

TCEQ DOCKET NO. _____

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

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S

BRIEF IN SUPPORT OF

MOTIONS TO OVERTURN

JULY 22, 2004

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

COMES NOW Texas Disposal Systems Landfill, Inc. ("TDSL"), and hereby files this, its Brief in Support of Motions to Overturn regarding motions filed July 9, 2004, and July 22, 2004, regarding the decision by the Executive Director ("ED") of the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") to allow Penske Truck Leasing Co., L.P. to dispose of certain waste, previously identified by the Commission as hazardous waste, as a non-hazardous special waste, and would respectfully show the Honorable Commissioners as follows:

I. INTRODUCTION.

As identified in its Motions to Overturn, TDSL respectfully requests that the Commissioners overturn the ED's decision to allow Penske, a hazardous waste generator, to reclassify a characteristic hazardous waste containing lead to a non-hazardous municipal solid waste for disposal as a special waste in a non-hazardous landfill facility. The ED's decision, issued pursuant to a letter dated June 18, 2004, through Mr. John F. Steib, Jr., Deputy Director of the Commission's Office of Compliance and Enforcement, and pursuant to a letter dated June 30, 2004, through Mr. Wade Wheatley, P.E., Director of the Commission's Waste Permits Division, authorized the transport and disposal as special waste of commingled D008 hazardous waste and municipal solid waste ("MSW"), which is currently stored at the TDSL landfill

awaiting proper disposal by the generator(s).¹ The ED's decision, memorialized in Mr. Steib's June 18, 2004 letter, is based on a fundamentally flawed legal analysis and is without technical support.

The ED's decision is directly contrary to previous opinions on this issue given by the ED's technical staff. Technical staff from the Commission's Waste Permits Division have previously testified under oath in a related lawsuit that the commingled D008 waste is subject to 40 C.F.R. § 268.3 (*i.e.*, the "Dilution Rule"), could not be treated for disposal by TDSL, could not remain in the TDSL landfill without a formal modification or amendment to TDSL's Type I MSW Permit to allow for the disposal of hazardous waste, and must be transported to an *authorized hazardous waste treatment/disposal facility* for final disposal.²

Additionally, as will be addressed below, the ED's decision to allow this particular characteristic hazardous waste to be reclassified as non-hazardous waste is contrary to U.S. Environmental Protection Agency ("EPA") regulations regarding hazardous waste mixtures and dilution, which the Commission is bound to follow through the delegation from EPA to the Commission of the Resource Conservation and Recovery Act ("RCRA") Subtitle C program.³

¹ Letter from Mr. John F. Steib, Jr., Deputy Director, Office of Compliance and Enforcement, TCEQ, to Mr. Marc E. Althen, Senior Vice President, Penske Truck Leasing (June 18, 2004). On July 9, 2004, TDSL filed a Motion to Overturn the ED's decision as memorialized in Mr. Steib's letter. A confirmation of Mr. Steib's decision was sent to Penske pursuant to a letter from Mr. Wade Wheatley, Director of the Commission's Waste Permits Division on June 30, 2004. See Letter from Mr. Wade M. Wheatley, P.E., Director, Waste Permits Division, TCEQ, to Mr. Marc E. Althen, Senior Vice President, Penske Truck Leasing (June 30, 2004). TDSL is filing concurrently with this Brief another Motion to Overturn in the event the June 30 letter is considered the final agency action.

² See, e.g., Deposition of Mr. Wade Wheatley, *Texas Disposal Sys. v. Penske Truck Leasing Co., L.P.*, Cause No. 98-0159, 207th Judicial Dist. Ct., Hays County, Texas, vol. 1, at 72, 76-77, & 98-99 (Jan. 30, 2004); see also Deposition of Dr. Richard Carmichael, *Texas Disposal Sys. v. Penske Truck Leasing Co., L.P.*, Cause No. 98-0159, 207th Judicial Dist. Ct., Hays County, Texas, at 26-28, 34-35, & 62-65 (Feb. 3, 2004); Deposition of Mr. Jesse K. Boultinghouse, *Texas Disposal Sys. v. Penske Truck Leasing Co., L.P.*, Cause No. 98-0159, 207th Judicial Dist. Ct., Hays County, Texas, at 16-17 (Feb. 3, 2004).

³ In the preambles to the regulations at issue, EPA made clear that hazardous wastes with the toxicity characteristic would not be included in the mixture/dilution exclusions applicable to other hazardous characteristics.

The precedent set by this decision will encourage irresponsible hazardous waste generators to mix toxic characteristic hazardous waste with non-hazardous waste in order to avoid manifesting and disposing of their hazardous waste in permitted hazardous waste treatment and disposal facilities. MSW landfill owners and operators and waste haulers cannot be left at the mercy of irresponsible hazardous waste generators who fail to properly characterize, manifest, and manage their regulated hazardous waste at the point of generation. MSW landfill owners and operators, such as TDSL, depend on everyone following the rules to insure that regulated hazardous waste is not disposed in MSW landfills. The RCRA regulatory system will fail if everyone is not required to follow the rules. In this case, Zenith Electronics Corporation ("Zenith") and Penske Logistics, Inc., and Penske Truck Leasing Co., L.P. (collectively "Penske") did not follow the rules. Generators, such as Zenith and Penske, that do not properly characterize and manage their hazardous waste should not be allowed the economic benefit of their irresponsible conduct. They should be severely punished to deter other irresponsible hazardous waste generators from allowing their regulated hazardous waste to be sent to MSW landfills for disposal.

A fundamental precept of hazardous waste treatment and disposal is at issue in this case. TDSL believes that Congress and the State of Texas, by accepting delegation of the RCRA program, have made it clear that the methodology now being accepted by the ED in the June 18th and June 30th approval letters is forbidden under RCRA. The ED's decision in the June 18th and June 30th letters will threaten EPA's delegation of the program and invite citizen suits against the TCEQ. TDSL urges the Commission to overturn the ED's decision for the benefit of all non-hazardous waste transporters and disposal facility operators who must rely upon the regulated hazardous waste generators to self-classify and properly manage the transport and disposal of their hazardous waste.

II. BACKGROUND AND CHRONOLOGY.

The ED's decision at issue arises from a truck accident involving a load of cathode ray tubes ("CRTs") owned by Zenith and transported by Penske. Zenith CRTs were being shipped by Zenith as component parts to a Zenith-owned final assembly plant in Mexico as part of Zenith's television assembly process. A Penske truck carrying the CRTs was involved in an accident on Interstate Highway 35 ("IH-35") south of Austin, Texas, on October 9, 1997. The CRTs were discarded by Zenith and Penske following the accident. Some of the broken and discarded CRTs were sent to TDSL's landfill for disposal pursuant to an initial designation by Penske that the CRTs were non-hazardous waste.⁴

In actuality, as a result of the accident, the broken and discarded CRTs were D008 characteristic hazardous waste pursuant to Zenith's pre-existing waste characterization for broken or discarded CRTs. By contract between Zenith and Penske, Penske was aware of the D008 characterization and the resulting necessity to dispose of the broken CRTs as hazardous waste pursuant to RCRA. In spite of this corporate knowledge and responsibility, the Penske driver initially notified the emergency responders that the broken and discarded CRTs were not hazardous. Neither Zenith nor Penske properly notified the on-scene emergency responders that discarded CRTs were in fact classified as hazardous waste until approximately four hours after the accident, although Penske officials were aware of the accident within minutes of when it occurred. Zenith officials, within approximately forty minutes after the accident, had reminded Penske officials that the broken and discarded CRTs had to be disposed as hazardous waste. As a result of Zenith's and Penske's misconduct, some D008 CRT waste was sent to TDSL's MSW landfill and placed on the working face. Upon notification of the D008 classification by Penske, approximately four hours after the initial misrepresentation by the Penske driver, TDSL refused to accept additional loads of D008 CRT waste and immediately isolated the D008 CRT waste that had been commingled in the working face with regular MSW. TDSL immediately placed a

⁴ The Penske driver who made the initial non-hazardous designation was doing so as Penske's agent at the scene of the accident.

demand upon Penske and Zenith to remove the D008 CRT waste from the TDSL site as required by TDSL's approved Site Operating Plan ("SOP").⁵

Penske hired an independent hazardous waste remediation contractor to finish the clean up of the accident debris on October 9, 1997. The state and local emergency responders had stopped all cleanup activities when notified that the waste was hazardous. The Penske contractor loaded into roll-off containers the remainder of the broken and discarded CRTs, packing materials, and CRT-contaminated soils from the bar ditch along IH-35. The Penske contractor then sent the roll-off containers to the TDSL landfill for secure storage awaiting proper disposal at an authorized facility. The D008 CRT waste and the regular MSW visibly contaminated by the CRT glass on the surface of the working face were removed from the working face by TDSL for disposal by Zenith/Penske. All of this segregated waste was hand-sorted by a Penske hazardous waste remediation contractor into separate hazardous and non-hazardous waste containers and the hazardous waste classified materials, which included the CRT glass contaminated bar ditch soils, were disposed by Penske in 1998 at a hazardous waste landfill as D008 hazardous waste under a standard hazardous waste transport and disposal manifest.⁶ The record is clear that TDSL immediately rejected all CRT waste that was delivered to the landfill working face after being notified that it was hazardous and demanded that Penske and Zenith remove their waste and other MSW contaminated by the hazardous CRT waste.⁷ The D008

⁵ See TCEQ, Permit No. MSW-2123, Texas Disposal Systems Landfill, Inc., Attachment 12, Site Operating Plan.

⁶ See Uniform Hazardous Waste Manifests, Generator: Penske Logistics; Transporter: American Ecology Transportation (May 1998). Treatability studies conducted at the TECO hazardous waste treatment and disposal facility confirmed a significant soil dilution factor of that waste. The CRT waste tested at TECO was significantly different from the CRT waste that was sent to TDSL's landfill. The TECO tested waste was about 70% soil from the accident site. The TECO tested waste did not contain daily cover soil from TDSL's landfill because TDSL isolated the commingled D008 waste prior to application of daily cover.

⁷ Contrary to recent assertions by Zenith, TDSL has no legal ability to direct ultimate treatment and disposal of the commingled D008 waste when the generator has been identified by TCEQ. TDSL has followed the letter of the law and must rely on the Commission and the courts to assure proper treatment and disposal of the commingled D008 waste at an authorized facility.

hazardous waste and the regular MSW contaminated by the CRTs (the "commingled D008 waste") were isolated for removal and proper disposal by Penske.

On November 7, 1997, the Commission⁸ requested information from Penske regarding the discharge and proper disposal of the D008 CRT waste generated in the truck accident on October 9, 1997.⁹ The Commission's inquiry was never fully answered by Penske, and there was no agency follow-up or formal enforcement action for the attempted illegal disposal of hazardous waste. This lack of agency follow-up was a major issue at Commissioner Larry Soward's recent Senate confirmation hearing.¹⁰ The ED's decision to allow Penske to dispose of the D008 waste as non-hazardous special waste in a non-hazardous waste landfill is directly contrary to the spirit and letter of Commissioner Soward's assurances to the Texas Senate. Likewise, the ED's apparent decision to not impose any monetary penalty on Zenith or Penske is directly contrary to Commissioner Soward's stated position and to the State's policy to discourage the disposal of hazardous wastes in MSW landfills. The ED's decision, which TDSL seeks to overturn, encourages illegal disposal of hazardous waste rather than protecting the health of Texas citizens and the environment through adequate treatment of toxic hazardous

⁸ Then the Texas Natural Resource Conservation Commission ("TNRCC").

⁹ Letter from Mr. Chris Smith, Waste Program Manager, Austin Region, TCEQ, to Mr. Mark Althen, Penske Truck Leasing (Nov. 5, 1997).

¹⁰ In responding to a direct question from Senator Gonzalo Barrientos regarding the lack of agency follow up, Commissioner Soward stated:

Commissioner, excuse me, Senator, the, the facts that you've outlined, even though very general, indicate a situation which I will be very candid with you, and I think you know me to be a very candid no-nonsense person. It's unexplainable, inexcusable and unacceptable that a situation would go that period of time with that amount of unresponsiveness and indecisiveness when it could have been, I believe, very readily, very reasonably and very effectively dealt with many years ago. And I, I can't answer for what might've been the, the thinking, the mind-set prior to my arriving on the scene, but I will tell you I believe there is a very straightforward, reasonable and effective approach to dealing, not only with that issue, but similar issues, and that's what I am committed to do, in behalf of the agency, and that's what the agency needs to commit to do in all such situations. We're there to protect the human health of our citizens and the environment of this state, and we need to do that effectively, responsively and timely, and taking years to act on some of these things does not accomplish that.

Transcript of Senate Nominations Committee, Testimony of Larry Soward, at 3 (May 4, 2004).

wastes prior to disposal. Both, the ED's prior lack of action until May of this year and now this most recent action are unexplainable, inexcusable, and unacceptable.

A critical fact for the Commission's consideration is that the D008 CRT waste was never actually disposed at TDSL's landfill even though Zenith and Penske allowed it to be shipped to TDSL's landfill for disposal and then abandoned it to become the problem of TDSL and the Commission. Instead, pursuant to Permit No. MSW-2123 issued to TDSL by the Commission and TDSL's approved SOP, the commingled D008 waste was immediately isolated and stored at TDSL's landfill pending removal by the generator (*i.e.*, Penske and/or Zenith) of the D008 CRT waste for proper disposal. The commingled D008 waste has been stored at TDSL's landfill for more than six years pending the resolution of which entity (*i.e.*, Penske and/or Zenith) generated the waste, which entity would bear the responsibility as a generator for the treatment and disposal of the waste in an authorized facility, which entity should pay for its disposal, and how the commingled D008 waste should be transported to an authorized disposal facility.

On January 15, 2004, the Commission authorized TDSL to transfer from storage into roll-off transport containers the commingled D008 waste from and ship it to an authorized facility.¹¹ TDSL removed the commingled D008 waste from storage, placed it in ninety-nine plastic-lined and covered roll-off containers, and is waiting for Zenith and/or Penske to ship it to an authorized facility under hazardous waste manifests. Pursuant to its Commission-issued Type I MSW permit, TDSL is not authorized to treat or dispose of regulated hazardous waste. Once again, neither disposal nor treatment of the D008 waste occurred on October 9, 1997, or since, at the TDSL landfill.¹²

¹¹ Letter from Mr. Wade M. Wheatley, P.E., Director, Waste Permits Division, TCEQ, to Mr. Bob Gregory, President and CEO, Texas Disposal Systems, Inc. (Jan. 15, 2004).

¹² TDSL's site operating record must be clear that D008 CRT waste which came into the landfill has left the landfill as hazardous waste. Otherwise, the site operating record will imply that either hazardous waste treatment or disposal took place at TDSL's landfill when it was not permitted to conduct such activities.

On May 13, 2004, the ED issued a notice of violation (“NOV”) to Penske as the generator of the D008 waste, alleging violations of 30 TEX. ADMIN. CODE §§ 335.4(b), 335.2(a)&(b), 335.43(a), and 335.62.¹³ The first alleged violation was presented as:

Failure to prevent the disposal of any industrial solid waste or municipal hazardous waste unless such activity is authorized by a permit, amended permit, or other authorization.

Penske caused, suffered, allowed, or permitted waste to be disposed of at an unauthorized facility.¹⁴

Specifically, the ED identified that Penske had violated 30 TEX. ADMIN. CODE § 335.43(a), which states: “No person shall store, process, or dispose of hazardous waste without first having obtained a permit from the . . . [Texas Commission on Environmental Quality].”¹⁵ The second alleged violation was presented as: “Failure to determine if a generated waste was a hazardous waste.”¹⁶

In a May 25, 2004 letter to TDSL, the ED clarified that “Penske generated the hazardous CRT waste and is responsible for the proper disposal of the waste”; that “TCEQ will not pursue any action against TDSL related to TDSL’s handling of the waste”; and that “TDSL acted in a responsible manner to ensure that the waste did not impact human health or the environment.”¹⁷ By letter dated June 1, 2004, Penske proposed to dispose of the commingled D008 waste as non-hazardous special waste.¹⁸

¹³ Letter from Mr. Glenn W. Shankle, Acting Executive Director, TCEQ, to Mr. Brian Hard, President, Penske Truck Leasing (May 13, 2004), Summary of Investigation Findings.

¹⁴ *Id.*, Summary of Investigation Findings at 1.

¹⁵ *Id.* (quoting 30 TEX. ADMIN. CODE § 335.43(a)).

¹⁶ *Id.* at 2.

¹⁷ Letter from Mr. Glenn Shankle, Acting Executive Director, TCEQ, to Mr. Bob Gregory, President and CEO, Texas Disposal Systems, Inc., at 1 & 2 (May 25, 2004); *see also* Letter from Mr. Glenn W. Shankle, Acting Executive Director, TCEQ, to Mr. Bob Gregory, Texas Disposal Systems Landfill, Inc. (May 13, 2004).

¹⁸ *See* Letter from Mr. Marc E. Althen to Mr. John Steib, Deputy Director, Office of Compliance and Enforcement, TCEQ (June 1, 2004).

In response to Penske's proposal, on June 18, 2004, Mr. Steib, acting on the ED's behalf, issued the letter approving the Penske plan to transport and dispose of the commingled D008 waste as non-hazardous special waste, failing to cite any valid testing, regulatory authority, or legal justification.¹⁹ The ED apparently based his decision on some assurance by Penske that the commingled D008 waste no longer tests hazardous for lead. Even if the regulations did allow this executive discretion, there is no factual or legal basis for Penske to have made such an assurance since representative sampling of the commingled D008 waste has not been conducted.

On June 28, 2004, Penske submitted a letter to the Commission referencing the portions of the ED's June 18, 2004 letter related to the reclassification of the commingled D008 waste as being subject to Penske's submission of a "Request for Authorization for Disposal of a Special Waste form" to "allow disposal in a municipal solid waste landfill."²⁰ The June 28, 2004 Penske letter lists seven landfills with Commission-issued MSW permits and one landfill with a Commission-issued hazardous waste permit, and requests authorization to dispose the commingled D008 waste at any of the eight listed landfills. The letter also states that the Commission-required "Request for Authorization for Disposal of a Special Waste" is attached.²¹

Apparently, the ED has lost the "Request for Authorization for Disposal of a Special Waste" form that was allegedly attached to Penske's June 28, 2004 letter. That completed Request form had to be reviewed, verified, and approved by the Commission before the waste reclassification was finally approved, but there is not record that such was done by the ED's staff. In spite of TDSL's repeated requests of the Commission and of Penske to be provided a copy of the Penske "Request for Authorization for Disposal of a Special Waste" form, TDSL has not been provided a copy to determine whether Penske misrepresented the physical and chemical characteristics of the commingled D008 waste they sought to reclassify from hazardous to non-

¹⁹ Letter from Mr. John F. Steib, Jr., to Mr. Marc E. Althen, *supra* note 1.

²⁰ Letter from Mr. Marc E. Althen, Senior Vice President, Penske Truck Leasing, to Mr. John Steib, Deputy Director, Office of Compliance and Enforcement, TCEQ (June 28, 2004).

²¹ *See id.* at 2

hazardous waste. There has been no valid sampling of the commingled D008 waste for waste classification purposes. The ED apparently recognized this rather glaring omission when he ordered, on July 8, 2004, Commission staff to sample the commingled D008 waste.²² The ED's sampling of the commingled D008 waste occurred on July 12, 2004. TDSL had two RCRA experts observe the ED's sampling and both experts were very clear that the limited sampling was not representative sampling for waste characterization purposes in accordance with the requirements of SW-846.²³ In fact, the ED's staff stated at the time that the sampling was not representative.²⁴

III. THE BROKEN AND DISCARDED CRTS WERE HAZARDOUS WASTE AT THE TIME OF THE ACCIDENT ON OCTOBER 9, 1997.

RCRA provides statutory authority for 40 C.F.R. parts 260 through 268, which place numerous restrictions on the disposal of hazardous waste. RCRA is a delegated program in Texas, with the Commission having permitting and enforcement authority, and with EPA retaining enforcement authority if the Commission does not properly administer RCRA in

²² Letter from Mr. John F. Steib, Jr., Deputy Director, Office of Compliance and Enforcement, TCEQ, to Mr. Bob Gregory, President and CEO, Texas Disposal Systems, Inc. (July 8, 2004).

²³ See 40 C.F.R. § 261.24(a) ("A solid waste (except manufactured gas plant waste) exhibits the characteristic of toxicity if, using the Toxicity Characteristic Leaching Procedure, Test Method 1311 in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in §260.11 of this chapter, the extract from a representative sample of the waste contains any of the contaminants listed in table 1 at the concentration equal to or greater than the respective value given in that table."). The heterogeneous state of the commingled D008 waste requires very specific sampling methodology, as detailed in EPA's RCRA waste sampling guidelines. For instance, to obtain a representative sample, a large number of samples must be taken and then crushed and ground for analysis. Large pieces must be included, not just soil. Neither of these basic sampling techniques was followed by the ED. In fact, the ED's sampling methodology seemed designed to insure that none of the D008 CRT waste would be included in any sample.

²⁴ The sampling conducted by the ED is similar to testing done by Zenith and Penske consultants between January 29 and February 2, 2004, in that manual separation of a limited waste volume minimized the possibility that any CRT lead-contaminated waste would be included in the sample.

specific situations. A primary purpose of RCRA is to assure that listed and characteristic hazardous waste is not land disposed without proper treatment.²⁵

There are two ways in which a solid waste²⁶ can be a hazardous waste pursuant to RCRA: (1) listed wastes; and (2) characteristic wastes. Listed hazardous wastes are wastes from specific sources listed in the regulations that meet a hazardous constituent threshold.²⁷ Characteristic wastes are any wastes that, upon testing, meet hazardous waste thresholds for one of four characteristics: ignitability; corrosivity; reactivity; or toxicity.²⁸

As previously discussed, prior to the accident on October 9, 1997, Zenith had characterized broken or discarded CRTs as D008 waste due to the high lead content in the glass and the leachability of that lead.²⁹ Pursuant to transportation contracts entered into between Zenith and Penske, Zenith had notified Penske that CRTs must be handled as hazardous waste if broken or discarded during transport.³⁰ When the broken and discarded CRTs were designated for disposal at the accident scene, and neither Zenith nor Penske took any action to preserve the

²⁵ See RCRA § 3004(d)(1), 42 U.S.C.A. § 6924(d)(1) (“[T]he land disposal of hazardous wastes referred to in paragraph (2) is prohibited unless the Administrator determines the prohibition on one or more methods of land disposal of such waste is not required to protect human health and the environment for as long as the waste remains hazardous . . .”).

²⁶ There is no issue as to whether the broken and discarded CRTs are a “solid waste” as that term is defined pursuant to RCRA. See 40 C.F.R. § 261.2.

²⁷ *Id.* § 261.3(a)(2)(ii); see also *id.* at pt. 261, subpt. D.

²⁸ *Id.* § 261.3(a)(2)(i); see also *id.* §§ 261.20 – 261.24.

²⁹ See *id.* § 261.24(b) & tbl. 1. A generator may pre-characterize a waste based on generic process test results or may characterize a waste on a case-by-case basis when generated. Zenith chose the first option based on extensive test data. TDSL understands that Zenith has consistently disposed of its CRT waste as D008 waste. As identified in its Hazardous Waste Report filed with the Illinois Environmental Protection Agency (“IL EPA”), in 1997 alone, Zenith generated 2,939,920 pounds of broken CRTs that were disposed as D008 hazardous waste. See Zenith Electronics Corp., 1997 Hazardous Waste Report for Zenith Electronics Corporation’s CRT Division, Melrose Park, IL, U.S. EPA #ILD049297765, submitted to the IL EPA via letter from Mr. Bruce A. Schubert, EHS Coordinator, Zenith Electronics Corp., to IL EPA (Feb. 28, 1998).

³⁰ In fact, Zenith had provided Penske with a Material Safety Data Sheet (“MSDS”) for the CRTs, characterizing them as D008 waste. See Material Safety Data Sheet, Manufacturer: Zenith Electronics Corporation; Identity: Cathode Ray Tube (CRT), attached hereto as Attachment A.

CRTs for reuse or recycling, the D008 waste was generated.³¹ Zenith and/or Penske had an opportunity at that point in time to test the CRT waste and attempt to show that it was not D008 hazardous.³² Neither Zenith nor Penske did so. Zenith followed its uniform policy and declared the CRT waste to be D008 hazardous waste. With that corporate decision, Zenith affirmatively waived its only legal opportunity to re-characterize the CRT waste at issue.³³

As identified in his May 13 NOV letter, the ED has determined that at least Penske was a generator of that waste.³⁴ At the point of generation, the CRT waste became subject to RCRA Land Disposal Restrictions. In accordance with 40 C.F.R. § 261.11, the generator had the responsibility of properly characterizing the waste at the point of generation.³⁵

Following Penske's initial classification of the CRT waste³⁶ as non-hazardous during the approximately four-hour period following the truck accident, Penske notified TDSL and TNRCC

³¹ Zenith's repeated assertions to TCEQ that the CRT waste was not hazardous when it was sent to TDSL's landfill is obviously misleading since the Zenith executive in charge of this incident, Mr. Edward Reszke, testified under oath that it was hazardous waste and had to be disposed as such. See Deposition of Mr. Edward P. Reszke, *Texas Disposal Sys. v. Penske Truck Leasing Co.*, Cause No. 98-0159, 207th Judicial Dist. Ct., Hays County, Texas, at 29 & 84-85 (Feb. 7, 2003); see also Letter from Mr. Wayne M. Koprowski, Senior Attorney, Zenith Electronic Corp., to Mr. Gary Newton, General Counsel, Texas Disposal Systems Landfill, Inc. (Nov. 20, 1997) (stating Zenith's then legal position that Penske was the generator of the CRT hazardous waste), attached hereto as Attachment B.

³² See 40 C.F.R. § 268.7.

³³ Since there is no longer any undiluted CRT waste to test, Zenith cannot re-characterize the CRT waste based on analytical data. Likewise, Zenith's corporate testimony by Mr. Reszke verified that there is no other data to support re-characterization.

³⁴ See Letter from Mr. Glenn W. Shankle to Mr. Brian Hard, *supra* note 13.

³⁵ See 40 C.F.R. § 261.11. Also, 30 TEX. ADMIN. CODE § 335.62 provides:

A person who generates a solid waste must determine if the waste is hazardous pursuant to § 335.504 of this title (relating to Hazardous Waste Determination) and must classify any nonhazardous waste under the provisions of Subchapter R of this chapter (relating to Waste Classification). If the waste is determined to be hazardous, the generator must refer to this chapter and to 40 Code of Federal Regulations Parts 261, 264, 265, 266, 268, and 273 for any possible applicable exclusions or restrictions pertaining to management of the specific waste.

30 TEX. ADMIN. CODE § 335.62. As reflected by the May 13 NOV, Penske did not meet this regulatory requirement. See Letter from Mr. Glenn W. Shankle to Mr. Brian Hard, *supra* note 13.

³⁶ The CRT waste generated at the accident scene included broken and discarded CRTs, packing materials, and trailer parts.

that the waste was D008 hazardous waste. The ED determined in the May 13, 2004 NOV issued to Penske that the CRT waste was hazardous when it entered the TDSL landfill,³⁷ and in a May 25, 2004 letter to TDSL, the ED identified that "Penske generated the hazardous CRT waste and is responsible for the proper disposal of the waste."³⁸ To the best of TDSL's knowledge, Penske has not contested the allegations contained in the ED's May 13 NOV letter.³⁹

Based on all of the above information, the evidence is undisputed that the broken and discarded CRTs resulting from the traffic accident on October 9, 1997, were a D008 characteristic hazardous waste under RCRA.

IV. BECAUSE THE D008 CRT WASTE WAS INTENDED FOR LAND DISPOSAL, THE LAND DISPOSAL RESTRICTIONS OF 40 C.F.R. PT. 268, INCLUDING THE "DILUTION RULE," ARE APPLICABLE TO THE COMMINGLED D008 WASTE.

As previously noted, a primary purpose of RCRA is to assure that listed and characteristic waste is not land disposed without proper treatment. Regulations promulgated to implement this purpose are codified at 40 C.F.R. pt. 268 – the Land Disposal Restrictions, also known as the "Land Ban." The underlying public health and safety rationale is to prevent contamination of ground water resources.

Title 40, section 268.3 of the Code of Federal Regulations prohibits the dilution (*i.e.*, mixing) of hazardous waste to justify land disposal without proper treatment. Specifically, 40 C.F.R. § 268.3(a) states:

³⁷ See Letter from Mr. Glenn W. Shankle to Mr. Brian Hard, *supra* note 13. In the Summary of Investigation Findings attached to the NOV Letter, the ED alleged that Penske had violated 30 TEX. ADMIN. CODE § 335.43(a): "No person shall store, process, or dispose of hazardous waste without first having obtained a permit from the Texas Commission on Environmental Quality." *Id.*, Summary of Investigations Findings at 1. The ED also alleged that Penske had violated 30 TEX. ADMIN. CODE § 335.62 by failing to determine if the generated waste was a hazardous waste. *Id.* at 2.

³⁸ Letter from Mr. Glenn Shankle to Mr. Bob Gregory, *supra* note 17.

³⁹ The Commission has established a process allowing a respondent to contest an alleged violation and thus secure a determination that a NOV is without merit. See 27 Tex. Reg. 191, 202 (Jan. 4, 2002). It does not appear that Penske has filed the required documentation to contest the merit of the NOV. All such timelines to contest the NOV have passed, and thus, the NOV would be included, for example, in Penske's compliance history as a meritorious NOV.

Except as provided in paragraph (b) of this section, no generator, transporter, handler, or owner or operator of a treatment, storage, or disposal facility shall in any way dilute a restricted waste or the residual from treatment of a restricted waste as a substitute for adequate treatment to achieve compliance with subpart D of this part, to circumvent the effective date of a prohibition in subpart C of this part, to otherwise avoid a prohibition in subpart C of this part, or to circumvent a land disposal restriction imposed by RCRA section 3004.⁴⁰

Section 268.3, the "Dilution Rule," is the centerpiece of the Land Disposal Restrictions. In promulgating the "Dilution Rule," EPA identified that in some circumstances a dilution prohibition is important to ensure actual treatment of the waste.⁴¹ EPA also wrote: "Such dilution could be in lieu of treatment or a specified method and would not fulfill the goals of section 3004(m). In many cases, dilution simply increases the volume of a waste without reducing or immobilizing the mass of hazardous constituents in the waste."⁴²

As explained in an EPA preamble addressing the "Dilution Rule," EPA adopted the dilution prohibition to be applied at the point of generation, not at the point of disposal, of a hazardous waste.⁴³ That the "Dilution Rule" is clearly applicable to the commingled D008 waste has been recognized by the Commission in previous correspondence. In a January 15, 2004, letter, Mr. Wade M. Wheatley, P.E., Director of the Commission's Waste Permits Division, stated:

You also raise an issue regarding a landfill operator accepting for disposal a generator designated and characteristic hazardous waste and then mixing it with nonhazardous waste to the degree that it can be sampled and tested sufficiently to satisfy the TCEQ that it is a nonhazardous waste. 40 Code of Federal Regulations Section 268.3 prohibits dilution as a means to render a characteristically hazardous waste non-hazardous.⁴⁴

⁴⁰ 40 C.F.R. § 268.3(a).

⁴¹ See Land Disposal Restrictions for Third Third Scheduled Wastes, 55 Fed. Reg. 22,520, 22,651 (June 1, 1990) (to be codified at 40 C.F.R. pts. 148, 261, 262, 264, 265, 268, 270, 271, & 302).

⁴² *Id.* at 22,652. Such is exactly what happened with the Zenith/Penske CRT waste in this case since the lead in the broken and discarded CRTs has not been stabilized to prevent leaching. The same amount of toxic constituent (lead) available for leaching and bioaccumulation is available after mixing with MSW. The volume increase has not resulted in a decrease in toxic threat.

⁴³ See *id.* at 22,651.

⁴⁴ Letter from Mr. Wade M. Wheatley to Mr. Bob Gregory, *supra* note 11.

In addition, Commission staff have previously testified under oath regarding the applicability of the "Dilution Rule" to the commingled D008 waste.⁴⁵

Neither Zenith nor Penske claimed any exclusion from the "Dilution Rule" at the point of generation or immediately thereafter. In fact, they handled the majority of the D008 CRT waste that was not commingled with MSW at the TDSL working face as hazardous waste.⁴⁶ Pursuant to 40 C.F.R. § 268.3, there is no applicable exception under RCRA for exclusion of the D008 CRT waste generated at the scene of the accident from the regulatory prohibition against land disposal of hazardous waste that is characteristically hazardous at the time of generation.⁴⁷ In other words, it was not legal to dilute the D008 CRT waste generated at the accident scene for disposal in lieu of proper treatment.⁴⁸ Pursuant to 40 C.F.R. § 268.3(a), because the D008 CRT waste was intended for land disposal, RCRA Land Disposal Restrictions, including the dilution prohibition, were applicable to the D008 CRT waste and continue to be applicable to the commingled D008 waste.

V. THE ED'S RELIANCE ON THE "MIXTURE RULE" TO THE EXCLUSION OF THE "DILUTION RULE" IS NOT SUPPORTED BY APPLICABLE REGULATIONS OR RCRA.

Certain provisions in 40 C.F.R. parts 260 through 268 allow for disposal, as non-hazardous wastes, of those hazardous wastes that are listed solely because they exhibit the

⁴⁵ Deposition of Mr. Wade Wheatley at 76-77, *supra* note 2. Mr. Wheatley stated: "My understanding was that the material went in as a characteristically hazardous waste, and the only thing that has happened to it since then to change that characteristic would be dilution. And that's a prohibited means of treating a characteristically hazardous waste." *Id.*

⁴⁶ After Penske notified TDSL that the broken CRTs were hazardous, TDSL refused to accept further loads of CRTs. The CRT hazardous waste that had not been commingled with the MSW was shipped by Penske as hazardous waste. *See* Uniform Hazardous Waste Manifests, *supra* note 6.

⁴⁷ While 40 C.F.R. § 268.3(b) and (c) provide certain exceptions to the dilution prohibition for land disposed wastes, none of the enumerated exclusions are applicable in this case. *See* 40 C.F.R. § 268.3(b)&(c).

⁴⁸ Zenith continues to assert a spurious argument that "intentional" dilution is prohibited, but "unintentional" dilution is not prohibited. If such were the law, the "Dilution Rule" would be meaningless since every hazardous waste generator would say it "accidentally" sent its hazardous waste to a MSW landfill and, therefore, the "unintentional" dilution was acceptable. Dilution of toxic characteristic hazardous waste is prohibited - period. In any event, Zenith's and Penske's actions in this case could hardly be called unintentional. Negligent, yes; unintentional, no.

characteristics of ignitability, corrosivity, or reactivity, or characteristic hazardous wastes, if the mixture no longer tests hazardous for the original hazardous constituent.⁴⁹ This exclusion is generally limited to wastes that are identified as hazardous wastes based on the characteristics of ignitability, reactivity, or corrosivity. The exclusion does not apply to wastes that are identified as hazardous based on toxicity.

For example, the “Mixture Rule” was modified to conserve hazardous waste disposal capacity in the United States by allowing non-hazardous disposal of some waste mixtures that no longer test hazardous.⁵⁰ Specifically, the “Mixture Rule” states:

(g)(1) A hazardous waste that is listed in subpart D of this part solely because it exhibits one or more characteristics of ignitability as defined under §261.21, corrosivity as defined under §261.22, or reactivity as defined under §261.23 is not a hazardous waste, if the waste no longer exhibits any characteristics of hazardous waste identified in subpart C of this part.

(2) The exclusion described in paragraph (g)(1) of this section also pertains to:

(i) Any mixture of a solid waste and a hazardous waste listed in subpart D of this part solely because it exhibits the characteristics of ignitability, corrosivity, or reactivity as regulated under paragraph (a)(2)(iv) of this section⁵¹

It is important to note, though, that pursuant to the entirety of the RCRA regulations, the “Mixture Rule” does not modify or overrule the “Dilution Rule” for wastes that are to be disposed via land disposal. Title 40, section 261.3(g)(3) of the Code of Federal Regulations states: “Wastes excluded under this section [261.3] are subject to part 268 [Land Disposal Restrictions] of this chapter (as applicable), *even if they no longer exhibit a characteristic at the point of land disposal.*”⁵² Thus, while the Land Disposal Restrictions, 40 C.F.R. pt. 268, do not

⁴⁹ These sections explicitly apply to listed wastes rather than characteristic wastes. However, the underlying environmental protection rationale is the same for both categories of toxic hazardous waste.

⁵⁰ The “Mixture Rule” was last modified in 2001. *See* Correction to the Hazardous Waste Identification Rule (HWIR): Revisions to the Mixture and Derived-From Rules, 66 Fed. Reg. 50,332 (Oct. 3, 2001) (to be codified at 40 C.F.R. pt. 261); Hazardous Waste Identification Rule (HWIR): Revisions to the Mixture and Derived-From Rules, 66 Fed. Reg. 27,266 (May 16, 2001) (to be codified at 40 C.F.R. pts. 261 & 268).

⁵¹ 40 C.F.R. § 261.3(g)(1)&(g)(2)(i).

⁵² *Id.* § 261.3(g)(3) (emphasis added).

determine which wastes are to be considered hazardous (such determination and classification is made pursuant to 40 C.F.R. § 261.3), it is clear based on 40 C.F.R. § 261.3(g)(3) that a waste, which would no longer be deemed hazardous due, for example, to the "Mixture Rule," would still be subject to the Land Disposal Restrictions even if it no longer, at the point of land disposal, exhibited the characteristic that rendered it hazardous at the point of generation.

In support of the ED's decision allowing the disposal of the commingled D008 waste as special waste, the ED has provided the following information to the Office of State Representative Eddie Rodriguez:

The waste generated by Penske was identified as being characteristically hazardous for lead. If a characteristically hazardous waste is mixed with a solid waste, the resulting mixture is hazardous unless it does not exhibit a characteristic. Stated another way, the resulting mixture is hazardous only if the mixture exhibits the characteristic. So, Penske must demonstrate that the mixed waste no longer exhibits the characteristic before the waste can be disposed of as a "special waste." 30 Tex. Admin. Code § 330.2(137) defines "special waste" and list specific categories of wastes that may be considered "special wastes." One of those categories is "Class I industrial waste if going to a MSW landfill with a dedicated special waste trench."⁵³ In order for Penske to dispose of the CRT waste as a special waste, Penske will need to complete TCEQ Form 0152 (Request for Authorization for Disposal of a Special Waste) and submit it to the MSW Permits Section for approval. Penske will need to demonstrate to the satisfaction of the MSW Permits Section that the waste, which was originally classified as hazardous for lead, should now be considered a Class I Industrial Waste.

⁵³ Contrary to this assertion by the ED's staff, the definition of the term "special waste" in Commission rules, actually states:

Special waste – Any solid waste or combination of solid wastes that because of its quantity, concentration, physical or chemical characteristics, or biological properties requires special handling and disposal to protect human health or the environment. If improperly handled, transported, stored, processed, or disposed of or otherwise managed, it may pose a present or potential danger to the human health or the environment. Special wastes are:

* * *

(B) Class I industrial nonhazardous waste not routinely collected with municipal solid waste . . .

30 TEX. ADMIN. CODE § 330.2(137). The ED's reference to "Class I industrial waste if going to a MSW landfill with a dedicated special waste trench" does not appear in the Commission's rules. Instead it is simply from one of the Commission's websites. See TCEQ, Special Waste, at <http://www.trcc.state.tx.us/permitting/wasteperm/mswperm/special.html> (last modified Feb. 17, 2004).

It should also be noted that even though 40 CFR § 268.3 states that dilution as a substitute for adequate treatment is prohibited, the actual waste that results may be considered non-hazardous if it no longer tests hazardous. 54 Fed. Reg. 48372, at 48495; See also 55 Fed. Reg. 22520. Thus, the act of diluting a characteristic hazardous waste is prohibited, but the resulting mixed waste may be considered non-hazardous if it no longer tests for the characteristic.⁵⁴

In saying that “if a characteristic hazardous waste is mixed with a solid waste, the resulting mixture is hazardous unless it does not exhibit a characteristic,”⁵⁵ the ED is apparently relying on the “Mixture Rule,” without addressing the applicability of the “Dilution Rule.” As identified in 40 C.F.R. § 261.3(g)(3), one cannot be read without the other.⁵⁶ And, pursuant to 40 C.F.R. § 261.3, in cases where wastes would no longer be considered hazardous wastes pursuant to section 261.3 (e.g., because of the “Mixture Rule”) and such wastes are destined for land disposal, the 40 C.F.R. pt. 268 Land Disposal Restrictions are applicable, “even if [the wastes] no longer exhibit a characteristic at the point of land disposal.”⁵⁷ The ED and Zenith/Penske have failed to recognize that the Land Disposal Restrictions “trump” the “Mixture Rule” where wastes are destined for land disposal.⁵⁸

The ED writes that “even though 40 CFR § 268.3 states that dilution as a substitute for adequate treatment is prohibited, the actual waste that results may be considered non-hazardous if it no longer tests hazardous.”⁵⁹ In making this statement, the ED is citing to the preamble to EPA’s *proposed* “Land Disposal Restrictions for Third Scheduled Wastes.” The preamble to the *proposed* rules states: “Consequently, under the rules *proposed* today, if an impermissible form

⁵⁴ E-mail from Ms. Diane Mazuca, IGR Division, TCEQ, to Ms. Robin Chandler, Office of State Representative Eddie Rodriguez (July 9, 2004, 3:29 p.m. CDT).

⁵⁵ *Id.*

⁵⁶ See 40 C.F.R. § 261.3(g)(3).

⁵⁷ *Id.*

⁵⁸ This critical failure by the ED will set a precedent in Texas allowing environmental bioaccumulation of toxic constituents (such as lead) in certain characteristic hazardous wastes which, pursuant to the ED’s decision, can be disposed of in a non-hazardous waste facility.

⁵⁹ E-mail from Ms. Diane Mazuca to Ms. Robin Chandler, *supra* note 54 (citing Land Disposal Restrictions for Third Scheduled Wastes, 54 Fed. Reg. 48,372, 48,495 (proposed Nov. 22, 1989) (to be codified at 40 C.F.R. pts. 148, 261, 264, 265, 268, & 271).

of dilution occurs that renders a toxic hazardous waste non-hazardous, the act of dilution would be illegal but the waste would be non-hazardous for subsequent management purposes. . . . EPA solicits comments on this approach”⁶⁰ This was *not* the approach adopted by EPA in the Final Rules.⁶¹

Instead, EPA adopted rules whereby the dilution prohibition applied at the point of generation, not at the point of disposal, of a hazardous waste. In the preamble to the Final Rules, EPA wrote: “One of the most fundamental issues in this rulemaking is whether the prohibition on the land disposal of untreated characteristic wastes applies at the point of generation or at the point of land disposal.”⁶² EPA concluded that applying the Land Disposal Restrictions at the point of generation was the approach that best-served the land disposal restriction program and Congress’ mandate, writing:

[A] characteristic waste is no longer deemed hazardous when it ceases to exhibit a hazardous waste characteristic. 40 CFR 261.3(d)(1). However, as discussed below, the characteristic level is only one indicator of hazard and, thus, removal of the specific characteristic is not the same as assuring that the waste is safe.

⁶⁰ 54 Fed. Reg. at 48,495 (emphasis added).

⁶¹ In the Final Rules, EPA wrote:

EPA proposed that prohibited hazardous wastes could not be diluted by impermissible means to render them non-hazardous, even though the waste resulting from dilution would not have to be managed in a subtitle C unit. 54 FR 48495. Although this possibility exists for all prohibited wastes--both those that are listed (i.e., dilution to achieve delisting levels) and those that exhibit characteristics--the issue arises most often with respect to characteristic prohibited wastes.

EPA is finalizing this approach in the final rule, *modified*, however, by a number of principles discussed above. Thus, since it is permissible to dilute prohibited *non-toxic* ignitable, reactive, and corrosive wastes, it is permissible to remove the characteristic from such wastes by this means. . . .

For other situations, however, dilution to remove a prohibited waste’s characteristic (or to render it delistable) is used “*as a substitute for adequate treatment to achieve compliance with [a treatment standard]*”, and so falls within the express terms of the § 268.3 dilution prohibition. Furthermore, as the Agency explained in detail in the proposal, if the dilution prohibition were not to apply in such circumstances, the authority Congress granted the Agency to establish treatment standards for characteristic wastes would be essentially meaningless.

55 Fed. Reg. at 22,666 (emphasis added).

⁶² *Id.* at 22,651.

Until today, a hazardous waste characteristic could be removed by treatment; however, it could also be removed by simply mixing or dilution. Thus, if LDR requirements were applied only to wastes which exhibit a characteristic at the point of land disposal, EPA would be unable to require full treatment, or in some cases, any legitimate treatment of wastes which exhibit a characteristic at the point of generation.⁶³

The ED has ignored, or does not understand, that EPA adopted the "point of generation" approach in the Final Rules, and has instead relied on an earlier proposal made by EPA to support EPA's ultimately rejected point of disposal approach. This is a fundamental mistake in the ED's legal analysis of this situation. It also is a fundamental deviation from the Commission's statutory mandate to protect the health and safety of Texas citizens and the environment.

The CRT waste was clearly a hazardous waste at the point of generation (*i.e.*, the time of the accident on October 9, 1997). The D008 CRT waste was not disposed; instead, it was commingled with MSW and then, upon notification of its hazardous classification, isolated by TDSL prior to the application of daily cover. The commingled D008 waste has been stored at TDSL's landfill awaiting proper disposal by Zenith/Penske. The Land Disposal Restrictions, based on EPA's stated policy of applying the restrictions at the point of generation, continue to apply to the commingled D008 waste. The commingled D008 waste must be transported via a uniform hazardous waste manifest and must be treated and disposed at a permitted hazardous waste disposal facility.

VI. APPLICABILITY OF THE "DILUTION RULE" IN THIS CASE SUPPORTS THE PURPOSES AND INTENT OF RCRA.

There is a very good technical and public health reason why the "Mixture Rule" was not extended to wastes that are identified as hazardous waste because of their toxicity characteristic, such as D008 waste. Toxicity restrictions are based on bioaccumulation of certain harmful constituents in the environment. For lead, a TCLP constituent level above five milligrams per liter (5 mg/L) is considered hazardous due to the possibility of bioaccumulation of high lead

⁶³ *Id.*; see also *id.* at 22,652.

levels in the environment.⁶⁴ The possibility of bioaccumulation remains even when lead waste is diluted with other waste to reduce the overall percentage lead constituent level in the diluted mixture. The actual toxic hazardous lead volume available for bioaccumulation is still present in the diluted mixture. In discussing the "Dilution Rule" EPA noted: "Toxic constituents can pose a cumulative impact on land disposal even where waste is below the characteristic level."⁶⁵ EPA continued: "[S]imple dilution is not effective treatment for toxic constituents. Dilution does not itself remove or treat any toxic constituent from the waste. Accordingly, EPA believes that a dilution prohibition for characteristic wastes is important for purposes of the treatment requirements and carries a significant benefit."⁶⁶

In contrast to toxic characteristic waste, the ignitability, corrosivity, and reactivity hazardous waste characteristics may be eliminated through dilution with other wastes. While the act of dilution itself of ignitable, corrosive, or reactive waste may not be legal, the resulting mixture may not require hazardous waste treatment for ultimate safe disposal. There is no issue of bioaccumulation.⁶⁷

It is not known at this time if the commingled D008 waste continues to exhibit a hazardous waste characteristic of toxicity for lead since SW-846 representative sampling has not been conducted on the commingled D008 waste. But whether or not the commingled D008 waste exhibits the toxicity characteristic at this time is not the critical question pursuant to the "Dilution Rule." The CRT waste was characteristic hazardous for lead at the point of generation, so it was subject to the "Dilution Rule" at the time of generation and it remains a characteristic

⁶⁴ 40 C.F.R. § 261.24(b) & tbl. 1.

⁶⁵ 55 Fed. Reg. 22,655.

⁶⁶ *Id.* at 22,656.

⁶⁷ *See id.* at 22,655.

hazardous waste until appropriate treatment and disposal occurs.⁶⁸ The commingled D008 waste cannot be disposed via land disposal until such time as the treatability analyses required pursuant to 40 C.F.R. pt. 268 have been conducted and the commingled D008 waste meets the Part 268 requirements.⁶⁹

As recognized by EPA, the point of disposal approach, inherent in the ED's June 18th decision, does not provide the Congressionally-mandated protection intended with the Land Disposal Restrictions. In the preamble to the Final Rule EPA wrote:

[T]he point of disposal approach could undermine the Congressional goals of the land disposal restrictions in critical ways when applied to characteristic wastes.

First, the Agency would not effectively be able to set a particular method of treatment or limit dilution for a characteristic waste. A point of disposal approach might permit dilution of characteristic wastes, since waste diluted below a characteristic level prior to land disposal would not be regulated by LDR provisions. Such dilution could be in lieu of treatment or a specified method and would not fulfill the goals of section 3004(m). In many cases dilution simply increases the volume of a waste without reducing or immobilizing the mass of hazardous constituents in the waste.⁷⁰

Such is the case here. The MSW commingled with the D008 CRT waste has simply increased the volume of the waste. It has not reduced or immobilized the mass of leachable lead in the

⁶⁸ Pursuant to the Land Disposal Restrictions, a Subtitle D non-hazardous, MSW landfill may accept waste that has been classified as hazardous waste, has been treated pursuant to applicable rules, and that no longer exhibits a hazardous characteristic. See 40 C.F.R. § 268.9(d)(1)(i). Contrary to Zenith's reliance on section 268.9(d) and the "Mixture Rule" to justify identifying the commingled D008 waste as non-hazardous, no treatment as contemplated by 40 C.F.R. pt. 268 has occurred to render the D008 waste non-hazardous pursuant to RCRA. The toxic lead constituent has not been stabilized through proper treatment. The lead constituent must be chemically stabilized so it will not leach in an acidic landfill environment.

⁶⁹ The treatability study should be conducted by an authorized hazardous waste treatment and disposal facility using representative sampling methodology. TDSL is not claiming that the commingled D008 waste can never be properly disposed as a non-hazardous waste. After proper treatment at an authorized hazardous waste facility and after the commingled D008 waste meets the 40 C.F.R. pt. 268 treatment requirements, the commingled D008 waste may very well be able to be disposed via land disposal in an industrial Class I non-hazardous waste landfill.

⁷⁰ 55 Fed. Reg. at 22,652.

commingled D008 waste. As such, the threat of leaching lead—the threat intended to be addressed through the Land Disposal Restrictions and the “Dilution Rule”—remains.⁷¹

The ED’s decision in authorizing the disposal of the commingled D008 waste as non-hazardous special waste contradicts the purposes and goals of RCRA § 3004(m) and is contrary to EPA’s RCRA rules. As a delegated state, Texas must enforce all applicable provisions of RCRA and its implementing rules. The precedent set by the ED’s decision will encourage irresponsible hazardous waste generators to mix toxic characteristic hazardous waste with non-hazardous waste in order to avoid manifesting and disposing of their waste as hazardous waste in appropriate hazardous waste treatment and disposal facilities.⁷² A fundamental precept of hazardous waste treatment and disposal is at issue in this case.

During his confirmation hearing, Commissioner Soward also testified:

I think the agency can and should get involved now and resolve this issue as best we can, and I think, I think there’s ways to do that. . . . I’ve already committed to do everything I can to get this done, get this addressed, as best we can, outside the courthouse if we can. And, that’s what sh-- I believe coulda been done in the past, it has not been, but it can be now.⁷³

Commissioner Soward pledged that the Commission would do everything possible to address the Zenith/Penske hazardous waste situation. The Commission must address this issue within the bounds of applicable statutes and regulations. The ED’s decision relies entirely on the “Mixture Rule,” without addressing the clear applicability of the “Dilution Rule,” and even goes so far as

⁷¹ TDSL believes it is important to note that restrictions on land disposal of lead contaminated waste have increased significantly since 1997. The RCRA treatment level has been reduced from 5 ppm to 0.75 ppm. Several states are now banning land disposal of any lead contaminated electronic product waste. Major computer manufacturers have recognized the environmental threat and are now recycling used consumer products. Clearly, the Commission should be insisting on greater environmental protection, not less as suggested by the ED.

⁷² The fact that the ED has not assessed Zenith/Penske any monetary penalty for this flagrant violation further encourages non-compliance by unscrupulous hazardous waste generators. Under the Commission’s current penalty/enforcement guidelines, a significant penalty should have been assessed. Instead, the ED is allowing Zenith/Penske the economic benefit of improper management of a regulated hazardous waste in a non-hazardous waste landfill. See Letter from Mr. Kerry Russell, Russell, Moorman & Rodriguez, L.L.P., to Mr. Glenn Shankle, Acting Executive Director, TCEQ (May 12, 2004), attached hereto as Attachment C.

⁷³ Transcript of Testimony of Larry Soward at 9-10, *supra* note 10.

to attempt to justify a reading of the "Dilution Rule" that was considered and discarded by EPA. To address the situation in a manner contrary to applicable rules violates both the intention and letter of RCRA's Land Disposal Restrictions. As such, the ED's decision must be overturned by the Commission. Allowing dilution of toxic characteristic hazardous waste in lieu of treatment will not "resolve this issue as best we can."⁷⁴

VII. CONCLUSION.

Zenith advised Penske the CRT waste was D008 hazardous waste at the point of generation. The ED has confirmed that the CRT waste was hazardous. The commingled D008 waste was not disposed at TDSL's landfill, in spite of Penske's attempt to do so. RCRA's Land Disposal Restrictions, based on EPA's stated policy of applying such restrictions at the point of generation, continue to apply to the commingled D008 waste now stored at TDSL's landfill. Therefore, the commingled D008 waste must be transported under a hazardous waste manifest to an authorized hazardous waste treatment/disposal facility for final disposal. The ED's decision expressed in the June 18th and June 30th letters to Penske to allow transportation and/or disposal of the commingled D008 waste as non-hazardous special waste in a non-hazardous waste landfill is a violation of RCRA's Land Disposal Restrictions and is contrary to the Commission's statutory mandate of environmental protection in Texas.

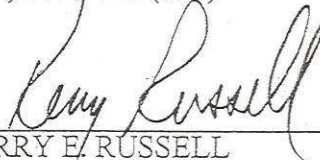
Texas Disposal Systems Landfill, Inc. respectfully requests that the Commission overturn the Executive Director's decision dated June 18, 2004, and confirmed in the Executive Director's June 30, 2004 letter, authorizing Penske's removal of the commingled D008 waste from the TDSL landfill as non-hazardous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

⁷⁴ *Id.*

Commission instruct the Executive Director to facilitate removal of the commingled D008 waste from the TDSL landfill under appropriate hazardous waste manifesting requirements.

Respectfully submitted,

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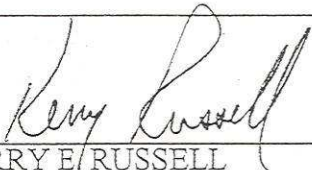
CERTIFICATE OF SERVICE

I hereby certify that on this the 22nd day of July, 2004, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, Federal Express overnight delivery, or hand delivery to the following:

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<p>Docket Clerk TCEQ Office of Chief Clerk (MC-105) P.O. Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building F Austin, Texas 78753 (delivery) Fax: (512) 239-3311</p>	<p>For the Office of the Chief Clerk</p>
<p>Mr. Gary Newton Texas Disposal Systems Landfill, Inc. P.O. Box 17126 Austin, Texas 78760-7126 (512) 243-4123</p>	<p>Texas Disposal Systems Landfill, Inc.</p>



KERRY E. RUSSELL

Material Safety Data Sheet
 May be used to comply with
 OSHA's Hazard Communication Standard,
 29 CFR 1910.1200. Standard must be
 consulted for specific requirements.

U.S. Department of Labor
 Occupational Safety and Health Administration
 (Non-Mandatory Form)
 Form Approved
 OMB No. 1218-0072



IDENTITY (As Used on Label and List)
CATHODE RAY TUBE (CRT)

Note: Blank spaces are not permitted. If any item is not applicable, or no information is available, the space must be marked to indicate that.

Section I

Manufacturer's Name ZENITH ELECTRONICS CORPORATION	Emergency Telephone Number (708) 450-2100
Address (Number, Street, City, State, and ZIP Code) 2407 W. NORTH AVENUE	Telephone Number for Information (708) 450-8108
MELROSE PARK, IL 60160	Date Prepared JULY, 1993
	Signature of Preparer (optional)

Section II - Hazardous Ingredients/Identity Information

Hazardous Components (Specific Chemical Identity, Common Name(s))	OSHA PEL	ACGIH TLV	Other Limits Recommended	% (optional)
ACCORDING TO 29CFR 1910.1200 "HAZARD COMMUNICATION", A CRT IS AN ARTICLE AND NO MSDS IS REQUIRED. A CRT DOES CONTAIN LEAD AND DOES NOT PASS THE EPA TCLP TEST.				
LEAD		50ug/m³		

Section III - Physical/Chemical Characteristics

Boiling Point	NA	Specific Gravity (H ₂ O = 1)	NA
Vapor Pressure (mm Hg.)	NA	Melting Point	ND
Vapor Density (AIR = 1)	NA	Evaporation Rate (Butyl Acetate = 1)	NA
Solubility in Water	NONE		
Appearance and Odor	GLASS TELEVISION-PICTURE TUBE WITH NO ODOR		

Section IV - Fire and Explosion Hazard Data

Flash Point (Method Used)	NA	Flammable Limits	LEL: NA	UEL: NA
Extinguishing Media	NA			
Special Fire Fighting Procedures	NA			
Unusual Fire and Explosion Hazards	ND			

(Reproduce locally)

NA = NOT APPLICABLE
 ND = NOT DETERMINED

OSHA 174, Sept. 1985

CATHODE RAY TUBE (CRT) JULY, 1993

Section V — Reactivity Data

Stability	Unstable		Conditions to Avoid	ND
	Stable	X		
Incompatibility (Materials to Avoid) ND				
Hazardous Decomposition or Byproducts ND				
Hazardous Polymerization	May Occur		Conditions to Avoid	
	Will Not Occur	X		

Section VI — Health Hazard Data

Routes of Entry:	Inhalation?	Skin?	Ingestion?
	NA		
Health Hazards (Acute and Chronic) NA			
Carcinogenicity:	NTP? NA	IARC Monographs? NO	OSHA Regulated? NO
Signs and Symptoms of Exposure NA			
Medical Conditions Generally Aggravated by Exposure NA			
Emergency and First Aid Procedures NA			

Section VII — Precautions for Safe Handling and Use

Steps to Be Taken in Case Material is Released or Spilled
SWEEP UP PARTS AND DISCARD IN ACCORDANCE WITH FEDERAL, STATE AND LOCAL REGULATIONS.

Waste Disposal Method
DISCARD AS A LEAD CONTAINING ARTICLE

Precautions to Be Taken in Handling and Storing
AVOID ROUGH HANDLING WHICH MAY CAUSE BREAKAGE

Other Precautions
CRT'S ARE VACUUM TUBES. ROUGH HANDLING MAY CAUSE IMPLSIONS AND THROW GLASS LONG DISTANCE.

Section VIII — Control Measures

Respiratory Protection (Specify Type) NOT REQUIRED UNDER NORMAL CONDITIONS OF USE			
Ventilation	Local Exhaust	NA	Special NA
	Mechanical (General)	NA	Other NA
Protective Gloves SLIP & CUT RESISTANT GLOVES RECOMMENDED		Eye Protection SAFETY GLASS OR GOGGLES TO PROTECT AGAINST BROKEN GLASS	
Other Protective Clothing or Equipment FACE, TORSO, AND ARM PROTECTION RECOMMENDED IF IMPLSIONS ARE LIKELY			
Work-hygiene Practices NO SPECIAL PRECAUTIONS NEEDED			



Wayne M. Koprowski
Senior Attorney
(847) 391-3066
(847) 391-3584 - Facsimile

November 20, 1997

Gary Newton, Esq.
General Counsel
Texas Waste Disposal Systems
P. O. Box 17126
Austin, Texas 78760-7126

Re: October 9th Penske Truck Accident

Dear Mr. Newton:

Thank you for sending us a copy of your November 11, 1997 letter to Penske Logistics relating to the aftermath of the October 9th truck accident. We have no basis at this time to contest the facts set forth in your letter. As your letter states in detail, the television picture tubes were under the custody and control of Penske Logistics at the time of the accident. Zenith personnel played no role of course in the accident, and had no say with regard to the response activities following the accident, including the decision of where to dispose of the broken picture tubes.

We do not think there is any doubt that you have stated a basis for Penske's liability for the disposal of the broken tubes at Texas Disposal. As you know, through letter dated October 16, 1997, Zenith made a claim for defense and indemnity against Penske under the parties' existing contract. Therefore, our two companies seem to agree on where responsibility rests for the disposal decision.

The part of your letter we do not understand is that after detailing the basis of Penske's liability, the letter states that unless TDL is satisfied with Penske's response, TDL will pursue legal remedies against Penske and Zenith. Although we regret that the damaged picture tubes wound up in TDL's landfill, we fail to discern how Zenith is responsible for that occurrence.

We do not know the status either of your discussions with Penske or of your plans to pursue legal remedies. In this letter, however, we would like to make a few points concerning Zenith's lack of legal responsibility for this matter. As a regulatory matter, we think it is important to point out that Zenith furnished Penske a product - television picture tubes. These

ZENITH ELECTRONICS CORPORATION

1000 MILWAUKEE AVENUE GLENVIEW, IL 60025-2495

zenith

TDS 01034

Attachment B

Gary Newton, Esq.
November 20, 1997
Page 2



tubes were in route to our plant in Mexico for further assembly. The tubes were certainly not wastes or hazardous wastes, and Penske was not licensed to ship such materials. As you know, under the hazardous waste rules, "generator" means "any person who produces the waste or whose act first causes the waste to become subject to regulation." 30 Texas Admin. Code § 335.1. Under this definition, Penske is the generator because its act (the truck accident) first caused the broken picture tubes to become subject to regulation. As the generator of the waste, Penske had the duty to determine whether the material was hazardous. *Id.* § 335.62. This conclusion, by the way, is consistent with your letter in regard to Penske's duty to classify the tubes as hazardous.

The second point we want to make arises under Superfund. Though the application of this statute to the present facts is problematic, we believe one principle under this statute is instructive. Specifically, it is well-established that the sale of a useful product does not constitute disposal for purposes of subjecting the manufacturer to Superfund liability. Dayton Index, School Dist. v. U.S. Mineral Prods., 906 F.2d 1059, 1065 (5th Cir. 1990); see also Amcast Indus. Corp. v. Detrex Corp., 2 F. 3d 746, 750 (7th Cir., 1993) (TCE was consumer product until it was spilled). The point under the hazardous waste regulations and Superfund is the same: Zenith hired Penske to ship a useful product component, and Zenith had no part in generating a hazardous waste or deciding where any such waste should be disposed of.

We realize that TDL will undertake its own analysis of the facts and the law should it decide to seek judicial relief. We simply ask that before TDL makes any legal claim against Zenith, it inform us of the basis for those claims. Addressing this issue now may save us both time in the future.

Very truly yours,

Wayne M. Koprowski
Wayne M. Koprowski

N:WAYNE:NEWTON

TDS 01035

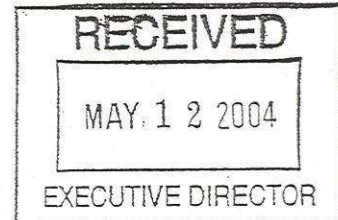
RM&R

RUSSELL, MOORMAN & RODRIGUEZ, L.L.P.
ATTORNEYS AT LAW

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E-mail: krussell@rmrlawfirm.com

May 12, 2004



Mr. Glenn Shankle
Executive Director
Texas Commission on Environmental Quality
P.O. Box 13087
MC 109
Austin, Texas 78711-3087

Re: May 6, 2004 TDSL Meeting

Dear Glenn:

This letter will provide you with the additional information we promised at our meeting last Thursday. The enforcement analysis (Zenith/Penske Penalty Calculations) enclosed with this letter was based on our recent experience with TCEQ staff wherein we have represented municipal clients on enforcement issues. In each of those cases TCEQ staff, up to and including the Executive Director level, advised us that there is no staff discretion to reduce penalties, only the Commissioners themselves can modify individual penalty assessments under the Commission's current Penalty Policy (September 2002). We have also enclosed for your cross reference another copy of the chart we presented last Thursday illustrating the factual basis for each violation.

To develop the enforcement analysis, we assumed Zenith owned the cathode ray tubes (CRTs) that spilled on IH 35 on October 9, 1997. This assumption is supported by the record in this case. Penske was the transporter of the CRTs for Zenith. Zenith and Penske are both responsible parties and generators under applicable statutes and regulations. The calculations follow the steps outlined in the Penalty Policy based on the type and severity of violation and the number events.

Enough D008 hazardous waste was generated during the October 9, 1997 spill (over 41,000 pounds) for each entity to qualify as a major source pursuant to the Penalty Policy. The type (actual/potential release v. programmatic) of each violation and the severity of the violation (major, moderate, minor) is identified. Because of the release of hazardous wastes, many of the violations have been identified as actual releases (spill of October 9, 1997) that caused major harm (release of hazardous substance). Also, all of the programmatic (i.e., paperwork) violations have been identified as major because of Zenith and Penske's continuing refusal to comply with the Commission's spill rules. The number of events is based on the intent of the regulations and the length of time since the spill (October 9, 1997 through April 2004). Based on Commission

interpretation and precedent, a 25% markup for culpability has also been included in the calculations. As noted, certain violations could be grouped together for calculation purposes because of the similarity of the provisions violated. The enforcement analysis confirms our position stated during the meeting that even a minimum penalty will be over \$1,000,000. If the Penalty Policy is applied to Zenith and Penske in the same way it is being applied to municipal entities in Texas, the minimum penalty will be closer to \$2,000,000.

In regard to the application of 40 CFR 268.3 to Zenith/Penske D008 waste which was generated at the IH 35 wreck site on October 9, 1997, we have now consulted with three different CERCLA/RCRA experts. These are attorneys with extensive Texas and EPA Land Ban experience. They have uniformly agreed with Wade Wheatley's testimony, and January 15, 2004 letter, that the Zenith/Penske D008 waste which they commingled with regular municipal solid waste at TDSL on October 9, 1997 cannot now be considered a different waste stream subject to new classification as non-hazardous. Under section 268.3 it is not a mixed waste stream that is no longer characteristically hazardous for Pb. Rather, it is a commingled waste stream that has been diluted in lieu of treatment. Such dilution is a clear violation of both the letter and the intent of the federal prohibition under 40 CFR 268.3 on land disposal of toxic characteristic hazardous wastes. The commingled D008 waste presently in the rolloff containers must be properly manifested to a licensed hazardous waste treatment/disposal facility. That facility can then perform a treatability study to determine what treatment is required prior to disposal. Simply put, the Zenith/Penske D008 waste is not subject to the Mixture Rule under the facts of this case.

Finally, I advised you that we were having an independent RCRA expert review the sampling methodology used by Zenith/Penske when the commingled D008 waste was placed in the rolloff containers earlier this year. He reviewed the videotapes of the sampling and the resultant report. He concluded that the sampling and testing was fundamentally flawed for the following reasons:

1. The sample matrix was not thoroughly mixed as stated in the report. It was hand selected and then spread out on a plastic sheet. For representative sampling under SW 846, the composite sample should be thoroughly mixed and then quartered. Each quarter should then be mixed again and a representative portion of each quarter should then be placed in a sample container.
2. The sampling protocol specifically excluded any pieces of broken CRTs from being included in the sample matrix.
3. The selection of commingled waste pieces from the trackhoe bucket was not a random sampling event since pieces were selected from exposed surface of the bucket rather than throughout the bucket.
4. All of the selected waste pieces were not reduced in size and included in the sample container; some were simply discarded.
5. Attachment 4 of the report does not contain the required SW 846 documentation to verify that the entire sample matrix was properly reduced in size and tested in accordance with Method 3010A.
6. A sample matrix that does not contain at least one piece of the various types of commingled waste cannot be representative under SW 846.

Mr. Glenn Shankle
May 12, 2004
Page 3 of 3

At this point it certainly appears clear from both legal and technical perspectives that the commingled Zenith/Penske D008 waste in the rolloff containers must be manifested by Zenith/Penske to a licensed hazardous waste treatment/disposal facility for further testing. That facility will need to undertake a treatability study to determine the treatment requirements for land disposal. Representative sampling of the D008 waste in its present form is not possible under SW 846 protocols and, in any event, could not be used to retroactively reclassify the D008 waste stream. It also appears clear that Zenith and Penske have violated a number of State and federal regulations. Even the most limited enforcement action by the TCEQ will result in a significant penalty assessment against Zenith and Penske under the Commission's Penalty Policy as it is being applied to municipal entities in Texas.

If we develop additional information on these topics, we will provide you with a copy. Please do not hesitate to call if you have any questions.

Sincerely,



Kerry E. Russell

Cc: Mr. Bob Gregory

ZENITH/PENSKE PENALTY CALCULATIONS

Violation	Source	Type of Violation	Continuing or Discrete	Number of Events	Calculation	Total Penalty
(1) TEX. WATER CODE § 26.121: Unauthorized discharge of D008 waste.	Major ¹	Major harm/actual release ² (\$10,000)	Continuing	78 monthly events (Nov. 1997 through April 2004)	\$10,000 (major/major/actual) x 78 events = \$780,000 + 25% (culpability markup) = \$780,000 + \$195,000 =	\$975,000
(2) TEX. WATER CODE § 26.266: Refusal to remove D008 waste stored at TDSL.	Major	Major harm/actual release (\$10,000)	Discrete	1 event	\$10,000 (major/major/actual) x 1 event = \$10,000 + 25% (culpability markup) = \$10,000 + \$2,500 =	\$12,500
(3) TEX. HEALTH & SAFETY CODE § 361.134: Failure to pay hazardous waste generation fee.	Major	Major programmatic ³ (\$10,000 x 25% = \$2,500)	Continuing (annual fee)	7 annual events (1998 through 2004)	\$2,500 (major/major/programmatic) x 7 events = \$17,500 + 25% (culpability markup) = \$17,500 + 4,375 =	\$21,875
(4) 30 TEX. ADMIN. CODE § 327.3: Required D008 notification not initially provided at spill location. ⁴	Major	Major programmatic (\$10,000 x 25% = \$2,500)	Discrete	1 event	\$2,500 (major/major/programmatic) x 1 event = \$2,500 + 25% (culpability markup) = \$2,500 + \$625 =	\$3,125
(5) 30 TEX. ADMIN. CODE § 330.5: Required actions not taken at spill location. ⁴	Major	Major programmatic (\$10,000 x 25% = \$2,500)	Discrete	1 event	\$2,500 (major/major/programmatic) x 1 event = \$2,500 + 25% (culpability markup) = \$2,500 + \$625 =	\$3,125
(6) 30 TEX. ADMIN. CODE § 335.2: D008 storage without a permit. ⁵	Major	Major release/actual harm (\$10,000)	Continuing	78 monthly events	\$10,000 (major/major/actual) x 78 events = \$780,000 + 25% (culpability markup) = \$780,000 + \$195,000 =	\$975,000

Violation	Source	Type of Violation	Continuing or Discrete	Number of Events	Calculation	Total Penalty
(7) 30 TEX. ADMIN. CODE § 335.10: * * * Failure to follow D008 generator manifesting, shipping, and reporting procedures. * * *	Major	Major programmatic (\$10,000 x 25% = \$2,500)	Discrete	1 event	\$2,500 (major/major/programmatic) x 1 event = \$2,500 + 25% (culpability markup) = \$2,500 + \$625 =	\$3,125
(8) 30 TEX. ADMIN. CODE § 335.43: Storage of D008 waste at TDSL without obtaining permit.	A violation of 30 TEX. ADMIN. CODE § 335.43 would probably not be considered as a separate violation in an enforcement action. Because of its similarity to 30 TEX. ADMIN. CODE § 335.2, one violation would probably encompass both violations. See reference to § 335.2, above.					
(9) 30 TEX. ADMIN. CODE § 335.62: * * * Required hazardous waste classification (D008) not done at time of spill. * * *	Major	Major programmatic (\$10,000 x 25% = \$2,500)	Discrete	1 event	\$2,500 (major/major/programmatic) x 1 event = \$2,500 + 25% (culpability markup) = \$2,500 + \$625 =	\$3,125
(10) 30 TEX. ADMIN. CODE § 335.63: * * * Required EPA identification number not obtained at time of spill. * * *	Major	Major programmatic (\$10,000 x 25% = \$2,500)	Discrete	1 event	\$2,500 (major/major/programmatic) x 1 event = \$2,500 + 25% (culpability markup) = \$2,500 + \$625 =	\$3,125
(11) 30 TEX. ADMIN. CODE § 335.65: * * * Required hazardous waste packaging not done at time of spill. * * *	Major	Major programmatic (\$10,000 x 25% = \$2,500)	Discrete	1 event	\$2,500 (major/major/programmatic) x 1 event = \$2,500 + 25% (culpability markup) = \$2,500 + \$625 =	\$3,125
(12) 30 TEX. ADMIN. CODE § 335.66: * * * Required hazardous waste labeling done at time of spill. * * *	Major	Major programmatic (\$10,000 x 25% = \$2,500)	Discrete	1 event	\$2,500 (major/major/programmatic) x 1 event = \$2,500 + 25% (culpability markup) = \$2,500 + \$625 =	\$3,125

Violation	Source	Type of Violation	Continuing or Discrete	Number of Events	Calculation	Total Penalty
(13) 30 TEX. ADMIN. CODE § 335.67: * * * Required hazardous waste marking not done at time of spill. * * *	Major	Major programmatic (\$10,000 x 25% = \$2,500)	Discrete	1 event	\$2,500 (major/major/programmatic) x 1 event = \$2,500 + 25% (culpability markup) = \$2,500 + \$625 =	\$3,125
(14) 30 TEX. ADMIN. CODE § 335.68: * * * Required hazardous waste placarding not done at time of spill. * * *	Major	Major programmatic (\$10,000 x 25% = \$2,500)	Discrete	1 event	\$2,500 (major/major/programmatic) x 1 event = \$2,500 + 25% (culpability markup) = \$2,500 + \$625 =	\$3,125
(15) 30 TEX. ADMIN. CODE § 335.69: Hazardous waste accumulation time exceeded with storage at TDSL. ⁶	Major	Major harm/actual release (\$10,000)	Continuing	Assuming 1 year of allowed storage: 66 monthly events (Nov. 1998 through Apr. 2004)	\$10,000 (major/major/actual) x 66 events = \$660,000 + 25% (culpability markup) = \$660,000 + \$165,000 =	\$825,000
(16) 30 TEX. ADMIN. CODE § 335.431/40 C.F.R. § 268.3: Prohibited LDR dilution of D008 waste.	Major	Major harm/actual release (\$10,000)	Discrete	1 event	\$10,000 (major/major/actual) x 1 event = \$10,000 + 25% (culpability markup) = \$10,000 + \$2,500 =	\$12,500
(17) 30 TEX. ADMIN. CODE § 335.504: * * * Required hazardous waste classification (D008) not done at time of spill. * * *	Major	Major programmatic (\$10,000 x 25% = \$2,500)	Discrete	1 event	\$2,500 (major/major/programmatic) x 1 event = \$2,500 + 25% (culpability markup) = \$2,500 + \$625 =	\$3,125

Pursuant to the Commission's Penalty Policy (Sept. 2002), a major source of industrial and hazardous waste is a "generator of more than 12,000 kg of hazardous waste on an annual basis. Commercial industrial facilities are majors. Based on this definition, both Zenith and Penske appear to be major-sources based on the one accident alone (more than 41,000 pounds of D008 were created by the spill).

2 Pursuant to the Commission's Penalty Policy, "major harm/actual release" is defined as "[h]uman health or the environment has been exposed to pollutants which exceed levels that are protective of human health or environmental receptors as a result of the violation."

3 Pursuant to the Commission's Penalty Policy, programmatic violations include, for example, "a failure to submit reports, a failure to maintain records, or a failure to obtain a permit or other authorization." It continues: "In the context of the penalty matrix, programmatic major means that all or almost all (greater than 70%) of a rule or permit requirement is not met"

4 Because of the similarities between 30 TEX. ADMIN. CODE § 330.5 and other provisions of the Texas Administrative Code identified in the above chart, violations of such provisions may be counted as one violation instead of multiple violations. For example, a violation of 30 TEX. ADMIN. CODE § 330.5 is very similar to a violation of 30 TEX. ADMIN. CODE § 335.65. As such, instead of these being separate violations for penalty calculation purposes, they would probably be included as one violation. Thus, instead of a \$3,125 penalty for the violation of each provision, it would be a \$3,125 penalty for the violation of both provisions together. All of the provisions marked with a * * * in the chart above are very similar to 30 TEX. ADMIN. CODE § 330.5, and thus could be included with it for penalty calculation purposes instead of being calculated as separate violations. While they are shown as separate violations above, it should be noted that they can be grouped together for calculation purposes.

5 A violation of 30 TEX. ADMIN. CODE § 335.2 could be grouped with a violation of TEX. WATER CODE § 26.121 for purposes of the enforcement action. If that were done, the violations of each provision would count toward one violation for penalty calculation purposes. Pursuant to that calculation, the combined penalty for the violation of both provisions would be \$975,000, instead of \$975,000 for each provision.

6 A violation of 30 TEX. ADMIN. CODE § 335.69 could be grouped with a violation of TEX. WATER CODE § 26.121 and/or 30 TEX. ADMIN. CODE § 335.2 for purposes of the enforcement action. If that were done, the violations of each provision would count toward one violation for penalty calculation purposes. Pursuant to that calculation, the combined penalty for the violation of all three provisions would be \$975,000, instead of \$975,000 for each provision.

ZENITH/PENSKE STATUTORY/REGULATORY VIOLATIONS

Basis of Liability

1. Zenith owned the CRTs which spilled on IH-35 on October 9, 1997
 - a. Responsible Party
 - 30 TEX. ADMIN. CODE § 327.2(15)(C) definition
 - D008 hazardous waste self classification
 - Penske contract
 - MSDS
 - Reske testimony
 - Handling of similar prior incidents
 - b. Generator
 - 30 TEX. ADMIN. CODE § 335.1(58) definition
 - 41,000+ lbs of D008 created by spill
2. Penske transported the CRTs for Zenith
 - a. Responsible Party
 - 30 TEX. ADMIN. CODE § 327.2(15)(B) definition
 - October 13, 1997 TNRCC Spill Report
 - b. Generator
 - 30 TEX. ADMIN. CODE § 335.1(58) definition
 - 41,000+ lbs of D008 created by spill
 - Belated notification of emergency response personnel
 - Fax to Code 3
 - Penske correspondence to TDSL
 - Zenith correspondence to TDSL
 - Penske correspondence to TNRCC
 - TNRCC Spill Report

Statutory Violations

1. Texas Water Code
 - a. § 26.121 – Unauthorized discharge of D008 waste
 - b. § 26.266 – Refusal to remove D008 waste stored at TDSL
2. Texas Health and Safety Code
 - a. § 361.134 – Failure to pay hazardous waste generate fee

Regulatory Violations

1. 30 TEX. ADMIN. CODE § 327.3 – Required D008 notification not initially provided at spill location.
2. 30 TEX. ADMIN. CODE § 330.5 – Required actions not taken at spill location.
3. 30 TEX. ADMIN. CODE § 335.2 – D008 storage without a permit.
4. 30 TEX. ADMIN. CODE § 335.10 – Failure to follow D008 generator manifesting, shipping, and reporting procedures.
5. 30 TEX. ADMIN. CODE § 335.43 – Storage of D008 waste at TDSL without obtaining permit.
6. 30 TEX. ADMIN. CODE § 335.62 – Required hazardous waste classification (D008) not done at time of spill.
7. 30 TEX. ADMIN. CODE § 335.63 – Required EPA identification number not obtained at time of spill.
8. 30 TEX. ADMIN. CODE § 335.65 – Required hazardous waste packaging not done at time of spill.
9. 30 TEX. ADMIN. CODE § 335.66 – Required hazardous waste labeling not done at time of spill.
10. 30 TEX. ADMIN. CODE § 335.67 – Required hazardous waste marking not done at time of spill.
11. 30 TEX. ADMIN. CODE § 335.68 – Required hazardous waste placarding not done at time of spill.
12. 30 TEX. ADMIN. CODE § 335.69 – Hazardous waste accumulation time exceeded with storage at TDSL.
13. 30 TEX. ADMIN. CODE § 335.431/40 C.F.R. § 268.3 – Prohibited LDR dilution of D008.
14. 30 TEX. ADMIN. CODE § 335.504 – Required hazardous waste classification (D008) not done at time of spill.