

TCEQ HEARING

MOTION TO OVERTURN EXECUTIVE DIRECTOR'S DECISION

[Starts at 27:17]

September 16, 2004

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Marianne Horinko	[MH]	RCRA Specialist for TDSL
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Kerry Russell	[KR]	Attorney for Texas Disposal Systems Landfill, Inc.
Representative Eddie Rodriguez	[RR]	State Representative, SE Travis County
Larry Soward	[LS]	TCEQ Commissioner
Kathleen Hartnett White	[KHW]	TCEQ Chairman
Bob Zoch	[BZ]	RCRA Specialist for TDSL

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[KHW] Are we on? Good afternoon. This is a meeting of the Texas Commission on Environmental Quality. The day is Wednesday, September, Thursday, it is usually Wednesday when we are here in these chairs, but this is Thursday, um Sept, Wednesday, Thursday, September 15<sup>th</sup>. I am Kathleen Hartnett White, Chairman. Did I do it again? I am a creature of habit. Um, this is Thursday, September 16<sup>th</sup>. I am Kathleen Hartnett White, Chairman. Present also for the record are Commissioner Ralph Marquez and Commissioner Larry Soward. Duncan would you re-read the caption on our single item of business for this afternoon?

[DN] Yes ma'am. This afternoon we have before us the consideration of Motions to Overturn filed by Texas Disposal Systems Landfill, Inc. regarding the Executive Director's June 18, 04 and June 30, 04 letters allowing Penske Truck Leasing Company, L.P. to dispose of commingled picture tube waste as a municipal solid waste special waste. Commission will consider briefs and replies to the Motions to Overturn filed by TDSL. The Commissioners have received extensive briefing on this matter and they've been provided in their backup notebooks with all the filings. Um, we have also received some Amicus Briefs and 15 letters from the following ah, public officials of our state, Senators Whitmire, Lindsay, Armbrister, Barrientos, Estes, Wentworth, and Van De Pute and State Representatives Geren, Talton, Baxter, Chisum, Kuempel, Allen, Bonnen and Representative Cook and I hope that I haven't left anyone out, but that is the list that I had. Um, we have not posted this item for public comment because it is a legal proceeding and we are receiving legal uh, closing arguments by the attorneys representing the parties in this case and in a, a letter that I sent out about a week ago, we have authorized 10 minutes for the movent TDSL and they can reserve part of that time for rebuttal, and 5 minutes for Penske and 5 minutes for Zenith and they can share that

1 time amongst themselves if they choose to, and 5 minutes each for the ED and OPIC in  
2 that order with the rebuttal coming at the very end if uh, TDSL reserves that time.

3  
4 [KHW] I might uh, make one uh, initial comment and if uh, my fellow Commissioners uh, uh,  
5 have a different uh, perspective, I really welcome their comments and that is this to say  
6 the excruciatingly obvious is a very complex matter of many years. Um, we have a very  
7 specific issue before us today um, relevant to um, the determination in the Executive  
8 Director's letters. Um, as, as much as possible, I would ask the parties to confine their  
9 remarks to those legal issues at hand and what facts um, are necessary to deport those  
10 rather than um, the very extensive um, factual record and um, matters I know which are,  
11 are now within a court and a very extensive, lengthy factual record. But please, um, I  
12 know there are significant facts at issue that are part of the long history of this issue, um,  
13 but as ah, General Counsel said we are, are here today on the basis of a, a legal  
14 determination and um, hope your ah, remarks and arguments will stay focused on those  
15 issues.

16  
17 [LS] Madam Chairman, if I can ask Mr. Norton, as we hear the arguments of the parties, and  
18 formulate our thoughts and deliberate the issues towards some decision, what, what  
19 options do the commission, does the commission, what options does the Commission  
20 have in the way of making a decision today?

21  
22 [DN] Um, Commissioner Soward, I guess uh, I can think of three that come to mind rather  
23 clearly, one being the Motion can be voted on to be denied. I think you can also choose  
24 not to take action and allow the Executive Director's decision to stand uh, on its own.  
25 Also, I think you could grant the motion and do a range of things related to that in terms  
26 of uh, directing further uh, investigation or reconsideration with directions back to the ED  
27 to reach a different result. I think that could also include a, a, uh, rendering of your own  
28 different decision as you saw fit or as, as the vote supported.

29  
30 [KHW] Duncan, is one of those um, that you listed would include, um, um, if the legal word is  
31 appropriate, upholding the Motion to Overturn without...

32  
33 [DN] Without further?

34  
35 [KHW] without further addition?

36  
37 [DN] I think it would include that.

38  
39 [KHW] Ok.

40  
41 [DN] I guess at this time, then we would begin by hearing the presentation of TDSL. Mr.  
42 Russell are you going to begin that?

43  
44 [KR] Yes sir. Chairman White, Commissioner Marquez, Commissioner Soward, Mr. Norton,  
45 for the record, my name is Kerry Russell and I am here today with my co-counsel,  
46 Kinnan Golemon representing TDSL in its Motion to Overturn the Executive Director's  
47 Decision and that decision was to allow toxic characteristic hazardous waste to be  
48 disposed in Texas Landfills as a Class I, non-hazardous industrial solid waste. We also  
49 have with us two widely respected RCRA experts, Marianne Horinko and Robert Zoch.

1 Ms. Horinko will speak. Mr. Zoch will be available as a resource. I'd like to reserve 2  
2 minutes for our side for closing.  
3

4 You have two, inspite of all of the stuff that has been filed, uh, many hundreds of pages,  
5 you basically have two questions before you today, I think to help you render your  
6 decision on our Motion to Overturn. One is a public policy question and the other related  
7 one is a fundamental RCRA legal question.  
8

9 The public policy question is are you going to allow a resurgence of sham dumping by  
10 providing a loophole in the regulations where by unscrupulous hazardous waste  
11 generators can avoid hazardous waste treatment and disposal and those related costs by  
12 "inadvertently" sending their toxic characteristic hazardous waste to type I MSW  
13 Landfills in Texas and then after discovering their mistake, have it magically converted to  
14 regular municipal non-hazardous solid waste that can remain in those landfills as non-  
15 hazardous solid waste? Ms. Horinko is going to address this question in some detail in a  
16 few minutes. However, I want to say that I personally believe that such a policy is  
17 directly contrary to what each of you commissioners have believed and have professed  
18 over the years as you have addressed these questions and I think it is contrary to the  
19 direction you are trying to set for this agency.  
20

21 The RCRA legal question is, is somewhat complicated. But if you tie it to the issues and  
22 facts before us, I think it is equally straightforward. Are you going to allow, through the  
23 Executive Director's decision, this agency to create what I call an Inadvertent  
24 Commingling exception to the RCRA land ban that is found at 40 CFR 268.3? We  
25 believe the land ban is explicit and has to be followed in this case. I am now going to turn  
26 the podium over to Mr. Golemon to explain to you why there is not and cannot be a  
27 RCRA Inadvertent Commingling exception that Zenith and Penske would like for you to  
28 adopt or at least create here today. Thank you.  
29

30 [KG]

31 Ms. Chairman, Commissioners, I am Kinnan Goleman. I think, uh, you know me uh,  
32 basically what I do is real unique. I'm here on behalf of a municipal solid waste landfill.  
33 It is the first time in my career I have ever stood up on behalf of a municipal solid waste  
34 landfill operator. I represent generators, treators, disposers, transporters, manufacturers,  
35 and people who end up, for one reason or another, their product needs to be disposed of. I  
36 represent the lead miners, smelters, refiners, recyclers, product manufacturers, treators of  
37 lead, but I don't represent, normally, municipal solid waste landfills.

38 This is a question of law and of major public policy. At the time of the approvals, the ED  
39 principally relied upon the Penske/Zenith argument, accepted by the senior staff, but  
40 inconsistent with sworn testimony of your own program people, that there is no bright  
41 line when that truck turned over overthere. It says point of generation. That's what the  
42 regulation says. That's when waste, the material became discarded. It was busted. It was  
43 all over the highway and the bar ditch. It contained leachable lead. Down there at the  
44 bottom is the Penske/Zenith point of generation, after it's been commingled.  
45

46 There is a bright line. Bright lines are established as a matter of public policy. One of the  
47 best examples in the State of Texas is school buses. You can drive down the highway and  
48 you can go by any school bus anyway you want to as long as you are going by them and  
49 it's lights aren't flashing. It can be sitting on the side of the road, plum full of school kids,  
50 and if it's lights aren't flashing, no foul no play.

1  
2 You go by it with the lights flashing, bingo. It doesn't matter whether you've just arrived  
3 in Texas, you're on your way through to Mexico, or you're on your way through to  
4 wherever. You go by that school bus with the lights flashing; that is a bright line test.  
5 You are in violation. The same thing was created with RCRA and Ms. Horinko will  
6 explain it a little more fully.  
7

8 Argument is best characterized in my view as a dog named Fido. That's what they're  
9 bringing to you. Zenith and Penske have a dog named Fido. One thing about it in Texas  
10 vernacular, that dog don't hunt. The other part of it is, that dog died in 1990, seven years  
11 before this accident. Now, Fido is gone. So, we have today with us just another  
12 consultant. She's going, she was present. She's just like you. She sat in the decision  
13 making in her career, dealing with law and public policy. The rest of us are advocates.  
14 We haven't sat up there and done that. That's why Ms. Horinko is here, because she  
15 understands it. She's a mother of two small children, an analytical chemist, a lawyer.  
16 She's had our nation's responsibility to clean up at ground zero, after the 9/11, the  
17 Pentagon, the anthrax in the nation's capitol, and the Columbia shuttle debris. She  
18 understands public policy and the importance of it. Marianne was also the pres, the  
19 attorney advisor to Don Clay when 40 CFR, section 268.3 was adopted. She sat through  
20 the meetings. She understands why it is there and the importance of it. So, as our  
21 opponents have characterized her, she is just another consultant, so I'll let you hear from  
22 Marianne Horinko.  
23

24 [MH] Chairman White, Commissioner Marquez, Commissioner Soward, Mr. Norton, thank  
25 you. I am Marianne Horinko and I am here today uh, on behalf of TDSL to talk about  
26 why you should support the Motion for Overturn and I will briefly mention four reasons.  
27 Ah, first the regulations. Clearly the CRTs became discarded when they fell off the truck,  
28 became broken; no longer a usable product. That is as Kinnan said, a bright line. Once  
29 the material is discarded, if it contains a hazardous waste with which both Zenith and  
30 Penske knew, it would be a hazardous waste in the event of an accident such as this. It is  
31 then subject to the RCRA regulations from the point of generation through its ultimate  
32 disposal.  
33

34 When we signed the Third Third's Rule, the final rule in 1991, EPA clearly intended to  
35 establish a prohibition against dilution, not only to meet the land disposal restrictions, but  
36 also against diluting to avoid the characteristic. Congress intended that waste be treated to  
37 minimize threats, not just at the level the bright line establishes by the characteristic, but  
38 beyond that, not just for lead, but for the underlying constituents and that goal has not  
39 been achieved here.  
40

41 Saying the commingled waste is just trash...

42  
43 [CC] Time.

44  
45 [MH] Pardon me?

46  
47 [CC] Time.

48  
49 [MH] Ok, thank you. ...ignores the RCRA statute. In fact that this material could contain  
50 hotspots, it could contain other, uh, contaminants and we don't know that. Third,

1 Superfund liability. TDSL has been exposed to this and action needs to be taken to  
2 address and make sure that this material is ultimately disposed of in a way that will  
3 minimize not just RCRA and Superfund liability. And last, I think the Commission really  
4 does need to send a strong message to the generators that they need incentives to properly  
5 manage their waste whenever an incident like this does occur. Thank you all very much.  
6

7 [DN] Next, I believe we are going...do you want to hear everyone first and then ask questions?  
8 Is that how you want to do it? Zenith and Penske, whichever of you wants to go first.  
9

10 [PG] Good afternoon Chairman White, Commissioner Marquez, Commissioner Soward, uh,  
11 General Counsel Norton. I'm here, uh, representing Penske this afternoon, and it is uh,  
12 just so obvious from hearing the presentation and from reading the materials that were  
13 filed by TDSL, that they are trying to mischaracterize what the question is before you is  
14 today. The question before you today is actually very simple. What is the chara, what are  
15 the characteristics of that waste in those 1,660 cubic yards of waste that are in dumpsters  
16 at this landfill? And they are trying to go back to what happened at the scene of the  
17 accident back in '97. Since there is no question that CRTs are not listed hazardous waste,  
18 we are governed by the wastes dealing with characteristically hazardous wastes and  
19 Counsel for Zenith will go into a great more detail about why the decision of the  
20 Executive Director has to be supported.  
21

22 There are two very important procedural, one procedural and one substantive reason why  
23 the Executive Director's decision is absolutely consistent with law, and with science, and  
24 with common sense and many a time I heard you especially Commissioner Marquez, talk  
25 about the common sense component. And this is one of those times when all three of  
26 those are aligned. First of all, the procedural precedent. A Motion to Overturn is only  
27 available to overturn a permit decision by the Executive Director. Uh, this is an  
28 extraordinary leap in that, in a re-writing of what the rules are in Motions to Overturn.  
29 And you set a very, very troublesome precedent if any decision of the Executive Director  
30 can be the subject of a Motion to Overturn and brought and sort of re-hashed, if you will.  
31 Uh, more importantly, the decision of the Executive Director was exactly right. Largely  
32 because it was anchored in science. There's a huge and very important point in this case  
33 which is how you determine whether or not the material in those dumpsters, which is the  
34 material in question, which is the material, the only material that's in question, how do  
35 you determine it's hazardous?  
36

37 You test it. That mat, there have been 3 rounds of testing. There's probably never been a,  
38 a mound of garbage that's been tested as much as this material. And, the, the interesting  
39 thing is that TDSL never bothered to test that material. They are the movement in this  
40 case. They have the burden of proof. If they are coming before you and saying that the  
41 decision of the Executive Director, which we believe was absolutely solid in science that  
42 it is not hazardous waste. They're saying it's wrong. Why in the world have they not  
43 tested that material over which they have had custody and control? If they thought for  
44 one minute that that material was truly hazardous waste, they would be in knowing,  
45 willful violation everyday they've been storing it in these dumpsters. When they dug this  
46 material up in January of this year, and chose to put it in dumpsters without a permit,  
47 without complying with all of the rules that govern storage; they put themselves in  
48 knowing, willful violation. But they know it's not hazardous waste.  
49

1 And, and had, as I said, if anybody else, any other landfill, if they truly thought it was  
2 hazardous waste would have had it removed somewhere else and would have come  
3 before you in a state of compliance. But again, they didn't because they know it is not  
4 hazardous waste.  
5

6 Let me talk really briefly about the tests. As I indicated, there has probably been no more  
7 testing of garbage than, than, this round of, of testing that has been done. Uh, Penske  
8 used an independent contractor to perform. We took 49 samples and those were analyzed.  
9 They weren't even close. They were orders of magnitude below the threshold level. The  
10 Executive Director independently hired a contractor. Penske had nothing to do with it.  
11 We weren't at the scooping meetings and they told this contractor "Go do it by the book."  
12 And they did. And those came out even lower than the samples that we, that, that Penske  
13 had taken. Again, further confirmation that by any standard, this waste is not hazardous.  
14 Then, uh, Penske, excuse me, TDSL had split samples with us and, uh the Executive  
15 Director and never revealed the results of those. Uh, they, they indicated they never  
16 analyzed the samples they split with us. When they filed their brief on September 8<sup>th</sup>, was  
17 the first time they revealed the results of the samples that they had split with the ED.  
18 Same thing, orders of magnitude before the, ah, below the, the threshold.  
19

20 And then one last testing point, which is so important, the worst part of the accident  
21 debris, the next day after the, after the disposal in TDSL's landfill, which incidentally  
22 occurred when they accepted it with no paperwork. You would think that they would  
23 have asked for a manifest that they would have required some sort of, of, of backup as to  
24 what this waste was. Uh, the next day after it was disposed of in that landfill...

25  
26 [CC] Time.

27  
28 [PG] Uh, I'll just take one second. Uh, uh the material was plucked out, the glass part, the  
29 worst part, and that was later tested by TECO and in the worst part of the waste, was  
30 shown not to be hazardous. No question that this waste is not hazardous.  
31

32 [PC] Commissioner Marquez, Chairman White, Mr. Soward, Mr. Norton, my name is Philip  
33 Comella, I'm here to represent Zenith Electronics. I have a Power Point, if you will bear  
34 with me just for one minute. Might even work. Thank you for the opportunity to say a  
35 few words in support of the Executive Director's decision. TDSL's position is  
36 characterized by two major problems.  
37

38 Problem one. A fundamental flaw in the legal analysis. They are applying rules intended  
39 for listed waste, a separate category of waste, to a characteristic waste. Problem two. The  
40 complete absence of data contradicting the overwhelming data showing that this material,  
41 under science, under law, is not a hazardous waste. Now let me try to clarify this by  
42 spinning through a fast Power Point trying to show the problem as a matter of law.  
43

44 RCRA establishes two types of hazardous waste since 1990; listed waste, characteristic  
45 waste. Listed wastes are wastes that are, on individual EPA lists. The rule is once listed,  
46 always listed, unless delisted. That's the short way of saying once you're in the listed  
47 waste prison, you can't get out without a delisting petition.  
48

49 Characteristic waste, however, are wastes that exhibit a hazardous characteristic.  
50 Analytical tests showing indeed that these materials are hazardous. Now the

1 classification of a waste mixture depends upon the type of waste you start with. If you  
2 start with a listed waste and you mix it with a solid waste, you will always wind up with a  
3 listed waste. The waste code carries through as they say. If you start off with a K048,  
4 petroleum refinery sludge, you mix it with a solid waste, you will always wind up with a  
5 K048, no dispute. The problem is that TDSL wants to apply the listed waste rules to  
6 this case.

7  
8 Characteristic wastes are completely different. They depend upon analytical testing. If  
9 you miss, mix a characteristic waste, assuming we had one here in the beginning by the  
10 way, with solid waste, it's only hazardous if the mixture exhibits a hazardous  
11 characteristic. This is the rule in 1980, it's the rule in 1990 and it's the rule today. I have  
12 the regulations here, the decisions if you would like more detail.

13  
14 Part 268 are, is, are where the dilution prohibition is. This is the land ban that they are  
15 talking about. The problem is it is an entirely separate program. The, the land ban  
16 regulates treatment. Dilution is prohibited as a means, as a substitute for adequate  
17 treatment. But the dilution must be intended to avoid treatment. There must be some  
18 intent to avoid. They, it is, they do not regulate inadvertent treatment. Example, look at  
19 exhibit L, to TDSL's brief. They have a memo from James Burlow who uses the word  
20 "deliberate dilution is illegal."

21  
22 Here's the way it works. Under chara, with a characteristic waste, if you start with a  
23 characteristic waste, indeed, you have to comply with the land ban. It attaches at the point  
24 of generation. That is correct. If, if there's a mixture that occurs, if, if it's rendered non-  
25 hazardous, the LDR continues. The land disposal restrictions, the treatment requirement  
26 hangs on to the waste, it latches on like a horse back rider until you meet the .75 which is  
27 the land ban standard. Once you are at .75, that's parts per million TCLP, it's ok to  
28 landfill it. And you know what, it's ok to landfill it in a non-hazardous waste landfill.  
29 That's section 268.9(d) of the RCRA regulations.

30  
31 Dilution is illegal. Well, the, the public policy determined after, after, 10 years of  
32 vigorous rule making is to punish the diluter not the waste. Let science determine the  
33 waste. Let the criminal laws and the civil penalty laws regulate, punish the diluter. RCRA  
34 allows up to 5 years in prison for the dilution of a hazardous waste. Here's the question,  
35 if impermissible dilution does occur, what is the status of, of the diluted material? On the  
36 same page of the Federal Register that Ms., Ms. Horinka cites to in her brief, is, is the  
37 answer to the question. EPA answered the question. If an impermissible form of dilution  
38 occurs that renders a toxic hazardous waste non-hazardous, the act of dilution is illegal,  
39 but the waste is not hazardous for subsequent management purposes. EPA was not  
40 redefining hazardous waste with the land ban. EPA finalized that approach.

41  
42 Conclusion, impermissible dilution is illegal but does not affect the classification of the  
43 commingled material. The science tells us whether something is hazardous. This material  
44 indisputably show levels of lead that are actually higher than the clay underneath TDSL's  
45 soil. We are talking about levels that are, are barely detectable. The Executive Director...

46  
47 [CC] Time, time.

48  
49 [PC] ...appropriately applied the law and we ask you to uphold his decision. Thank you.  
50

1 [DN] Can we hear from the Executive Director now.

2  
3 [LGG] Good afternoon. The issue before you today is whether the ED decision to allow Penske  
4 to dispose of 1,660 cubic yards currently held in rollofts at TDS site, a special waste,  
5 should stand. The ED made his decision after a thorough evaluation and analysis of the  
6 facts and the law and with due regard to the protection of human health and the  
7 environment. We are here today to ask you to allow the ED decision to stand.

8  
9 Seven years ago, a collision resulted in the spill of accident debris. About 98 cubic yards  
10 of accident debris, including about 220 picture tubes, packaging material, and other  
11 debris were transported to the TDS landfill that day. The debris that arrived at the TDS  
12 facility has been described as a “drop in the bucket” of the facility’s total waste receipts  
13 for that day.

14  
15 The next day, approximately 80 cubic yards of accident debris was removed from the  
16 landfill with the focus being the removal of picture tubes. Recently, TDS removed 1,660  
17 cubic yards of waste from its landfill and filled 99 rolloff boxes with this material. It is  
18 the characterization and proper management of this waste, in its current form, waste that  
19 at most potentially contains trace amounts of remnants of picture tubes that is at issue.

20  
21 This waste is not hazardous. Under the law, a solid waste is hazardous if it is either listed  
22 or it demonstrates a hazardous waste characteristic. While Zenith identified broken  
23 picture tubes as characteristically hazardous for lead, the waste that was generated as a  
24 result of the accident did not consist entirely of broken picture tubes. And certainly, the  
25 waste streams in the rollofts today consists primarily of municipal solid waste, i.e. the  
26 waste receipt, receipts for that day.

27  
28 Under the law, the mixture of a solid waste with a characteristic hazardous waste will  
29 result in a hazardous waste only if the resulting mixture exhibits a hazardous  
30 characteristic. There is no confusion on the ED’s part regarding the mixture rule. The  
31 elements of the mixture rule are tied to whether the mixture is of a characteristic  
32 hazardous waste or of a listed waste. It is simply not the case that the mixture rule only  
33 applies to listed waste.

34  
35 Based on the application of the rule, a mixture may or may not be hazardous. In this case,  
36 none of the testing conducted by any of the parties has resulted in any levels of lead  
37 above 0.1 milligrams per liter. This level is significantly below the TCLP and LDR levels  
38 for leachable levels for lead. In fact, the latest analysis conducted by TDS shows non-  
39 detectable levels for leachable lead. The EPA has absolutely confirmed the EPA, ED’s  
40 position as noted by EPA under federal law. A waste that is not a RCRA hazardous waste  
41 and that has hazardous waste levels below that of both RCRA characteristically  
42 hazardous waste and LDR levels does not require disposal at a hazardous waste landfill.  
43 This is the situation before the commission today.

44  
45 The dilution prohibition does not trump the rules governing whether a waste is hazardous.  
46 The concept of dilution applies to the land disposal restrictions. The land disposal  
47 restrictions determine what standards must be met to allow a waste to be land disposed.  
48 Virtually all of the CRT waste was removed shortly after the accident and the remaining  
49 waste is not hazardous, is below LDR levels, and does not require disposal in a hazardous



1 waste landfill. Penske requested approval to dispose of the waste in its current form as a  
2 special waste.

3  
4 A special waste is defined as “any solid waste, that because of its quantity concentration  
5 or properties require special handling.” While Penske has argued that the waste need not  
6 be classified as special waste, the ED approved this request, applying the most  
7 conservative approach in light of all the circumstances. But to be clear, this was by no  
8 means a reclassification of the waste.

9  
10 The waste stream present in the rolloffs today is vastly different from a waste stream  
11 consisting entirely of broken picture tubes. The ED’s decision is consistent with sound  
12 science. The agency hired an independent consultant to conduct sampling of the waste.  
13 This sampling is representative. A representative sample is defined by EPA guidance as  
14 “average properties of the waste as a whole.” This is what the contractor did. TDS’  
15 position is that a needle in the haystack needs to be found in order for waste, for a waste  
16 sampling to be representative. And if no needle is found, the sampling is not  
17 representative.

18  
19 [CC] Time.

20  
21 [LGG] One more minute please. But if no needle is found, but if no needle is found maybe it is  
22 just not there. The Executive Director’s decision makes common sense. Our current  
23 regulatory scheme recognizes that it is only at certain levels that potential harm to human  
24 health and environment becomes a regulatory concern. We ask that you affirm the  
25 decision of the ED as one that is firmly supported and grounded in the law and science.

26  
27 [KHW] I would like to ask one, um, and you may answer very briefly question, uh, before we  
28 turn to OPIC’s um, statement and that is has the um, ED, the agency ever um, and I know  
29 you chose not to say this was a reclassification of waste, but a waste stream, um, whether  
30 we are treating it as commingled or not, that at the point of generation would be um,  
31 described as a characteristic toxic hazardous waste as a special waste? I know we have  
32 for all of the reasons that you just um, um, shared as I have some information on other  
33 types of hazardous waste which um, because of, of mixing or, or commingling had been,  
34 uh, uh, the ED determined no longer exhibited, um, characteristic hazardous waste, but  
35 has that ever occurred with where the, the constituent for which the original point of  
36 generation hazardous waste characterization was for toxicity? Have we ever, um...

37  
38 [LGG] There are um, um, one situation involving a spill of some methanol contaminated waste.  
39 And in that situation, um, uh, even though, ah, that waste could have been, uh, deemed to  
40 be characteristically hazardous, um, after sampling it was determined that that waste, um,  
41 no longer exhibit, exhibited characteristics and that waste was handled as a special waste.

42  
43 [KHW] But that wasn’t, I don’t think that was toxic. Is methanol toxic? Is that a toxic  
44 characteristic?

45  
46 [LGG] Oh, I am sorry, that would be an ignitable, an ignitability example.

47  
48 [KHW] But to your knowledge the, um, uh, uh, a point of generation, either pure or commingled  
49 uh, characteristic toxic hazardous waste has not been treated as a special waste?  
50

1 [LGG] Um, we have not been able to find other examples other than the example that I identified  
2 for you.  
3  
4 [KHW] Thank you.  
5  
6 [BC] Thank you. For the record I am Blas Clay for the counsel on the commission on OPIC.  
7 Ann Rolland and Eric Allmon are attorneys in the office and Eric Allmon will be  
8 presenting our position for you.  
9  
10 [EA] Good afternoon Chairman, Commissioners, General Counsel, my name is Eric Allmon  
11 and I represent the Office of the Public Interest Council. First OPIC will note that a  
12 question has been raised as to whether an opportunity for a Motion to Overturn even  
13 exists in this case. OPIC has examined the issue and determined that such a Motion is  
14 available. Considering the Motion to Overturn, we recommend that the Commission  
15 grant Motion to Overturn filed by TDS and remand the matter to the ED for further action  
16 to ensure compliance with the requirements of RCRA, land disposal restrictions and the  
17 Texas Solid Waste Disposal Act.  
18  
19 These requirements are an essential element in the overall framework develop to prevent  
20 landfill disposal hazardous waste and resulting in environmental problems. We are  
21 concerned about possible precedental effect of today's decision. The regulations are clear  
22 and consistent concerning the point at which waste is classified. 40 CFR 261.3(b)3 relied  
23 on by the ED as providing the mixture in the rolloff containers as not hazardous provides  
24 specifically that a solid waste becomes hazardous when it exhibits one of the hazardous  
25 characteristics which includes toxicity.  
26  
27 Zenith has classified this ship of CRTs as containing lead at the level that would make  
28 them characteristic hazardous waste for toxicity when they are discarded. These CRTs  
29 were respectfully discarded at the time of the accident and thus they became hazardous  
30 waste at that time. Pursuant to both federal and state non-disposal restrictions this point  
31 of generation determines whether a waste is hazardous for purpose to the landfill disposal  
32 restrictions.  
33  
34 I will note that you have heard both Zenith and the ED say that in the event of a  
35 characteristic waste that the land disposal restrictions no longer apply once that  
36 characteristic is lost. Um, it's in 261.3(d)1 that the federal regulations do provide any  
37 solid waste described in paragraph c is not a hazardous waste if it meets the following  
38 criteria. One, in the case of any solid waste that does not exhibit any characteristic of  
39 hazardous waste identified in subpart C. This is what they are referring to. However, they  
40 disregard the parenthetical which follows that sentence. However, wastes that exhibit a  
41 characteristic at the point of generation may still be subject to part 268 even if they no  
42 longer exhibit a characteristic at the point of disposal.  
43  
44 The land ban restrictions hold on the waste even at this point. The next issue is what  
45 those restrictions require. 268.40 provides a prohibited waste may be disposed of only if  
46 it meets requirements found in the table in that section labeled "Treatment Standards for  
47 Hazardous Waste."  
48  
49 268.3 makes clear that dilution is not an allowable treatment under these standards. It  
50 may not be used to achieve compliance. In the preamble, the EPA stated its treatment

1 authority would be meaningless if dilution could serve as a form of treatment. If it could,  
2 if in the adoption of the preamble the EPA stated the EPA is applying a dilution  
3 prohibition to waste which exhibits a characteristic at the point of generation. The EPA's  
4 letter to the TECQ relied on by the ED in their briefing supports this position when it  
5 states that improper dilution, such as mixing with solid waste, may not be used to meet  
6 the treatment levels.  
7

8 And you asked a question about other cases where wastes have been reclassified. I will  
9 note that the regulations at 335.512 grant the ED the ability to reclassify a waste.  
10 However it says that "the Executive Director may reclassify the waste to the more  
11 stringent regulated classification. This regulation does not give the right to the ED to  
12 reclassify a waste to a less stringent classification. And b, grants a person the right to  
13 appeal that particular decision of the ED.  
14

15 Unfortunately what has happened is that the dilution has occurred and that the waste  
16 mixture may now be below the standard. Consequently some treatment method or an  
17 EPA variance for the mixed solid waste since CRT hazardous waste is required to  
18 reclassify the mixture as non-hazardous. This authority is only granted to the EPA and  
19 was not delegated to the TCEQ. Thank you. Both I and Ms. Rolland are available for any  
20 questions which you may have.  
21

22 [KHW] Thank you Eric.  
23

24 [DN] Yes, we, I do believe there is at least a minute or so that has been not used in case uh,  
25 TDSL had any kind of rebuttal statement they wanted to make.  
26

27 [KR] Actually, if we could we would like to save the rebuttal until the very end. If you, if, if  
28 you want us to make a rebuttal statement now, we can correct some things and if you  
29 want to ask questions, however you want to do it.  
30

31 [DN] I think our typical process is to take rebuttal now and then the deliberations of the  
32 commission start and of course if they have questions of you or others, they can do that at  
33 that point. Is that, that, that's our procedure.  
34

35 [KR] Ok, ok I'll make a couple of very quick points and we have people here to answer them.  
36 Ms. Horinko probably better than anybody else what the EPA meant when it developed  
37 these regulations. It focused on point of generation not point of disposal. As OPIC said,  
38 that's what it's all about and I encourage you to ask Ms. Horinko questions on that  
39 because she was part of drafting those rules on behalf of the EPA.  
40

41 Two factual errors have been made here and stated here today. One factual error that  
42 almost all the CRT waste is gone from the landfill. That's flat wrong. Mr. Zoch can get  
43 up and tell you why that's not true. There's probably at least a thousand pounds of  
44 leachable lead left in there. The other thing is, yes Commissioner Soward, and I would  
45 encourage you to ask Mr. Zoch that question. There is a lot of leachable lead left in that  
46 landfill.  
47

48 The other thing is that they bring up the TECO results as part of their testing protocol that  
49 supports their position. The TECO results were for treatability study. If you look at those  
50 TECO results, one of those results of the four was 2.34 which is significantly above the

1 .75 treatability level and that's why the waste still has to be treated. Thank you very  
2 much.

3  
4 [KHW] Thank you. I have several questions, but I would defer to any...

5  
6 [RM] [inaudible]

7  
8 [KHW] um, which and I think we heard, um, from all the parties we've heard, um about various  
9 policy considerations, we've heard about, um, the science, scientific issues, and the legal  
10 issues and for me, um, all of those are important, the legal are the first, um, because that  
11 is the basis upon, um, the ground on which the Executive Director's decision stands and I  
12 am not sure of the most, um, succinct way to ask this question, but it has to do, and it  
13 comes from not only the statements made today, but reading some, some of the four  
14 volumes of pleadings, um, that in the primary party's brief, um, the this issue between,  
15 um, listed and characteristic wastes. And I believe Zenith's and Penske's claim that, um,  
16 the, the manner in which um, TDS, um, argues that the ah, dilution rule prohibits, um,  
17 um, appl, the ED's application of the mixture rule in this case does not apply because this  
18 is not a listed waste and I would, um, I would first like to, um, hear from, um, any of TDS  
19 representatives, um, in response to this issue and then to the other parties.

20  
21 [MH] I appreciate the opportunity to respond and I think what has gotten confused here is that  
22 in the early years of the RCRA program in the 1980's when the rules were still being  
23 developed, it is indeed true that before the land ban rules came out, you could indeed, um,  
24 mix ah other materials with a characteristic hazardous waste or an ignitable corrosive or  
25 reactive waste in order to remove the characteristic. The land ban changed all of that and  
26 in fact the EPA was very explicit when we put the ah, preamble and the final rule out for  
27 the Third Third's rule containing the land disposal restrictions for characteristic waste,  
28 that from now on, it is inappropriate, to and in fact illegal, to remove the characteristic  
29 using dilution. Only legitimate treatment can be used to remove the characteristic. And  
30 furthermore, it is not enough to remove the characteristic, you must treat further to  
31 minimize threats from, ah, underlying hazardous constituents which may otherwise exist  
32 in the material. So a lot of the material that is cited to support the, um, positions of  
33 Penske and Zenith is material from the 1980s, when in fact, that was in deed the case.  
34 What we intended in 1990 and 1991 in proposing and finalizing the Third Third's rule  
35 was essentially a sea change in policy. It is now illegal to dilute, to defeat the  
36 characteristic. So the mixture rule as it applies to listed waste has always been the same.  
37 So that is where I think the...

38  
39 [KHW] And there is also, while you are up here, that is part of that is, ah, um, a claim that if the  
40 dilution was inadvertent or accidental, ah, the law has, ah I mean, the rule has different  
41 significance, and I don't from what I've understood, your saying that would not apply?

42  
43 [MH] That would certainly not apply.

44  
45 [KHW] ...the dilution would not um, um, address the hazardous, the treatment issue prior to the  
46 disposal.

47  
48 [MH] Right, that's exactly right. And the reason why the language that Mr. Comella cited and  
49 said so quickly was finalized in the final rule is a paragraph or two that EPA put in and  
50 we wrestled with that issue because of the question of historical waste. What about waste

1 that was ah, ah, disposed of 30 or 40 years ago before the program existed, and that  
2 person could of no way of knowing is that forever hazardous even before the law existed.  
3 Ah, and so in the preamble to the Third Third's rule, ah, we proposed an approach and  
4 invited comment and in the final rule, ah, we were silent on it, and the reason why is  
5 because we wrestled with the appropriate date. Would it be 1976 when the RCRA law  
6 was enacted? Anything that was impermissibly diluted before that date? Then you know  
7 you could make a case-by-case determination, would it be 1980, um, would it be 1984, or  
8 1986 when the RCRA CERCLA amendments came out? Because the idea being that if it  
9 occurred at the point when the person wasn't on notice, um, then maybe that kind of  
10 impermissible dilution, you could look at it, um, and say that's a different situation, that's  
11 historical waste. But certainly, we never intended that in 1997, when people had had  
12 years of experience with the RCRA program and the CERCLA liability statute and  
13 recording scheme, that they could then say, oops, impermissible, oh well. I mean, that  
14 was never definitely never our intention that people going forward with plenty of years of  
15 notice as to what the requirements were would be able to then say, you know, waste got  
16 diluted, things happen. That was never...

17  
18 [KHW] And one other thing that I think is directly related to this realistic characteristic issue, um,  
19 is that, the, the um issue on the point of generation at, the, the hazardous characteristic as  
20 I understand, um, in your statement, um, you believe attaches at the point of generation  
21 and is not measured scientifically, prior, is not evaluated or assessed prior to disposal.

22  
23 [MH] The point of generation is critical to the RCRA scheme because otherwise people could  
24 continue testing and testing and testing and adding, and adding and adding and then all of  
25 the sudden we've added enough material to our original hazardous waste was that it  
26 doesn't meet the criteria anymore and we don't have to comply with the land ban and that  
27 is not what Congress intended at all.

28  
29 [KHW] I don't know if I can ask this question, but to use the Executive Director's analogy, if you  
30 had a needle in a haystack, if you literally had waste, um, commingled that was the  
31 volume of a haystack, and the amount or volume of the characteristically hazardous was a  
32 needle, the um, um, the disposal restrictions would still apply.

33  
34 [MH] They would still apply. Note, um, two things. First of all, it is not at all clear that they  
35 have characterized the waste in a way that ensures that there aren't hot-spots, ensures that  
36 they've accounted...

37  
38 [KHW] [inaudible]

39  
40 [MH] But even assuming worse case, um, there would still need to be a treatability study to  
41 make sure, that, that there isn't, there isn't, first of all you need to make sure that you  
42 analyze the material properly, ah, to make sure it is below the level. And secondly, um,  
43 um, less if met both characteristic standards and the land standards, um, and options need  
44 to be analyzed to ensure proper treatment had appropriately occurred, you could not  
45 escape the, uh, hazardous waste regulations.

46  
47 [KHW] ...for the land disposals.

48  
49 [MH] Right, because of Congress' very clear intention that treatment occurred to minimize  
50 threats posed by that material.

1  
2 [LS] Well, if what you say is true, the statute, the 40 CFR 268.3 would say dilution is  
3 prohibited. It doesn't say that. It says that dilution is prohibited as a substitute for  
4 treatment. It's not a blanket prohibition. It says if you are doing it to avoid treatment, it's  
5 prohibited. There's got to be intent written into that otherwise those last words are  
6 meaningless.  
7  
8 [MH] Well, EPA states very clearly in the preamble to the rules that dilution to defeat the  
9 characteristic is also prohibited.  
10  
11 [LS] Again, intent. If you do it to defeat the characteristic, it's is prohibited. If you do it to  
12 avoid treatment, it's prohibited. If it just happens, and there is no intent to avoid  
13 treatment, to change the characteristics, how can you say it is prohibited?  
14  
15 [MH] If you look at it the reverse way though. If you make intent a critical part of the rule, then  
16 there is no incentive for people to ever manage waste properly. They can simply say they  
17 didn't intend to, they intended to manage it properly.  
18  
19 [LS] But you can certainly judge that from the actions that were taken. Uh, you know if, if  
20 Penske had been out there taking this waste and commingling it with municipal solid  
21 waste, that would be one thing. Penske's fingers are not on the commingling of this  
22 waste. So how do you, oh no, I'll get to you in a minute [directed towards Kerry Russell].  
23 How do you, how do you, how do you get to there was an intent to substitute for  
24 treatment, to change the characteristics on behalf of Penske?  
25  
26 [MH] Um, first of all, Penske was on clear notice that the material, if discarded, would be a  
27 hazardous waste. The agreement...  
28  
29 [LS] The CRT waste?  
30  
31 [MH] The CRT...  
32  
33 [LS] yes  
34  
35 [MH] would be hazardous, yes that is right. Um, in fact, Penske, to its credit once it realized  
36 what had happened that it had inadvertently let the material go to a municipal landfill, took  
37 care of the rest of the material properly...  
38  
39 [LS] You mean the rest of the CRT waste?  
40  
41 [MH] ...and the CRT waste, that is exactly right.  
42  
43 [LS] Right.  
44  
45 [MH] So, in a, now, the fact that Penske is a large, sophisticated company, and so is Zenith, and  
46 that they did not properly ensure that that material was transported and the spill was not  
47 handled responsibly, I think, um, that's a questionable, to me in this day and age, that any  
48 company could...  
49

1 [LS] I understand. TDS is one of the most reputable waste disposal firms in this state as well,  
2 and they know what the regulations are as well.  
3  
4 [MH] And the other thing, ah, just is that is astounding is that they would not, upon realizing  
5 their mistake immediately take care of their waste and ensure sure that it was properly  
6 managed the material that had gone to the landfill.  
7  
8 [LS] Didn't they do that, the very next day?  
9  
10 [MH] Ah, no. Only some of it, the rest of it is still there.  
11  
12 [LS] Well, why wasn't it taken care of the next day?  
13  
14 [MH] I mean, uh, that you will have to question...  
15  
16 [LS] I plan to.  
17  
18 [MH] Yes.  
19  
20 [LS] Let me ask you, um, [thinking], no that is fine, I will wait.  
21  
22 [KHW] Well, uh...  
23  
24 [LS] Go ahead.  
25  
26 [KHW] But if the characteristic hazardous waste label applies at the point of generation, I don't  
27 understand how the intentional or unintentional dilution is an issue. Because if, if, if, if, if  
28 we are talking about the hazardous waste characteristic, um, as it applies to land disposal  
29 restrictions is something that is determined at the point, of unless other parts of the rules  
30 that I don't understand, as far as commingled waste streams, um, I don't understand why  
31 intentional or unintentional dilution is, um, an issue.  
32  
33 [MH] That is exactly my point. If you start putting intent into the regulations, that intent  
34 becomes, every act of disposal becomes a question of what was the generator's intent?  
35 And generators can get away with essentially saying my intentions were good and it's too  
36 bad the waste was mismanaged.  
37  
38 [KHW] And that is if the label at the point of generation and is not measured  
39 prop...immed...prop..., immediately prior to disposal.  
40  
41 [LS] Let me, let me follow up on that, because, here is where, where I get back to. This whole,  
42 in my view, this whole matter has been clouded by the fact in January of this year, 1,600  
43 cubic yards of municipal solid waste and dirt and presumably some CRT waste were dug  
44 up and put into 99 rolloff bins. And all the sudden we are focusing on 99 rolloff bins of  
45 stuff. D1, D008 classification, which I agree with you that the law attaches it at the point  
46 of generation which I believe was at this accident, but that was for the CRT waste. That's  
47 not for the 99 bins of stuff that is sitting out there today. So all of this discussion about  
48 intentional, intentional dilution mixture, we don't have to get there. We have to focus on  
49 the CRT waste that's still there. Not the 99 bins of stuff, unless we find the CRT waste in  
50 the stuff and we deal with that under the current regulation both as it relates to

1 generation, handling, treatment and disposal. So don't we need to quit talking about the  
2 99 bins of stuff and start talking about the CRT waste that are there, if any?

3  
4 [MH] Actually I completely agree. And I think the appropriate thing to do here is to manifest  
5 that material out, take it to a licensed handler, have the handler characterize the material,  
6 do a treatability study, see if there are any hazards post by this material. If there are, if  
7 there is CRT waste, other lead containing waste, pull that material out and make sure it is  
8 properly treated. If the rest of it doesn't need treatment, then, there can be a treatability  
9 variance or some other appropriate, um, measure to, ah, material be handled properly.

10  
11 [LS] What if you don't find any CRT waste in it? Why do you need to do a treatability study?

12  
13 [MH] If there is not a shred of CRT waste in it, and there is no other treatment needed to  
14 minimize threats...

15  
16 [LS] If the, if the contractor follows approved EPA sampling and testing protocol, and finds no  
17 measurable levels of CRT waste, any bin, why should there have to be treatability studies  
18 done on that bin, when the CRT wastes are not there? Why can't it go back to Mr.  
19 Gregory's landfill and be disposed of?

20  
21 [MH] On that, I will defer to my colleagues at OPIC just because I don't know if that is doable  
22 under Texas law. But if there is no further treatment needed to minimize threats from the  
23 material, then, um, at that point, it probably could be reclassified.

24  
25 [KHW] The Executive Director's in his June 18<sup>th</sup> letter has identified the waste in question as,  
26 um, um, waste generated as a result of the cleanup activities relating to the accident  
27 involving the Penske truck carrying Zenith's picture tubes. I mean, it is identified as, as, I  
28 would read that that waste.

29  
30 [LS] The Executive Director took samples on 99 rolloff bins of stuff and not, those samples do  
31 not indicate CRT waste. It, they represent testing of samples of 99 rolloff bins of dirt,  
32 municipal waste and presumably some CRT waste. So I, I see, when the Executive  
33 Director made his analysis, his decision, he was basing it on the 99 bins of stuff. Not on  
34 CRT waste that came from this accident. That's why I said this whole matter got clouded  
35 in January of this year when all of this got dug up and put in rolloff bins and we started  
36 focusing on 99 rolloff bins and not CRT waste from this accident in October of 1997.

37  
38 [MH] The material that was removed, was removed primarily as I understand it, because TDSL  
39 found itself in a box. It needed that space to actually manage more legitimate municipal  
40 solid waste for its business. And it was stuck, it's been in limbo since 1997. Through  
41 actions that it thought it was taking to help out public safety officials, and now like a tar  
42 baby, both because of RCRA and Superfund, this waste is, is, is attached to them. And in  
43 terms of the future of this waste, its, its analogous to a, a paternity suit, where Penske is  
44 the father and doesn't want anything to do with the baby, and now even though TDSL is  
45 kind of the foster parent of this material, it is responsible for ensuring that the future  
46 disposition of this material minimizes its liability from a public health standpoint. It is  
47 forever stuck to this material in some way and needs to ensure that whatever happens, it's  
48 a proper result, both for its own business and for its customers.



1 [LS] I don't disagree with you with regards to the CRT waste. But that does not necessarily  
2 mean that 1,600 cubic yards of waste should be the focus of this Commission's decision.  
3

4 [MH] Well, and I will let Bob talk about the actual nature...

5

6 [LS] Ah, we will decide if we want to hear from Mr. Zoch.  
7

8 [RM] Yea, ah, before you go away, first of all Ms. Horinko, ah, I have a great amount of  
9 respect for you and I want to thank you for so many years of service, ah, at EPA, ah, I  
10 have a lot of respect for your opinion. Ah, and you may not want to agree with me, at  
11 least in public with the statement that I am about to make, and I wouldn't blame you if  
12 you don't. Ah, but I think that RCRA is probably the worst environmental law that  
13 Congress has ever written. Primarily because it leads to so many absurd results. It just  
14 don't make sense. I have a question for you. Ah, if an accident happens here in the next  
15 few minutes on Interstate 35, car gets demolished, totaled out. It's got fuel, residual fuel.  
16 It's got oil. It's got a lead acid battery. It's got mercury switches everywhere. It's got  
17 plastic that if ah caught on fire would give toxic fumes. Why isn't that, ah, taken to  
18 hazardous waste landfill? Isn't it, ah, it's a mixture of all kinds of things there. It's an  
19 accident. Ah, it's got all kinds of toxics and hazardous, both listed and probably  
20 characteristic, and it doesn't, doesn't make it to the landfill. And city crews, even the city  
21 of Austin picks them up, sweeps the, all trash around it, and dispose of them on a  
22 municipal landfill or you know, gets recycled, not as a hazardous waste.  
23

24 [MH] Uh-huh

25

26 [RM] What's the difference of me dropping a TV set out of the back of a pickup truck and  
27 having that wreck? Why should that be any different?  
28

29 [MH] The difference between the situation that you talk about and the situation that occurred in  
30 1997 is the generator knowledge, primarily. In this case, a truck full of lead containing  
31 CRTs is different than you driving down the road on your truck and dropping a TV off.  
32 First of all, one TV, from a home, there is a household hazardous waste exclusion as  
33 opposed to a truck full of commercial products. Secondly, the rules rely, rely upon  
34 either generator testing and generator knowledge. Um, in this case ZRT and Penske had  
35 full knowledge that that quantity of CRTs, if discarded, would be D008 waste. And in  
36 fact Zenith routinely generates large volumes of D008 waste from discarded CRTs from  
37 its operations every year. So that would be the difference between you driving down the  
38 road and a TV falling off or a car accident, and, for example, a tractor-trailer carrying a  
39 whole bunch of cars all containing a lot of toxic fuel, or a uh, a uh, uh truck full of CRTs.  
40

41 [RM] So, so, my car, there can be a pile up there, and everyone of those cars can be full of  
42 toxics and hazardous waste, but it does not have to be handled as hazardous waste?  
43

44 [MH] I don't think that is the case. I think most, ah, emergency responders are trained to test,  
45 and if there is actually hazardous material generated at a site, they will manage that  
46 material properly.  
47

48 [RM] Did all the mercury and all the lead and all the oil, all the remaining gasoline that's in  
49 those cars is not considered hazardous?  
50

1 [MH] I would have to get back to you on that Commissioner.  
2  
3 [RM] You know, it's ah, to me, ah, I guess that's the issue were to me some of the rules, even if  
4 interpreted, ah, in some extreme cases, just don't make a lot of sense. That why  
5 [inaudible] with RCRA. It doesn't distinguish, it's not based on risk at all.  
6  
7 [MH] But I also hear you questioning, given what the law is, and also what happened here  
8 today, it's the same question that Commissioner Soward has. Alright, what do we do  
9 going forward? And the real question that you want to ask yourself as risk managers is  
10 what is the risk posed by this material? What is the proper way to handle it? What is the  
11 fairest way to handle it? And consistent with Texas law and Texas public policy. And  
12 what you want to do is make sure that you minimize threats to human health and the  
13 environment by properly characterizing the material. That you don't disincentivise  
14 generators and transporters to handle their waste properly, but instead just say, "Oh, well,  
15 no harm, no foul". And then third, ensure that people who are good Samaritans and help  
16 out in situations like this, don't get punished for their actions and be exposed to liability.  
17 So, I think those are the kinds of criteria that you should look at as you think about  
18 what's the solution going forward.  
19  
20 {1:29:07}  
21 [KHW] Thank you. I will allow the other parties, and I can say, just in our, it is our intent, and  
22 please step forward, but it is our ah custom to always allow elected officials, um, who  
23 come to any of our agendas or meetings to speak and we have, um, but I was going to say  
24 because I want to allow you to respond, are you...  
25  
26 [PC] Yes  
27  
28 [KHW] Is that alright with you?  
29  
30 [PC] Yes, that is fine.  
31  
32 [KHW] Ok, but I was just going to finish my sentence, Representative Rodriguez is here, and we  
33 would, um, if Representative Rodriguez does not mend, does not mind waiting while we  
34 allow the other parties to respond, unless the other parties would like to have, um,  
35  
36 [RR] I don't mind.  
37  
38 [KHW] Are you sure? Ok.  
39  
40 [PC] Thank you for an opportunity to respond. I have to say that Ms. Horinko and me are very  
41 close to agreeing on a core principle and, and here is the area of disagreement that we  
42 part company on. If you draw two lines on a piece of paper, and the top line is 5.0 and  
43 that is the hazardous waste level for lead. The TCLP. If you start off above that line, you  
44 are a hazardous waste. If there is an inadvertent mixing that occurs, and you go below the  
45 line, below 5.0, you are not a hazardous waste, below the line, you are not a hazardous  
46 waste. And I would challenge anybody to say that you are a hazardous waste below the  
47 line. The RCRA regulations are very clear on that point. However, at the point of  
48 generation, the land disposal restrictions do attach when you are over 5. They do attach,  
49 and like I tried to express in my opening comments, they attach, the land ban attaches to  
50 the non-hazardous waste from 4.9 down to .75. .75 is the treatment standard. That is the

1 second line. The top line is 5.0 and the bottom line is .75. Between the 5.0 and the .75  
2 you are not a hazardous waste. Once you go below .75 you have now satisfied the land  
3 disposal restrictions and you can dispose of this material in a hazardous or non-hazardous  
4 landfill. So, the point being that for characteristic waste, once you go below the line, the  
5 code does not carry through. It's not D008.

6  
7 [KHW] Would you, um, this has been said before, but then tell me how you, ah, explain this  
8 language in the rule, um, that I believe Mr. Alman also read, um, and this is in, um,  
9 261.3(g)3, "Waste excluded under this section", that being 261.3, "are subject to the 268  
10 land disposal restrictions of this chapter, even if they no longer exhibit a characteristic at  
11 the point of land disposal."

12  
13 [PC] Right. That's, that's, that's, that's the point of what I just said. Because the point is the  
14 LDRs attach, they ride that waste over the 5.0 while it is still a non-hazardous waste. The  
15 debate in Congress, I'm sorry, in front of the DC Court of Appeals, and in the rule  
16 making in early 90s, on this point was whether the EPA had jurisdiction over a non-  
17 hazardous waste, to require treatment below the characteristic level. In 1998, at the, in  
18 1997, at the time this material was accepted by TDSL, the treatment standard for lead  
19 was still 5.0. See, they lowered it to .75. They went below the hazardous waste level,  
20 because they thought they had the authority to do it, and the DC Court of Appeals, and  
21 the Chemical Waste Management Decision, cited in some of these briefs, said the EPA  
22 did have, not only had the authority, but the obligation to require treatment below the  
23 characteristic level. That's, that's why, maybe that regulation is one of these unfortunate  
24 RCRA, um, um, ambiguities, but the point is, is that, is that EPA had, has the jurisdiction  
25 on the non-hazardous waste to require treatment to the LDR. The code does not carry  
26 through, ah, for a characteristic waste, and I, I will read from the Third Third, "Residues  
27 from the treatment of characteristic waste are not automatically considered the  
28 characteristic waste. These residues are considered characteristic if they still display the  
29 original characteristic or if they display another characteristic." Point is if you treat  
30 something and you are below that level, you are not a hazardous waste. And, and so...

31  
32 [KHW] Where did the treatment occur on this?

33  
34 [PC] Pardon?

35  
36 [KHW] Where, when and how did the treatment occur on this waste?

37  
38 [PC] On, on this waste here?

39  
40 [KHW] Uh-huh

41  
42 [PC] The, uh, in this situation, and believe me, we are only skimming the surface of the  
43 complexity, I appreciate that...

44  
45 [KHW] We appreciate that too.

46  
47 [PC] But it is true as, ah, Ms. Gonzales said that Zenith had characterized tubes as hazardous.  
48 This truck was carrying more than just tubes. It was carrying packaging material, ah, ah,  
49 plastic crates that held the tubes for safe transportation, etc. The only test on that material  
50 showed that it was not a hazardous waste. Everyone wants to ignore that, but it is the only

1 data point that we have on that. In this case, there was an inadvertent, unintentional  
2 mixing...

3  
4 [KHW] That's not treatment, I don't...

5  
6 [PC] It's not, correct. It is improper treatment, but I, I agree with Chairman Soward, that the  
7 regulations prohibit impermissible dilution. They, they prohibit dilution intended to avoid  
8 treatment. The, the ah, exhibit L, to, ah, TDSL's Brief, has a James Burlow memo that  
9 says, "Any deliberate mixing of a prohibited hazardous waste with soil to change the  
10 treatment classification, is illegal", using the word "deliberate". The, the provision that I  
11 had on the slide is directly on point from EPA's preamble discussion on what happens  
12 when you have, have a mixture, even an impermissible dilution that renders a, a  
13 hazardous waste non-hazardous. EPA says, "On the rules proposed today, if an  
14 impermissible form of dilution that occurs that renders a toxic hazardous waste non-  
15 hazardous, the act of dilution is illegal, but the waste would be non-hazardous for  
16 subsequent management purposes."

17  
18 [KHW] Do you think you can distinguish management and disposal?

19  
20 [PC] Pardon?

21  
22 [KHW] Management and disposal? Are those, do you think those are interchangeable?

23  
24 [PC] They say that the haz, that the non-hazardous material will not have to be disposed of it in  
25 a Subtitle C landfill in the final rule. What they are saying is that they are not redefining  
26 a, a waste mixture. They are not redefining what a hazardous waste is. A mixture, that's  
27 why this case is about the mixture rule, or a mixture between a solid waste and a  
28 characteristic waste. Nobody, despite the adversarialness we have shown in this entire  
29 matter, unfortunately or fortunately, whatever the case may be, has claimed that TDSL  
30 intentionally diluted this material. This was an accident. It was an accident at the scene. It  
31 was an accident at the site. People were rushing to clear the road. Nobody intentionally  
32 mixed anything. This is inadvertent disposal. Now we have about 18 cubic yards of  
33 material that was left after, after the um, debris was removed the next day, some  
34 unknown amount, becoming 1,600 cubic yards. And I, if, I, and the analytical data on  
35 1,600 cubic yards shows that the hot, 45 results show no detections, at a detection level of  
36 1 part per billion. So, Ms. Horinko, I agree with her, that for, for risk management  
37 purposes, we should assess the risk of this waste. It has already been done. This material  
38 has been assessed more than any pound, pile of garbage in this state, I am sure. There is  
39 no risk posed. There has never been a risk posed. But the data shows that it poses no risk.  
40 There is really is nothing else somebody can do with this waste. Um, it's been tested. It's  
41 been examined. It's been, um, evaluated. Uh, that's why in light of the unique  
42 circumstances here, the ED's decision is the correct decision. They are applying a  
43 solution that fits the problem. They're not over regul, over regulating and they are not  
44 under-regulating. They are not saying it is a municipal solid municipal waste. They are  
45 saying treat it as a special waste and I believe it is a Class I. Um, by the way, the Class I  
46 level is 1.5 parts per million. It's way below Class I. So under these circumstances,  
47 unique circumstances, apply the rules as stringently as you want, you still wind up with a  
48 non-hazardous waste, under, under the rules. Um, the, the only part of difference that I  
49 have with Ms. Horinko is thinking that the material remains, once it's a hazardous waste,  
50 it remains a hazardous waste til disposal. I don't, I am not sure if she said that, but that

1 would apply to a listed waste, not a characteristic waste. And I, and perhaps that's my  
2 understanding, but perhaps if we talked about it, we would have the same understanding.  
3  
4 [LS] Two quick.  
5  
6 [PC] Yes  
7  
8 [LS] Two lines of questions. When that accident occurred in October of 97, and the 19 inch  
9 color picture tubes were broken, that became, those broken CRTs became a classified  
10 hazardous waste, correct?  
11  
12 [PC] It would depend. Can I, I am going to give you a depending answer, if I, it would depends  
13 on how many were broken because there is a small quantity generator exemption...  
14  
15 [LS] Ok, let's assume...1,200 of them were broken.  
16  
17 [PC] ...the conservative, the, the facts show that a few were broken as a result of the accident  
18 and a bunch more were broken when they were trying to upright the truck. But to be  
19 conservative, without data, the, ah, it was, ah, it was, it was correct to say that they were  
20 most like hazardous at the scene.  
21  
22 [LS] Didn't, doesn't Zenith classify broken CRTs as D008 hazardous waste?  
23  
24 [PC] At it's plant. First of all, Zenith is out of the TV tube manufacturing business.  
25  
26 [LS] I am very more surprised at that then I am at Penske.  
27  
28 [PC] It's a long story. I am not going to left. But...  
29  
30 [LS] Doesn't Zenith classify broken CRTs as D008 hazardous waste?  
31  
32 [PC] At their plant in Melrose Park during this time, yes. That, but that, you are talking about  
33 tubes coming off a production line. You are not talking about this, this package tubes in  
34 plastic wrappers, boxes, packages, the whole thing. You are talking about a different  
35 waste stream. That's, that's why I can't just agree with you. Yes, yes we did characterize  
36 the tubes off of the production line as D008. At, at the scene, we don't really know. The  
37 conservative thing to do would, was to treat it as D008, unless, until there was data  
38 showing that it wasn't.  
39  
40 [KHW] I thought Zenith contacted TDS a couple of hours after the waste had arrived, um, at the  
41 landfill. This was the D008 waste.  
42  
43 [PC] As far as I know, the communication, there was never any direct communication between  
44 Zenith and TDSL. I believe it went from Zenith to Penske and maybe Penske to TDSL.  
45 We were in Illinois.  
46  
47 [LS] Whatever.  
48  
49 [PC] Whatever it was, right.  
50

1 [LS] Your company and Penske both believe, or took the position in October of 97, that those  
2 broken and discarded CRTs were classified hazardous waste.  
3  
4 [PC] As I said, my best answer I can give you, is that the conservative thing to do at the time  
5 was to treat it as D008. And if someone would have called us up and asked us, by the  
6 way, that is what we would have told them. One of the problems is that noone ever  
7 contacted us.  
8  
9 [LS] And in fact, the very next day, your company, or Penske, or both, participated in the  
10 removal as best as was, no, I am going to follow up in just a minute. I started to use the  
11 word best as possible, but participated in the removal of some amount of waste which  
12 was transported and disposed of as hazardous waste.  
13  
14 [PC] My understand is that the next day, TDSL went out there and removed...  
15  
16 [LS] Two rolloff bins full of stuff.  
17  
18 [PC] Visibly, whatever it was. They removed some of the debris from the working face. They,  
19 they got two rolloffs, Two eighty, two forty-yard rolloffs, totaling 80 yards. 98 went in.  
20 So we're looking at 98 subtracting 80, you get 18. It is true that ah, Penske, I believe  
21 made arrangements to manage the rolloffs that were removed from the landfill.  
22  
23 [LS] They were, I can ask Penske, but you're the one up there.  
24  
25 [PC] I'll do the best I can.  
26  
27 [LS] They, they were handled, transported and disposed of as hazardous waste.  
28  
29 [PC] I believe that is correct. But, can I um, say something? This is, this is, this is what  
30 happened. You have 5, about 5 rolloffs that never went into the landfill.  
31  
32 [LS] I understand.  
33  
34 [PC] Ok, you have 2 rolloffs that were taken out.  
35  
36 [LS] Yes.  
37  
38 [PC] Let's say about 7. A consulting company, Code 3, came by and segregated the 7 rolloffs  
39 into bad and good, hazardous and non-hazardous rolloffs. The 5 non-hazardous rolloffs  
40 went to BFI's solid waste landfill. There's no, this is the same, this is the stuff in the  
41 accident debris, but they separated out the glass and the glass contaminant.  
42  
43 [LS] They separated out the CRT waste.  
44  
45 [PC] Right. Essentially that, those 2 rolloffs went to TECO, Texas Ecology, as a hazardous  
46 waste. Texas Ecology tested it, to do their treatability study, using the exact same tests  
47 you would use for hazardous waste purposes, the TCLP. Came out with no detection at a  
48 reporting limit of .1 part per million. Ok, that is the only data point that we have with that  
49 material. Uh, so it was manifested, uh from TDSL to TECO, those 2 rolloffs, as  
50 hazardous waste. The significance of that is that the worst part of this stuff was actually

1 tested and wasn't hazardous and to me, that leads to think that either the material wasn't  
2 hazardous to begin with um, and maybe we are all here for nothing, or um, it further  
3 explains the uh, correctness of the Executive Director's decision.  
4

5 [LS] Would you agree that there is some amount of CRT, D008 waste in those 99 rolloff bins  
6 as a result of this accident in October 1997?  
7

8 [PC] I have ah, a lot of speculation.  
9

10 [LS] You don't think there is any?  
11

12 [PC] I believe that there is probably some left. Ok, the consultants who were out there saw  
13 very little glass, and because TDSL takes TV tubes as hazardous wa, as household  
14 hazardous waste, who knows where the glass came from. So, at this point in time it is  
15 hard to tell.  
16

17 [LS] I understand. There may be CRT waste in there that came from Commissioner Marquez's  
18 wreck.  
19

20 [PC] It could be, it could be, it could be Panasonic, it could be, you know, RCA, whatever.  
21 They have the whole Zenith thing going on there.  
22

23 [LS] But I have a math degree and you learn early on that 98 minus 80 leaves some amount.  
24 So if you only got 82 yards of CRT waste out the first time, and you knew that you put 98  
25 in, there is 18, thereabouts, somewhere there. That's probably got a Zenith label on it.  
26

27 [PC] It's poss, it's possible. It, nobody's really, you know when have 18 and go to 1,660...  
28

29 [LS] And we won't know until we go look.  
30

31 [PC] Well, possibly, if it, if, if it is still possible to look for a needle in a haystack. Or 18 in  
32 1,660 cubic yards. And the point is, is, is that effort, where's that effort leads you, that it  
33 might be possible.  
34

35 [LS] But, but if we were to go look, and find it, why would we not handle it the same way we  
36 handled it in 1998? In February of 1998.  
37

38 [PC] Because there is overwhelming scientific data showing that it is not a hazardous waste.  
39 That the material that has been declared to be hazardous by TDSL, 1,660 cubic yards...  
40

41 [LS] I'm not talking about that. I'm not talking about the 16, the 99 rolloffs of stuff. I'm  
42 talking about you go out there and you look for that needle, and when you find that  
43 needle, you handle it as you would have handled it January and February of 1998.  
44

45 [PC] Um, Commissioner, I think the method of separating out the hazardous debris is a very  
46 reasonable approach to handling this kind of problem. And the earlier that you do it, the  
47 better off you are.  
48

49 [LS] Of course, I ...  
50

1 [PC] That's the problem.  
2  
3 [LS] if you'd have done all of it in 98.  
4  
5 [PC] That's the problem that we have right now. We know they looked for visible glass. I can't  
6 say they took it all out. I can't say that. I haven't seen it myself. But our consultants say  
7 they didn't see much glass. I would agree with you that there is probably some glass left.  
8 The question is it, is it, is it, um, the cost benefit analysis, what do you gain by going in  
9 there and raking it out or sifting through ah, the glass, if it minimizes the problem at  
10 hand, it might be a reasonable approach. I don't know if it is reasonable to do it.  
11  
12 [LS] It depends on how you define the problem.  
13  
14 [PC] Yes.  
15  
16 [LS] Thank you.  
17  
18 [PC] Thank you.  
19  
20 [KHW] We will hear from Representative Rodriguez, Rodriguez now.  
21  
22 [PC] Thank you.  
23  
24 [KHW] Is Representative Rodriguez still here, yes.  
25  
26 [RR] [inaudible]  
27  
28 [KHW] If you care to, we always welcome elected officials' comments.  
29  
30 [RR] That's refreshing.  
31  
32 [KHW] I think we're consistent in that.  
33  
34 [RR] Well, I mean just being an elected official being welcomed is [inaudible].  
35  
36 Uh, thank you Chairman and Commissioners. I will try to be brief and I know that it has  
37 been long for y'all. I just wrote down some comments. I think you must have received a  
38 letter from me a few weeks back but I am going try to maybe just rehash some of that in  
39 my comments. But, uh, I am here because Texas Disposal Systems Landfill is in my  
40 district in Creedmoor. And I have met Bob Gregory and I have been out to the facility. I  
41 am impressed with the facility, and even more so, Texas Disposal System's reputation of  
42 being extremely responsible and environmentally friendly and a very good neighbor to  
43 my other constituents in Creedmoor. In this situation in which the Texas Disposal  
44 Systems' landfill has been the long-time guardian, so to speak, of hazardous waste which  
45 was illegally disposed of, in my opinion by Penske Trucking Company. It seems to me  
46 that TDSL did everything they were was suppose to do and probably more, even tough  
47 this should have never been their problem.  
48  
49 Yet it seems that rather than acting, uh, to assist TDSL, the Agency appears to be  
50 protecting Penske, in my opinion. I am not going to review the entire history, since you



1 are familiar with it and you have heard it all day, but I am not going to talk about the  
2 circumstances of the accident, the accident of TDSL, Penske or Zenith as those entities  
3 are not formally under my jurisdiction as a State Representative. However, as a State  
4 Representative, it is appropriate for me to comment on the actions of the TCEQ and that  
5 is what I am here to do. There were, there were some key, uh, commission actions, or  
6 lack thereof, in the chain of events that I am very uncomfortable with and want to point  
7 out. The first would be the Commission's lack of follow up or enforcing immediately  
8 following the illegal disposal of the waste in 1997. Rhetorically, I am wondering why the  
9 Agency failed to pursue its request for information or ah, impose penalties on Zenith or  
10 Penske.

11  
12 Fast-forwarding to several months ago, and the Commission's proposal to reclassify the  
13 waste, which for almost 7 years had been acknowledged hazardous to non-hazardous  
14 special waste. I realize that this sounds accusatory, but I am stating my opinion based on  
15 my knowledge of the situation. Once this solution began being discussed, the, the  
16 solution being, uh, uh, declass, reclassification, it seemed to be in favor of Penske. That  
17 seemed further affirmed when the testing which was to be done to make the  
18 determination of whether or not the waste was hazardous waste conducted. And I am  
19 talking about the last testing a few months ago. I am admittedly not an expert in this area,  
20 but my staff and I did do some research regarding sampling and analysis. As a result, I  
21 am not at all comfortable with the sampling protocols used in this situation.

22  
23 In my, it is my understanding, in this case, it would have been more appropriate to use a  
24 method in which a large sample is taken from the middle ground, middle ground, and uh,  
25 analyzed. And again, I am talking about this last sampling a few months ago. Finally, I  
26 was told very specifically in response to an inqu, inquir, inquiry that I made, to Chairman  
27 White's office that this was the first time ever that hazardous waste was reclassified, or  
28 you can use another word if you like, as non-hazardous special waste, other than in  
29 different type of situations, where the waste went through a formal treatment process.  
30 And I think that was confirmed just earlier today. Given the, given that, given the facts as  
31 I know them, I can, I cannot understand how or why a precedent setting decision, such as  
32 that has been made by the Executive Director, in this particular situation can be allowed.  
33 Obviously I am unhappy about what my constituents TDSL, who I consider to be one of  
34 the really good guys in the waste management business, has gone through in this  
35 situation.

36  
37 However, I am also here because I have a much larger fear. I am gravely concerned about  
38 the statewide precedent that could be set in this case by your decision here today. And I, I  
39 fear what we, what the legislature might have to do. I want to leave as much of this to  
40 your discretion as possible, but I am worried about the precedent that this might set and  
41 we will have to see what we can do to make sure it doesn't happen if this is allowed. The  
42 public policy implications of this decision and the potential challenges it could present  
43 for enforcement of solid waste regulations are freighting. Do we really want to open this  
44 door? Is this the best, is this in the best interest of the Commission's State Environmental  
45 Policy or the people of Texas to not only offer up, to offer up an out to hazardous waste  
46 generators that may choose not to play by the rules? Is it in good public policy for the  
47 Executive Director to arbitrarily be allowed to change the explanation of hazardous  
48 waste? I don't think so. And I hope not to have to visit this in, uh, in session and through  
49 legislation. But I have to tell you that I will do that, if I, myself, if need be, and I know

1 that you all received letters from other elected officials, at the state level, and uh, and uh,  
2 I would be happy to work with them to make sure that this can't happen. Thank you.

3  
4 [KHW] Thank you.

5 [RM] Can I ask a question? No not to you [directed at Representative Rodriquez], to staff. Ah,  
6 was there anytime in this process since day one where this agency officially classified  
7 this waste as hazardous?

8  
9 [LGG] Ah, Commissioner, waste classifications are the responsibility of the generator. It is the  
10 responsibility of the generator to classify the waste.

11  
12 [RM] Well, I, I want to make...is there anyone here who disagrees with that? Because I want to  
13 put an end to this issue that this agency reclassified the waste, reclassified the waste, like  
14 we changed our minds. That's the way it has been played. And I don't think that this  
15 agency has really flip-flopped on this.

16  
17 [KHW] I would note and with uh, uh, caviate that um, as Commissioners, we do not deal with  
18 and do not have knowledge of pending enforcement matters unless they are part of a  
19 record with which we deal. And there are pending enforcement matters um, which the  
20 Executive Director has initiated, um, against um, Penske. I don't know whether it's  
21 Penske and Zenith. All of that that is referenced in many of our articles here. One  
22 violation for which, that, an alleged violation, at this point is "failure to determine if a  
23 generated waste was a hazardous waste". [Looking at Marquez] Um, and all the others  
24 relate to, um, um, you know, unauthorized disposal, storage, etc. of um, hazardous waste.  
25 Which complicates, it doesn't make, it doesn't mean, you know, we made a  
26 classification, um, I don't, I don't want to abbreviate any other um, questions or  
27 comments. Um, I am...

28  
29 [RM] I want to make some comments.

30  
31 [KHW] Ok, please do.

32  
33 [RM] Ah, first, first of all, ah, you know, it's been said here before, and I want to make sure I  
34 repeat it. I don't think that this is an indictment of the, ah, landfill that received the waste.  
35 It is a very reputable operation. Does a great job and is well recognized, ah, as a good  
36 entity. So, there's, there's nothing here derogatory about that. Ah, second, you know we  
37 have received more letters on this issue from very prominent Texans mostly, elected  
38 officials, than any other matters since I've been here in the last 9 1/2 years. And those  
39 letters don't really add very much to this issue. It's just, "we like this company", "we like  
40 this operator", "we like this process". It's really reflecting just one side of the story. The  
41 one side that they choose to support. And while I give a great, great amount of difference  
42 to those types of letters when they relate to policy matters, I think, when I am in the  
43 function that I am serving in here today, which is a judicial capacity, I have to look at  
44 these 4 volumes of information that are here and make up my mind based on the facts and  
45 not on the number of one-sided letters that I received. So, with all due respect to everyone  
46 who sent a letter, ah, I think my obligation to the State of Texas is to make a decision  
47 based on the facts rescinded to me.

48  
49 Ah, the other thing, and for those of you who may not know, I have had to deal with  
50 record for 10, 12, 14 years and I am familiar with every line of the regulations. But

1 fortunately I have forgotten most of it. But what I have not forgotten is, is the, because I  
2 talked about it just a few agendas ago, about what I have to go through when I make  
3 decisions, and it's the decision making triangle. And I am sorry that you are going to  
4 have to hear it again. And the triangle has got 3 sides and the base is the law. And the 2  
5 sides are science and common sense. I happen to believe that the interpretations that have  
6 been made by the Executive Director on the law are right. But they are extremely  
7 confusing and we can probably argue them here forever.  
8

9 So I am going to say that in, in that part of that, that side of the triangle, ah, there is some  
10 wiggle room. There's a lot of maneuvering room. It is not a, a clean line. When I come to  
11 the scientific part, the science part of the triangle, I do not find that this is a matter of  
12 protecting environment or public health. I do not see where the problem is. I don't think  
13 that what this action, we are here doing today will be one ioda of protection to human  
14 health or the environment. This is not a, a health or environmental issue really. And when  
15 it comes to the common sense, I think the way its all been handled, it just doesn't make  
16 much sense to me. So, uh, I, I will make a motion, I would like to make a motion, ah, that  
17 we affirm the decision of the Executive Director.  
18

19 [KHW] Well, Commissioner Marquez, I, uh, as I have for 3 years, um, have a great deal of  
20 respect for, um, all of the way you assess, I don't think I can't think of a matter, but um, I  
21 would make a counter motion, and I, I am for the triangle on the basis for which I do that,  
22 and I might substitute, um, what I would call, um, um, my individual basic policy, um,  
23 principles on the way I assess this matter. I would, I would put that in, in prior to the  
24 science side, because in this matter, um, the, the law, common sense and policy to me,  
25 um, come prior to me than science than actually in my assessment of this, um, make that  
26 a second step, which at this point I don't think we can get to. I might say as a um, um,  
27 caviate, um, I think this matter, legally and scientifically and the factual record is um,  
28 more appropriately sorted out in a judicial forum, um, than at this agency, and I, I  
29 understand it, it is in one such now. Um, and I actually, um, as an individual hope, um,  
30 that any decision that has already been made here or, um, is made today, um, um, does  
31 not really have effect on something which has to do with the entire, what is it 6 or 7 year  
32 history of this issue.  
33

34 But, um, I do agree with you [motioning to Marquez] that the law is um, is confusing, it  
35 is, it is hard to um, completely sort out, and I am not a RCRA expert as you are, but in the  
36 manner in which I have tried to do so, um, I am um, persuaded on one side of the line, by  
37 what we have discussed earlier about characteristic toxic waste at the point of generation  
38 and how that affects how land disposal um, restrictions apply to them. Treatment prior to  
39 disposal. Uh, what type of treatment is appropriate um, and um, so, on that basis, but, but  
40 that is, on that basis, that, that doesn't take me very far over the line of ah, opposing the  
41 Executive Director's decision but it does take me over the line. If I add to that, what I call  
42 basic policy um, considerations, and I view, um, um, all communication we have had  
43 from the legislature, including our 2 jurisdictional chairmen in the Senate and the House,  
44 um, really something more than uh, very appropriate support for the uh stellar um,  
45 landfill we have here in Central Texas which I think is a model to the country.  
46

47 Um, but, really, the basic policy considerations, that if, if you have a choice um, to move  
48 to a more protective um, consideration of this issue or perhaps a less con, protective but  
49 practical consideration, don't move to the more practical one in this case. Move to the  
50 more protective one. Um, and in this case, because of the toxic substance however, and I

1 don't even get to the point of how minute a level, um, but none the less, lead, a toxic  
2 substance which we all know has bio-cumulative properties, um, I would rather err on the  
3 side of protectiveness rather than on the side of practical. And added to that, what we  
4 have heard about in some Amicus Briefs, and um, not too much comment today, but the  
5 message, that this um, um, delusive, dilution rule basis, um, of this rule, mixture rule, rule  
6 basis of this decision might give to those who um, are not uh, concerned about honesty.  
7 Um, might, um consider mixing for means for avoid, avoiding costly, um, disposal as  
8 hazardous waste. So, for those reasons, I would um, um, make a motion to actually grant  
9 the Motion to Overturn. So it looks as if, Commissioner Soward...um, we need you to  
10 weigh in on this matter.

11  
12 [LS] And you know I am happy about that.

13  
14 [RM] Commissioner, I, I, I have maybe, maybe a question for staff that might give you a little  
15 more time.

16  
17 [LS] You can have all the time you want.

18  
19 [RM] Can anyone in the audience tell me relative, give me the relative concentration for, for  
20 this ah, hazardous chemical that is making this hazardous? The concentration of lead in  
21 the waste at any one of the stages. How does it compare for example to the amount of  
22 lead that we are allowing to remain in El Paso? In, in, in the ground in El Paso?

23  
24 [KG] I can answer that if you want me to.

25  
26 [RM] Yea, that's fine.

27  
28 [KG] In the hot spots? In the hot spots relative to what's in, in this here in El Paso? In all  
29 likelihood in some of the hot spots you are going to have 10 to 25 times the amount of  
30 lead in the hot spots in here that you are allowing in El Paso.

31  
32 [RM] [inaudible]

33  
34 [KG] Because some of the glass...some of the frit is 400 to 7,000 parts per million depending  
35 on whether it is the glass or the frit.

36  
37 [RM] I am talking about talking about what is toxic.

38  
39 [PG] Commissioner...

40  
41 [KG] I can give it to you more in detail.

42  
43 [PG] Well, since if TDSL had wanted to test this material to show that it was hazardous, they  
44 had so many opportunities to do it as we have indicated. Every single set of samples  
45 that's been done now, 3 sets of samples, has shown that the highest value is .09 parts per  
46 million. Orders of magnitude, not just below the hazard level, Chairman White, but  
47 below the treatment level which is hugely important. There is nothing more that could be  
48 done to this waste. And, and it is uncontraverted that this waste is not causing any kind of  
49 environmental harm. Even TDSL has said that was perfectly safe in their landfill, which  
50 it was. And why they chose to dig it up and store it, without a permit, in, in the elements,

1 in dumpsters, is beyond me because that is a contrivention of federal law. And that is  
2 something, if you all were to decide that this was hazardous waste...  
3  
4 [KHW] But see, this is what ...Pam, I think that those kinds of issues that you are bringing up are  
5 really a matters for a court and not for us here today.  
6  
7 [PG] But, but it's hugely important the determination of what this waste is. And, and, and  
8 again, think about what the tests show. And I would agree with you if the tests showed,  
9 for example, 4.9 parts per million or something really below. But I...  
10  
11 [KHW] I don't think the law takes me to testing, I mean this is how I am putting this together  
12 today, to testing what is in any of the 95 rolloff containers now, at a certain level, and that  
13 is what determines how it can be disposed. That's not how I am putting it together.  
14  
15 [PG] But, but...  
16  
17 [KHW] If it was, the I would be very interested in the protocols of testing and all of that, I'm not,  
18 I, you know, at this point I have concluded that that's not relevant to the decision here  
19 today.  
20  
21 [PG] But, but I heard you say one of the reasons was because of this treatment standard. In  
22 otherwords, ok assuming that it's not a hazardous waste...  
23  
24 [KHW] It needs to be, I am concluding it needs treatment and therefore it needs assessing that I  
25 don't think, for that purpose has yet occurred.  
26  
27 [PG] But if it starts below the treatment standard, it needs no treatment. In otherwords, you  
28 treat to .75...  
29  
30 [KHW] That would need to be determined. I don' t think that has been determined.  
31  
32 [RM] Would you tell me again what the concentration is in, at, at, of, you know of what sample  
33 it is of? The 19 rolloffs...what, what's the number that you gave?  
34  
35 [PG] There was testing done by an independent contractor for Penske who did 49 samples.  
36 Representative samples by the book.  
37  
38 [RM] Yeah, yeah...What was it?  
39  
40 [PG] The highest concentration was, I believe .1 parts per million. The state then did hired an  
41 independent contractor arms length who said "do it by the book". Much more rigorously  
42 than the EPA procedure would prescribe, as you heard Ms. Gonzales-Gromasky describe.  
43 That concentration was even lower than ours. It was .09 parts per million. Orders of  
44 magnitude below the .05...  
45  
46 [RM] Just answer my question. What is the clean up standard that we require in, in when there  
47 is lead contamination and we have had a number of places where we have...  
48  
49 [LGG] In El Paso, 500 parts per million.  
50

1 [KR] Total lead.  
2  
3 [RM] My issue is, my issue is are we talking about a public policy or a health hazard or are we  
4 talking about health hazard, that's my statement about scientific standpoint. I am sorry, it  
5 doesn't pass mustard because we allow more lead in someone's yard then we allow inside  
6 a landfill. So from a protection of human health and environment, it doesn't make sense.  
7  
8 [KR] Can I say something about that please Commissioner? You made the City of Fresco clean  
9 up 250 part per million lead back in the early 90s...  
10  
11 [KHW] That's oral ingestion standard isn't it?  
12  
13 [KR] That's oral, nasal, anything else. 250 was just the overall ingestion standard. The EPA  
14 residential level is 500 parts per million. Fresco did it with the battery chips at 250 parts  
15 per million. That's total lead. That's not the TCLP that these results have been quoted.  
16 Mr. Zoch is the RCRA expert. He can tell you what that means. But I want to remind you  
17 of one thing, Penske keeps saying that there's 3 tests made. They don't pull out their  
18 TECO data. The TECO had 3 sample after line added for treatability studies, and one of  
19 those was 2.34, when the current level that they have to treat to is .75. That test alone  
20 says that you need to err on the side of caution.  
21  
22 [RM] The question Kerry, the question is not the testing, it is not the regulations. I am looking  
23 for whether to see if this makes sense from a scientific standpoint. My responsibility to  
24 protect human health and the environment. And I am trying to get a reference point that if  
25 I allow 5 parts in someone's yard, why is it that 1 part is not safe inside a landfill?  
26  
27 [KR] Cause I'll tell you the difference. Those 5 parts, I've handled a lot of lead sites over the  
28 years, not as many as Kinnan Golemon has, but when you talk about 5 parts, you are  
29 talking about representative sampling. A RCRA sampling protocol that cost hundreds of  
30 thousands of dollars. We had a surficial sampling protocol here your staff would not  
31 allow one of my clients to use for waste characterization. It was not a SW-846 sampling  
32 protocol, in spite of what anyone wants to say. Your own internal staff people have said  
33 that. They've testified to it under oath. That's the difference Commissioner Marquez.  
34 And that's why there is a hazard here, because if you don't draw the bright line here,  
35 there is no control over the amount of leachable lead that can go into any landfill. And  
36 that is where we as a society drew the bright line. It was, it was that, and that is why the  
37 EPA came down with the point of generation. Bright line, just like Chairman White said.  
38 We got one real RCRA expert here that you all know, Robert Zoch, Bob Zoch,  
39 recognized on both sides of the fence on this. He can explain your question to you and  
40 tell you what is out there from a scientific perspective. Bob, would you get up here...  
41  
42 [LS] Wait, wait, wait a minute. If we are going to go into a factual hearing...  
43  
44 [RM] I know what the TCLP is and I know. I just asked for one reference point number. Just  
45 for a relative, to get it clear in my mind and in other people's minds. But relative to what  
46 risk is. That's all.  
47  
48 [KR] I can tell you a reference point number for the City of Fresco, and that lead is still under  
49 the street and sidewalks up there. Your level out here that's remaining in this landfill  
50 based on the scientific analysis based on the mass balance of what went in and what

1 could have come out maximum, you have significantly higher levels of leachable lead out  
2 there in that landfill right now then we left at Frisco. Kinnan did the El Paso stuff. He's  
3 more familiar with that. He's just told you something, but I will tell you that for a fact,  
4 because I handled that one. You have a significantly higher level...

5  
6 [RM] You do not have any data that says, you do not have any data that allows me to compare  
7 those numbers.

8  
9 [KR] Wait a second, yes we do...

10  
11 [RM] [inaudible]

12  
13 [KR] ...that is what Mr. Zoch as put in his report. You either want the data or you don't. I'll be  
14 glad to do it however you want to. But the one piece of data you got to remember is that  
15 2.34 when the treatability standard is .75.

16  
17 [LGG] I just wanted to point out that attached to one of the filings of TDS is analyses. Those  
18 analyses include amounts of total lead. The highest total lead number in those analyses is  
19 12.4. And as, has been stated previously, with respect to leachable lead, the highest level  
20 ever found, with respect to any sampling done has been .1, which is below the LDR  
21 treatment level.

22  
23 [RM] Ok, thank you.

24  
25 [KHW] There is a manner of critique in which we did that. It is also part of the record, um, which  
26 I think it would be fair to, um, Mr. Zoch, would you like to speak to that?

27  
28 [BZ] Thank you Chairman White. Chairman White, members of the commission, my name is  
29 Bob Zoch. Unlike the rest of the speakers today, I am an engineer, not a lawyer. Uh, Mr.  
30 Soward asked that I not come up here a minute ago, and I beg his permission...

31  
32 [LS] Mr. Zoch I respect you. I just think if we are going to go into expert witness testimony,  
33 then we need to adjourn into a contested case hearing and let all parties present evidence  
34 and that's not the form of this case.

35  
36 [BZ] I appreciate that sir.

37  
38 [KHW] I agree with you Commissioner Soward, that is why I made my comments initially, but  
39 we just had a, a number of comments in support of...

40  
41 [BZ] And I will not...

42  
43 [KHW] ...one set of facts and think it is fair to allow someone who has in the record some  
44 qualifications...

45  
46 [BZ] What I would like to do is respond to some of the testimony of fact. Uh, some of the  
47 questions Commissioner Marquez has asked, uh some of the questions that has been  
48 asked here. One of the issues is whether or not this stuff was hazardous when it was  
49 generated. Up there at the point where the accident occurred. Um, Zenith has lots of data,  
50 that they furnished to show that it was without question it was hazardous waste. With

1 respect to what the concentrations are, the glass that comprises the funnel of a TV tube,  
2 contains somewhere in excess of 200,000 parts per million of lead. The frit that bonds the  
3 funnel to the screen contains in excess of 440,000 parts per million of lead. Both cases,  
4 that lead is leachable. And if you'd have asked me in 1997 whether or not this was a  
5 RCRA problem, I'd have probably said I didn't think so.  
6

7 But with testing, it has been demonstrated that this lead does leach. It leaches from the  
8 glass. It leaches from the frit. And it leaches to the extent of 20 to 7,000 parts per million.  
9 Zenith's own testing shows that broken picture tubes leaches 406 parts per million. Well  
10 above the 5 part per million regulatory standard. So at that point up there, there is no  
11 doubt that that stuff was hazardous. Now, what happened when it got to the landfill? It  
12 got inadvertently put into the landfill, we agree with that. TDSL, when it found out that  
13 this stuff was hazardous from a report from Penske, took out what they could see. The  
14 contractors that came out later to sort that out determined that at least 226 picture tubes  
15 are still in that stuff. And the reason that they came up with that number is cause they  
16 counted the band, the steel bands that go around the tube, 226 of them are still missing.  
17 They are somewhere in those rolloff boxes.  
18

19 As Commissioner Soward asked, "How do we find that stuff and if we found it, is it  
20 hazardous?" The answer to the first question is an issue because in these 99 rolloff boxes,  
21 there's a lot of dirt in there, there's a lot of garbage, and it's been sitting there for 7 years.  
22 Consequently it's difficult to find that stuff. That sampling that's been done that Ms.  
23 Giblin has talked about a couple of times, was sampling that did not include chards of  
24 this glass. I'm convinced of that. And the reason that I am convinced of that is because  
25 the limited sampling that we have that analyzed for both total lead and leachable lead  
26 demonstrates that there wasn't any lead in those samples. 10 parts per million,  
27 background in soil. Consequently, the sampling that's been done to date has never found  
28 any of the original CRT waste. Now one option to do for Penske and Zenith to do in this  
29 case is to go out and sort through these 99 rolloff boxes. The TCEQ looked at 20 of them.  
30 Not 99, they looked at 20 of them. They took samples directly off of the surface, this  
31 deep. If you go through and sort through four feet of that stuff, you would eventually find  
32 some of this stuff. I'm convinced there is probably more than 226 picture tubes worth of  
33 glass in there. Once you find it, you can take that and dispose of it as hazardous waste  
34 and send the rest, like they did before to a municipal waste treatment facility. Uh, TDSL  
35 actually offered Penske the opportunity to do that the day after the accident occurred.  
36 They said, you know "We haven't applied our intermediate cover. We've got to do it  
37 quick. So you guys come on down here, sort it out, take it off, do whatever you want to.  
38 Just get it out of our landfill." They didn't do that.  
39

40 [KHW] Mr. Zoch, thank you. In trying to balance things, I welcomed your comments, but, but  
41 um, I think additional comments are unusable.  
42

43 [BZ] Thank you Chairman White.  
44

45  
46 [LS] Madam Chairman White, let me ask a question. Your motion was simply to overturn the  
47 Executive Director's decision. Um, what then?  
48

49 [KHW] Well, um, I don't, I don't think that it is necessary. It might be, uh, there might be um,  
50 alternative additions to that motion, but I don't think it is necessary to do anything other



1 than overturn that which takes us to the point and time, um, I think, uh, after the  
2 Executive Director issued notices of violation, um and that process, um, Commissioners  
3 are not a part of.  
4

5 [LS] This kind of reminds me of Romeo and Juliet, when the prince is looking at the two  
6 families that had just argued and fought for years and years and then only to find out that  
7 they lost much more value than what they were fighting about. Um, and the Prince was  
8 trying to make sense of it. Um, with all due respect, um, I'm, I'm not sure that I am  
9 honored by being the one to have to, to break this, um, difference of opinion. Right after I  
10 was appointed to this position, this matter became, um, public. Uh, again. And, um, in the  
11 course of my confirmation hearing, the spotlight got shown on me and I expressed some  
12 views as to how, um, I felt about how this matter had been handled. Not to, in anyway,  
13 um, be critical of what happened in the past, but to say that I believe that it could have  
14 been addressed in the past and it can be addressed today.  
15

16 And that I told the Senate that I was committed to do whatever this agency reasonably  
17 could do to address the issues as they should be addressed and to um, solve, solve the  
18 problem. Um, I have looked at this maybe too simply. But I have looked at this to say  
19 "What would we have done in January and February of 1998?" Not today, but what  
20 would we have done in January and February of 1998. Because that's where the whole  
21 issue that's facing us today starts. That's where, when I was talking to the Senate, I  
22 believe there were things that could have been done by all parties involved, in early 1998  
23 that would have addressed this issue. And this matter would not be languishing 7 years  
24 later in about, come next month. So I said, "What would this agency and what would the  
25 parties have done in January and February of 1998?" And in reviewing the voluminous  
26 records that we have, I believe the agency and the parties would have done what they did.  
27 They would have gone out there and collected this waste, identified that which was the  
28 CRT waste, removed that CRT waste, and properly dispose of it under the regulations.  
29 And in fact, what appears to be a significant portion of that CRT waste was indeed  
30 handled that way. Unfortunately it stopped there.  
31

32 We didn't, and when I say we, I mean all parties involved, take it the next step and say  
33 "We obviously didn't get it all, let's keep looking and get the rest of it and handle it  
34 appropriately." We can't...I don't get hung up on dilution and mixture and all of that  
35 because I believe that the CRT waste that was taken to the landfill by those 7 dump  
36 trucks on the afternoon of October 7, 1997, was classified as hazardous waste. Nothing  
37 changed that. It's still classified as hazardous waste. The CRT waste. Not the 99 bins of  
38 stuff which is what we have focused on throughout these proceedings. Again, I may be  
39 too simplistic, but I, I don't think we should focus on the 99 rolloff bins. We should find  
40 out if there is CRT waste in any of those bins and if we find it, deal with it according to  
41 the regulations and if we don't find it, TDS can put the rolloff bin back in the landfill.  
42 Now, you say we've got to do a cost benefit. Commissioner Marquez, I would agree with  
43 you all day long that we have regulations that in applying them, just doesn't make sense  
44 at times. But, two things. One, we're suppose to apply them when they are legally and  
45 appropriately adopted and promagated. But secondly, we have got to make sense of  
46 them. And I think we can make sense of these regulations. We can make sense of these  
47 regulations by saying that which is CRT waste, that was placed in that landfill as a result  
48 of an accident, which was classified as D008 hazardous waste, take that waste and handle  
49 it according to regulations. All the other stuff, put it back in the landfill. It's unfortunate  
50 that in January of this year, all of this got clouded by all of this waste being removed and

1 put into the 99 rolloff bins because it immediately cause, that set the stage for these  
2 discussions and it shouldn't have set the stage for these discussions. The 99 rolloff bins  
3 are irrelevant. It's the waste, the CRT waste that's somewhere in those 99 rolloff bins  
4 that's what relevant. I agree, I agree, Commissioner Marquez, you, this room could hold  
5 those 99 rolloff bins with just a little bit to spare because I did the calculation.  
6

7 This room is 1,700 cubic yards. See, I told you that I had a math degree. So, look at the  
8 volume of this room. This is how much waste we are talking about. Let's assume that  
9 there is only 18 cubic yards of CRT waste. Take four of those desks that Blas and his  
10 staff are sitting at and stack them on top of each other. That's 18 cubic yards. And look at  
11 how much that is in the scheme of all of this and you say it is insignificant, it's  
12 diminimus, but I don't think the regulations go there. If you can identify the waste, the  
13 regulations say that that particular waste, which is classified, has to be dealt with in a  
14 certain way. If you don't find it, you don't have to do anything with it. So, where I keep  
15 coming down is what would we have done in '97 and '98? I believe that we would have,  
16 if we all had done that which we should have done, we would have said that we found 80  
17 cubic yards of it. Obviously there is 200 something TVs that we can't account for  
18 because we can't find the bands. They are in there somewhere, let's keep looking until  
19 we are all satisfied that we just can't find them anymore.  
20

21 We didn't do that. But we can still do that. Yes it's going to cost money and yes it's  
22 going to take time. Um, but I think that is making sense of the regulations. That's, that's  
23 making common sense of the regulations and not creating a precedent that says um, that  
24 we are going to allow hazardous waste be placed improperly in municipal landfills uh,  
25 and not properly dealt with. Um, so that's where I come down. I believe, I believe the  
26 Executive Director made the right decision based on the facts that the Executive Director  
27 and the issues that the Executive Director was looking at at that time. I think we may  
28 have a different view looking at all the facts and all the issues that we have to look at at  
29 this time. And I think that if we grant the Motion to Overturn it is not saying that the  
30 Executive Director made the wrong decision, it's saying that we are making a different  
31 one, given all the information, all the facts, all the arguments, all the considerations that  
32 the three of us have to make. Which I believe, in some respects are different than what  
33 the Executive Director has to make. So I don't think it is a right or wrong, uh whichever  
34 way we go. I read SW-846. And I think there are ways to test this waste in each one of  
35 the bins that scientifically, Commissioner Marquez, on our triangle, will determine  
36 whether or not there is any CRT waste in that particular bin. And if there are, let's handle  
37 it. If there's not, put it back in the landfill. Uh, that upholds the base of your triangle. It  
38 upholds the law. It upholds the other side of the triangle as best we can of common sense  
39 and I may want to agree with you that the RCRA doesn't make sense.  
40

41 But we've got to make sense of it. And I think you can structure that triangle, even today,  
42 so that the science is appropriately applied, the law is appropriately applied and the  
43 common sense is appropriately applied as best you can do it. Um, and so that's where I  
44 come down. I, I believe that, um, again, without any, um, any communication that  
45 granting the motion to overturn is something that the Executive Director made the wrong  
46 decision, but rather saying, by granting the motion to overturn, that we are looking at all  
47 the issues and even other issues that the ED was not permitted to look at or was not  
48 appropriate for him to look at, and saying that we reach a different conclusion. So, I  
49 would go along with the motion to grant the Motion to Overturn. I believe as I have  
50 outlined that there are ways that this issue can once and for all be resolved. I believe that

1 even though it will cost money, in the end it will be cheaper than protracted litigation.  
2 Um, and it will protect the integrity of this agency, the hazardous and solid waste  
3 program, the federal regulations, the science and the common sense. So, I would second  
4 your motion.  
5

6 [RM] Would, would both of you clarify your intent as to what would happen then, when this  
7 motion gets overturned? What actions, when the Motion to Overturn is granted. What  
8 message, what instructions are we sending to staff as on what we expect them to be  
9 doing? I do not want to dump it all back to staff without direction. And I do not want to,  
10 for the next 12 months, to, to, to have every politician in town telling me what it is that I  
11 need to be doing. Ah, so, I, if you are going to overturn it, let's have the guts to go ahead  
12 to tell the Executive Director what is it that we expect from him. Good, initiate a new  
13 sampling program like you suggested, that, you know, is fine. Is it to punt and not do  
14 anything? I do not agree with that. I believe that we need to take an action.  
15

16 [KHW] The reason that I did not see why a further, um, action, necessary action or I did not view  
17 as a punt, but this, um, whatever is most appropriate way to determine that this  
18 determination or decision of the Executive Director was in, in part of an enforcement  
19 process [directed to Commissioner Marquez]. In which I do not view the, uh,  
20 Commissioners in the decision-making role. This is, ah, in, ah, the decision the Executive  
21 Director made in response to a plan submitted by a respondent in enforcement action.  
22

23 [RM] You say the enforcement action in resolving this matter.

24  
25 [KHW] I see it just as a fact going on that is the Executive Director's responsibility and not ours.  
26

27 [LS] Well, let me, and I, I don't intend to punt either. Um, to me there is a clear cut way to  
28 resolve this. Go sample, go sample each of the 99 rolloff bins using the appropriate and  
29 approved EPA sampling and testing protocol. If there is any measurable amount of D008  
30 waste in that bin as a result of that sampling, handle it appropriately under the  
31 regulations. If there is no measurable amount of D008 waste in that bin based on that  
32 proper sampling, put it back in the landfill.  
33

34 [RM] Commissioner Soward, I am just trying to clarify what we are telling staff. Is it for our  
35 staff to set that up and, and go do it? Or are you telling the parties to go do it? Or, I just  
36 want to make sure the Executive Director knows what it is that we are asking him to do.  
37

38 [LS] I understand.  
39

40 [RM] Because he is going to be getting quite a bit of advice from everybody else.  
41

42 [LS] I understand. I believe that the Executive Director issued an NOV in May, I forget the  
43 exact date, May, thereabouts. And it ordered Penske to take certain corrective actions or  
44 to propose corrective actions and submit it to the Executive Director for approval that  
45 would in effect take those wastes and appropriately dispose of them or make disposition  
46 of them. Penske made a proposal to the ED. The ED accepted that proposal. We have a  
47 motion in the second pending to overturn that decision to accept that proposal. I view that  
48 as it puts it back such that the ED has told Penske to come up with a plan that's  
49 acceptable to handle this waste and properly make disposition of it. And, I think the

1 parties have heard enough today to kind of have an idea as to what might fly and what  
2 might not fly.

3  
4 [KHW] Commissioner Soward. If I understood what, um, you were speaking about in terms of,  
5 of, of identifying that waste within the 95 rolloff containers which could be characterized  
6 as CRT waste,

7  
8 [LS] Are you saying how would I suggest that?

9  
10 [KHW] Yeah, I mean, first of all, I am asking would that be um, um, would there be an addition  
11 to the motion that would be, be, um, what I think you were proposing, but I don't want to  
12 ah, I was asking that.

13  
14 [LS] Well, I, I'm trying very hard to walk the fine line of making a judicial decision, like I  
15 agree with Commissioner Marquez that we are being called to do and making an  
16 enforcement slash regulatory decision which I believe the Executive Director has the  
17 authority to do. Um, and I believe that we should let the Executive Director review a  
18 proposal from Penske as to how to deal with this waste consistent with what, at least the  
19 majority of us have indicated our concerns are. Um, and, and that, that's left to the ED.  
20 Now I have, I have my own ideas because believe me I have read everything I can read  
21 on the SW-846 and I know what it says about how to sample heterogeneous waste in an  
22 area. And I can express my own views as to how it should be done, I don't think I should  
23 do that. I would be happy to do it, but I don't think I should do it.

24  
25 [PG] Your honor, as, as Representative for the Respondent, I would like to hear your thoughts  
26 on that because what I don't want to wind up getting into with, what Commissioner  
27 Marquez talked about, to submit a plan to the ED and then have TDSL quibbling with  
28 that so the major clarification is, and it is going to involve some cooperation from them,  
29 which so far they haven't been willing to give, notwithstanding directives from the  
30 Executive Director. So I think some enlightenment about how you envision that sampling  
31 would be very helpful so that if we stay within parameters and then if they choose to  
32 challenge again and bring that determination before you at least we are trying to foreclose  
33 that.

34  
35 [LS] I guess that it is very fundamental. Go out to each one of the 99 rolloff bins. Take  
36 samples pursuant to the approved protocol established by EPA for this type of  
37 heterogeneous waste. Test those samples and if there are detectable levels of CRT waste  
38 in that particular bin then handle it accordingly. If there's no detectable CRT, D008 waste  
39 in the samples taken from that bin, put it back in Mr. Gregory's landfill.

40  
41 [KHW] I think that is what the Respondent has already done.

42  
43 [PG] That's exactly right, Commissioner Soward. That's the problem that we have. We told  
44 our contractor, "Do it by the book" in the methodology that you described. Same, same...

45  
46 [LS] I saw nothing in the 3 4" thick notebooks that I have that said your contractor followed  
47 the SW-846 sampling protocol.

48  
49 [PG] Ok.

1 [LS] I saw nothing in there.  
2  
3 [PG] Those were the instructions.  
4  
5 [LS] That may be the case, but wasn't in front of me when I looked at it.  
6  
7 [PG] Ok. So, so it maybe that the testing simply clarifies that, that protocol was complied with  
8 when they have already achieved the goal that you are talking about. In otherwords, our  
9 position, what you're saying makes a lot of sense and that's what we were attempting to  
10 do and what staff was attempting to do. Let's test this waste and find out if its got...  
11  
12 [KHW] I think that would bring us right back to where we are here today.  
13  
14 [PG] Ok.  
15  
16 [KHW] The same legal issues where we are, which began this proceeding...  
17  
18 [PG] But...  
19  
20 [KHW] ...if there were no detectable levels, at whatever it is for lead, um...  
21  
22 [LS] But, there were detectable levels.  
23  
24 [PG] At point, so, so, I'm sorry, your view is that if there were one sample that had a .09 for  
25 example...  
26  
27 [LS] If you find 008 waste in it, you got to deal with it.  
28  
29 [PG] So, so ok. I just want to make sure we understand...  
30  
31 [KHW] We haven't all concurred with this, um...  
32  
33 [LS] That's just my opinion.  
34  
35 [Many] [Everyone speaking at once]  
36  
37 [KR] Let me just say, let me just say for the movement here, we do agree with what you have  
38 just suggested and believe that is possible.  
39  
40 [RM] And as soon as you figure it out, make sure that my old Zenith TV is not counted there as  
41 part of it, ok?  
42  
43 [KHW] Kerry, did I understand, I just want to clarify, Kerry I just want to clarify, I want to make  
44 sure that I understood what you understood...  
45  
46 [KR] I understood that against his better wishes as he seconded the motion, he was asked to say  
47 what he would suggest to directions to the ED that every rolloff out there be sampled in  
48 accordance with SW-846 sampling procedures for heterogeneous mixtures and if any  
49 D008 waste from those CRT waste tubes was identified, it be handled appropriately. And  
50 if a rolloff is not identified as D008 CRT waste, then it will go back to the landfill as

1 regular municipal solid waste. The rest of it obviously will be manifested as hazardous  
2 waste. That is what TDSL has been trying to get all along. That's why I wanted to make  
3 clear that we agree with what you suggested although I don't necessarily think that you  
4 need to give that instruction to your ED. I think your original motion was clear. That's  
5 why I didn't jump up and try to push you.  
6

7 [LS] And I was not giving it as an instruction. I was expressing it as an opinion, as an option.  
8

9 [PC] I just want to point out, relevant to an earlier question, that there is background lead in  
10 this clay at TDSL. There are two samples at TDSL's consultant took earlier this year,  
11 earlier this year, after they cut this stuff out, when they got it all out. And they have two  
12 samples, one is .56 parts per million and one was 1.5 parts per million, which is higher  
13 than any lead detected in this garbage that we are all concerned about. So, part of the  
14 problem is figuring out how clean is clean? The classic questions. And that is why we  
15 used the um, standards as .75 5. I just wanted to point that out that it is difficult to  
16 separate background from what we are trying to clean up.  
17

18 [DN] Commissioner, since I get the uh, the duty to draft the motion, the order that results from  
19 your vote here, I want to make sure that I get that right, so if I can get any clarification if  
20 there are any instructions back to the Executive Director that need to be included in that  
21 order um, if you would be explicit or if there are none, then simply vote on the motion  
22 and, and the order will be drafted accordingly.  
23

24 [LS] Well the Chairman's motion did not have any instructions...  
25

26 [KHW] It did not.  
27

28 [LS] And I didn't second a motion that had instructions.  
29  
30

31 [DN] Thank you.  
32

33 [KHW] And you, at this point would not like to propose any?  
34

35 [LS] Laughs.  
36

37 [KHW] I just want to make sure that that was not intended, not necessarily an encouragement.  
38

39 [LS] That's not my intention.  
40

41 [KHW] Then we have a motion and a second. Um, all in favor, Aye.  
42

43 [LS] Aye.  
44

45 [KHW] All opposed.  
46

47 [RM] Nay.  
48

49 [DN] And that's our only item on this afternoon's agenda. Thank you for your attendance. We  
50 stand adjourned.