</sup> Letter from Mr. Glenn Shankle, Acting Executive Director, TCEQ, to Mr. Bob Gregory, President & CEO, Texas Disposal Systems, Inc., at 1 (May 25, 2004), attached hereto and incorporated herein as Exhibit G.

<sup>25</sup> The ED, in his Response Brief, addresses at length how special waste is to be handled pursuant to TCEQ's regulatory system. That discussion is irrelevant since proper handling of special waste is not at issue in this case. Because the CRT waste was a hazardous waste at the point of generation and continues to be a hazardous waste because it has not been properly treated pursuant to LDR requirements, the commingled D008 waste cannot be disposed as a special waste pursuant to Texas law.

<sup>26</sup> *See, e.g.*, Horinko, "Report," *supra* note 5.

<sup>27</sup> After Penske notified TDSL that the broken CRTs were hazardous, TDSL refused to accept further loads of CRTs. The CRT hazardous waste that had not been commingled with the MSW was shipped by Penske as hazardous waste. *See* Uniform Waste Manifests, Generator: Penske Logistics; Transporter: American Ecology Transportation (May 1998).



land disposal of hazardous waste that is characteristically hazardous for toxicity at the time of generation.<sup>28</sup> Thus, the commingled D008 waste must be transported via a uniform hazardous waste manifest and must be treated at a permitted hazardous waste disposal facility prior to final disposal.<sup>29</sup>

#### IV. THE MIXTURE RULE IS INAPPLICABLE

The utter confusion of the ED in this matter is best exemplified in the two pages of text in the ED's Response Brief under the heading "The Mixture Rule," a rule that is only applicable to listed hazardous wastes.<sup>30</sup> Furthermore, even if the rule were applicable, the source that the ED relies upon in his argument, "FAXBACK guidance documents"<sup>31</sup> and the Indiana District Court case<sup>32</sup> are irrelevant as these were all published prior to promulgation of the current EPA Mixture Rule and they do not address EPA's LDRs and the Dilution Rule.<sup>33</sup> Once again, obfuscation has been relied upon since the facts and laws do not support the ED's position.

#### V. THE SAMPLING PERFORMED BY THE COMMISSION AND PENSKE HAS FAILED TO PROVIDE REPRESENTATIVE SAMPLES OF THE COMMINGLED D008 WASTE.

The ED, Penske, and Zenith all claim that the commingled D008 waste is not a hazardous waste. In making such claims they rely on (1) sampling conducted on behalf of Penske in

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<sup>28</sup> A September 2, 2004 letter from EPA Region 6's Regional Counsel to the TCEQ's Office of Legal Services explicitly acknowledges that dilution cannot be used to avoid treatment. The remainder of the letter describes how to determine if a waste is hazardous. Such is not the situation before the Commission since the D008 CRT waste was determined to be hazardous at the point of generation and dilution cannot change that determination. See Letter from Mr. Charles J. Sheehan, Regional Counsel, EPA Region 6, to Ms. Lydia Gonzalez-Gromatzky, Deputy Director, Office of Legal Services, TCEQ (Sept. 2, 2004), attached hereto and incorporated herein as Exhibit H.

<sup>29</sup> TDSL has been unable to locate a situation where TCEQ has not rigidly enforced this requirement when lead is the constituent of concern.

<sup>30</sup> *Executive Director's Response to Texas Disposal Systems Landfill, Inc.'s Motion to Overturn, In the Matter of the Authorization of Disposal of Waste as Special Waste Issued by the Executive Director to Penske Truck Leasing Co., L.P.*, TCEQ Docket No. 2004-0984-IHW-E at 4-6 (Aug. 13, 2004).

<sup>31</sup> See ED's Response at Exh. ED-9.

<sup>32</sup> *U.S. v. GK Techs., Inc.*, No. IP 90-2122-C-D/G, 1997 WL 413,604 (S.D. Ind. Jan. 27, 1997).

<sup>33</sup> The FAXBACK documents relied on by the ED pre-date the Dilution Rule; thus, they cannot and do not address its applicability to this matter.



January and February of 2004 and (2) sampling conducted by the ED in July 2004. Even if sampling were a relevant legal consideration at this point in time, there has been no valid sampling of the commingled D008 waste for waste classification purposes, and thus the ED's, Zenith's, and Penske's reliance on such sampling is misplaced.<sup>34</sup>

With regard to Penske's sampling in early 2004, the sampling protocol did not result in representative samples. Mr. Robert Zoch, Jr., a chemical engineer, registered professional engineer in the State of Texas, and expert in the characterization of waste materials and contaminated media, has identified that because of the heterogeneous nature of MSW and the random distribution of CRT accident residue within the commingled CRT/MSW, there is virtually no way that a representative sample of the commingled hazardous waste was obtained using the methodology relied upon by Penske representatives.<sup>35</sup>

It is apparently this non-representative sampling performed on behalf of Penske in January and February 2004, that Penske relied on in submitting its "Request for Authorization to Dispose of a Special Waste" to the Commission on June 23, 2004. It should be noted that Penske's filing was defective as the company failed to utilize the appropriate "Request for Authorization" form when it submitted its request to the Commission for authorization to dispose of the commingled D008 waste as a "special waste," and in so doing, failed to provide key

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<sup>34</sup> Any sampling is irrelevant to the hazardous waste classification of the commingled D008 waste since the LDRs attached at the point of generation, not when the D008 hazardous waste was commingled with MSW and cover soil at the TDSL Landfill. The D008 hazardous waste classification is a matter of law.

<sup>35</sup> Zoch, "Technical Evaluation," *supra* note 5; see also "Report of Robert M. Zoch, Jr.," *Texas Disposal Systems Landfill, Inc. v. Penske Truck Leasing Co. L.P.*, 207th Jud. Dist, Hays County, Tex. (June 4, 2004) [hereinafter "Report"], attached hereto and incorporated herein as Exhibit I. As identified by Mr. Zoch the materials sampled by Penske representatives were not homogenous and the samples taken were not representative of the waste being sampled. Mr. Zoch has identified that the sampling protocol utilized by Penske representatives did not demonstrate that the samples taken were representative of the commingled waste. First, the sampling methods utilized were developed based on the assumption that the mixed waste was homogenous. Such assumption was clearly erroneous. Second, field notes and the project reports identified little glass in the samples and none which was clearly representative of CRT debris. Mr. Zoch has noted that only three of the samples taken contained glass of unspecified appearance and that it is uncertain whether any of the CRT accident residue was included in the hand-picked grab samples. Zoch, "Report," at 10.



information required by the form currently in use. Specifically, if Penske had completed the Commission's current "Request for Authorization" form, it would have had to identify the metals and other constituents of concern as well as the source of the waste for which the form was being submitted.<sup>36</sup>

Mr. Zoch has also reviewed the procedures utilized by the ED during TCEQ's sampling of the commingled D008 waste in July 2004, and has identified that the TCEQ sampling program appeared to be even more superficial than the sampling performed on behalf of Penske.<sup>37</sup>

Even if the D008 CRT waste had somehow become "de-characterized" while isolated at the TDSL Landfill, according to EPA and TCEQ rules the CRT waste would continue to be subject to the LDRs. If a waste exhibits a characteristic at the point of generation and subsequently becomes decharacterized, then it is still subject to the LDR requirements.<sup>38</sup> Contrary to the ED's claims, EPA has made it clear that when a characteristic waste is mixed with a solid waste so that it no longer exhibits a characteristic it remains subject to the treatment standards found at 40 C.F.R. § 268.40 prior to placement in a RCRA-regulated landfill.<sup>39</sup> In a letter interpreting the LDRs, EPA wrote:

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<sup>36</sup> See Request for Authorization for Disposal of a Special Waste, Generator: Penske Truck Leasing Co, L.P. (June 23, 2004), attached hereto and incorporated herein as Exhibit J; see also TCEQ, Request for Authorization for Disposal of a Special Waste, TCEQ-0152 (rev. 02/19/04), attached hereto and incorporated herein as Exhibit K.

<sup>37</sup> Zoch, "Technical Evaluation," *supra* note 5. In his Technical Evaluation, Mr. Zoch notes that even TCEQ field personnel appeared to agree that the proposed sampling protocol could not be successful in obtaining representative samples. Mr. Zoch concluded that the data obtained by TCEQ during the ED's sampling is not acceptable for making waste characterization decisions. *Id.* at 8. Mr. Zoch has also identified that based upon the calculated amount of CRT waste generated and the volume delivered to the TDSL Landfill, the debris from at least 465 CRTs was likely placed onto the landfill. All but 226 of the steel band components of the 1,248 CRTs involved in the accident were recovered. From this rough material balance, it is likely that debris from at least 226 complete CRTs remain in the commingled D008 waste, along with a portion of the glass from an additional 239 units. Mr. Zoch has estimated that between 6,712 and 10,261 pounds of CRT glass remain in the commingled D008 waste. Based on this, between 791 and 1,209 pounds of lead were contributed to the commingled D008 waste by the CRT debris. *Id.* at 6-7.

<sup>38</sup> See 55 Fed. Reg. at 22,651-52.

<sup>39</sup> Letter from Mr. James R. Berlow, Director, Hazardous Waste Minimization & Mgmt. Div., EPA, to Mr. T.L. Nebrich, Jr., Technical Dir., Waste Tech. Servs., Inc. 1, RCRA Online No. 14547 (May 15, 2001), attached hereto and incorporated herein as Exhibit L.

It should also be noted that any dilution of a prohibited contaminated soil (or of a prohibited hazardous waste with soil) as a substitute for adequate treatment to achieve compliance with LDR treatment standards or to circumvent the effective date of an LDR prohibition is considered a type of impermissible dilution and is illegal.<sup>40</sup>

The ED's reliance on his argument that the waste has become non-hazardous through dilution with the MSW and cover soil is clearly misplaced.

It is also important to note that EPA, in the Third Third rulemaking, recognized that the characteristic of toxicity is defined by levels higher than the health-based levels that are the basis for delisting many hazardous wastes.<sup>41</sup> Ms. Horinko states in her Report: "[T]he toxicity characteristic concentration levels are those at which the wastes clearly present a substantial hazard, and that lower levels also may pose a hazard."<sup>42</sup> Ms. Horinko explicitly notes that characteristic wastes may also contain other hazardous constituents, and "only by mandating treatment beyond simply removing the characteristic will allow EPA to reach these other hazardous chemicals."<sup>43</sup> The commingled D008 waste must be tested for all hazardous constituents, not just lead, to ensure that human health and the environment are protected.<sup>44</sup>

It is critical that the commingled D008 waste be properly treated to reduce the threats to human health and the environment that it will pose if improperly and illegally disposed in a MSW landfill.

## VI. CONCLUSION.

The Executive Director's decision, if not overturned, will set a very dangerous precedent. Unscrupulous hazardous waste generators will be encouraged to "inadvertently" allow their

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<sup>40</sup> *Id.* at 2.

<sup>41</sup> The RCRA treatment level has been reduced from 5 ppm to 0.75 ppm.

<sup>42</sup> Horinko, "Report," *supra* note 5, at 9.

<sup>43</sup> *Id.*

<sup>44</sup> The ED's own RCRA expert, Mr. Wade Wheatley, P.E., has previously identified this statutory and regulatory requirement under oath. It is quite astonishing that the ED continues to ignore this obvious requirement.

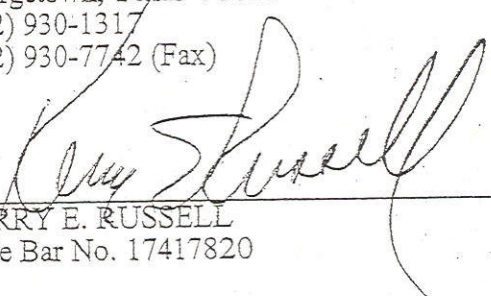


waste to be sent to municipal solid waste landfills and, thereby, convert it into non-hazardous special waste.<sup>45</sup> The health and safety of Texas citizens will suffer as a result.

Texas Disposal Systems Landfill, Inc. respectfully requests that the Commission overturn the Executive Director's decision dated June 18, 2004, and confirmed in the Executive Director's June 30, 2004 letter, authorizing Penske's removal of the commingled D008 waste from the TDSL Landfill as non-hazardous special waste. TDSL also respectfully requests that the Commission instruct the Executive Director to facilitate removal of the commingled D008 waste from the TDSL Landfill under appropriate hazardous waste manifesting requirements.

Respectfully submitted,

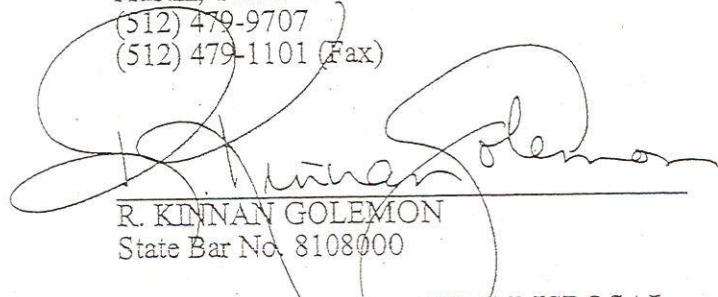
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<sup>45</sup> Since the ED has acknowledged Penske's illegal action, a significant fine should be imposed to discourage such activity by other negligent or unscrupulous hazardous waste generators.

## CERTIFICATE OF SERVICE

I hereby certify that on this the 8th day of September, 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:

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