

LOWERRE & FREDERICK

ATTORNEYS AT LAW
44 East Avenue, Suite 100
Austin, Texas 78701
(512)469-6000/482-9346 [facsimile]

BLACKBURN & CARTER

ATTORNEYS AT LAW
4709 Austin St
Houston, Texas 77004
(713)524-1012/524-5165 [facsimile]

November 14, 2005

Stephen L. Johnson
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington D C. 20460

By Certified Mail & Fax

and

Richard Greene
Regional Administrator, Region VI
Environmental Protection Agency
1445 Ross Ave.
Dallas, Texas 75202-2733

By Certified Mail & Fax

Re: Petition for Withdrawal of Program Approval for Texas RCRA Hazardous Waste Program

Dear Administrators Johnson and Greene:

Enclosed for filing is the petition of Texas Disposal Systems Landfill, Inc (TDSL) seeking action by the U.S. Environmental Protection Agency (EPA) to resolve a major ongoing conflict between the hazardous waste program of the State of Texas and federal law. If the State of Texas does not resolve the conflict and assure that the Texas hazardous waste program regulates the same universe of wastes as the federal program EPA must act to withdraw its authorization and to implement the federal hazardous waste program in Texas.

The Texas hazardous waste program no longer qualifies for EPA approval. While the language of the Texas and federal laws at issue is essentially the same, the Texas Commission on Environmental Quality (TCEQ) has interpreted its rules in a fashion that not only conflicts with the clear language of its rules, but also EPA's application of federal rules. In making its new interpretation, TCEQ has violated its Memorandum of Agreement with EPA and put itself in conflict with the Statement of the Texas Attorney General on the adequacy of Texas law.

TCEQ's interpretation of its rules would allow dilution of wastes that are classified as hazardous because they are toxic and management of the diluted wastes as non-hazardous wastes. Such dilution and management of "characteristically toxic" hazardous wastes as non-hazardous wastes is prohibited under federal law. Thus, the interpretation by TCEQ (and in particular the Executive Director of TCEQ) disqualifies the TCEQ hazardous waste program for federal authorization.

As is discussed in the attached petition, the interpretation is one made primarily by the Executive Director of TCEQ. It was initially rejected by the Commission but later allowed to stand by the Commission. As a result, the Executive Director has taken a series of steps that, when read together, make it clear the TCEQ is now applying the language in both Texas and federal rules in direct conflict with EPA's reading of EPA's rules. Unless this conflict is corrected, this invalid TCEQ approach to regulation of certain hazardous wastes could be adopted by other states, states which cannot afford for any other state to attract industry by creating a less strict environment for management of hazardous wastes. That is particular true, as in this case, for hazardous wastes from the electronic industry.

TDSL supports the Congressional goal of allowing states to implement all federal environmental programs. States, however, must have adequate laws that are consistent with the federal requirements, fair to competitors and protective of the public health and the environment. Consistency across the nation is critical for the federal program.

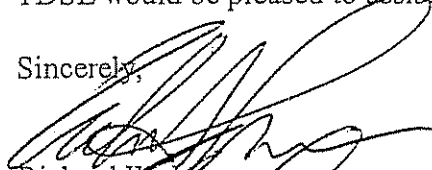
TDSL would prefer that TCEQ resolve the conflict in the Texas program. TDSL would prefer that TCEQ take the steps to assure that a consolidated state and federal hazardous waste program can continue to be administered by TCEQ. The significance of the conflict and the implications for future management of certain hazardous wastes in Texas, however, requires withdrawal of the Texas RCRA authorization if the State does not eliminate the conflict in a clear and timely fashion.

TDSL has made a significant effort to advise TCEQ of the conflict and to work with TCEQ to find ways to resolve the conflict. That effort has failed. Only with EPA's assistance will the matter now be properly resolved.

Thus, TDSL requests that EPA immediately notify Texas that it has 30 days to resolve the conflict. If TCEQ has not done so in 30 days, EPA should grant this petition and initiate formal action to withdraw the federal approval of the Texas RCRA program.

EPA can find the TCEQ documents associated with the underlying facts and the agency's actions on TDSL's website at www.texasdisposal.com/tceq_filings.htm. Should you need any additional information regarding these matters or wish to pursue any discussion of these matters, TDSL would be pleased to assist. Please contact Richard Lowerre for any such requests.

Sincerely,



Richard W. Lowerre



James B. Blackburn, Jr.

XC: The Honorable Alberto R. Gonzales, U.S. Attorney General
The Honorable Rick Perry, Governor of Texas

The Honorable Greg Abbott, Attorney General of Texas
The Honorable Kathleen Hartnett White, Chairman, TCEQ
Glenn Shankle, Executive Director, TCEQ
Bob Gregory, TDSL
Gary Newton, TDSL
Kinnan Golemon, Brown McCarrol, LLP, Counsel for TDSL
Kerry Russell, Russell, Moorman & Rodriguez, LLP, Counsel for TDSL
Doug Christian, Counsel for Penske
Pamela Giblin, Derek McDonald, William Johnson, Baker Botts, Counsel for Penske
Michael Duff, General Counsel, Penske
Philip Comella, Seyfarth Shaw, LLP, Counsel for Zenith Electronics Corporation

**PETITION
OF
TEXAS DISPOSAL SYSTEMS LANDFILL, INC.
TO
THE U.S. ENVIRONMENTAL PROTECTION AGENCY
FOR
WITHDRAWAL OF APPROVAL OF THE HAZARDOUS WASTE
PROGRAM OF THE STATE OF TEXAS**

Texas Disposal Systems Landfill, Inc. (TDSL) petitions the U.S. Environmental Protection Agency (EPA) to initiate formal proceedings regarding the failure of the hazardous waste program of the State of Texas, as administered by the Texas Commission on Environmental Quality (TCEQ), to comply with EPA's rules for state programs at 40 C.F.R. Part 271, and more particularly 40 C.F.R. §271.22.

Relief Requested: An order commencing proceedings for the withdrawal of approval of the Texas program should be issued pursuant to 42 U.S.C. § 6926(e) and 40 C.F.R. §271.23(b), if, after 30 days from the date of this petition, TCEQ has not 1) issued a revised statement from the Texas Attorney General, pursuant to EPA's rules at 40 C.F.R. §271.7 that clarifies that Texas law, as interpreted by TCEQ is as stringent as federal law for the regulation of waste classified as hazardous due to its toxic characteristics or 2) taken other equivalent action to eliminate the conflict between the Texas program and federal law.

By this petition, TDSL also notifies EPA that, if such relief does not result from this petition, in the time provided by federal law, TDSL intends to file an action in federal court to appeal EPA's action or non-action.

Federal Requirements: EPA has established a procedure and criteria for the withdrawal of a state program that no longer complies with the EPA's requirements for authorization pursuant to EPA rules at 40 C.F.R. Part 271. Section 271.22 provides:

(a) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this subpart, and the State fails to take corrective action. Such circumstances include the following:

- (1) When the State's legal authority no longer meets the requirements of this part...
- (2) When the operation of the State program fails to comply with the requirements of this part, including:
 - (i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits...
- (3) When the State's enforcement program fails to comply with the requirements of this part, including:
 - (i) Failure to act on violations of permits or other program requirements;
 - (ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed...
- (4) When the State program fails to comply with the terms of the Memorandum of Agreement required under Sec. 271.8.

Conflict in Texas Law: TCEQ has interpreted language in its rules, which is essentially the same as the language in EPA's rules, in a way that conflicts with both the clear language of the rules and EPA's interpretation of its rules. TCEQ has interpreted its rules to allow wastes classified as hazardous due to their toxic characteristics to be subsequently diluted or mixed and then reclassified as non-hazardous wastes. Such wastes could then be transported without a valid hazardous waste manifest and disposed of at facilities, such as municipal waste landfills, that are not authorized to manage hazardous wastes. No treatment would be required prior to disposal.

TCEQ has reached this decision through a series of actions involving TDSL's landfill in Texas. Despite the fact that the generators classified the waste at issue as a characteristically toxic hazardous waste when generated at the site of the accident, TCEQ has authorized the generators of the waste to test the mixture of that hazardous waste with municipal wastes and soils that came from TDSL's landfill and to reclassify the mixture of wastes as non-hazardous if

the mixture does not meet the regulatory concentration level for a characteristically hazardous waste. TCEQ has authorized these generators to pursue this alternative to the more expensive option of treating the waste to eliminate the toxic hazardous waste or disposing of the entire mixture as a hazardous waste. This cheaper alternative does not first require removal of the characteristically toxic hazardous waste before testing or disposal.

TCEQ's documents do not always make its position clear. TCEQ understands the potential impact of its action. TCEQ has tried to conceal the impact of its decision through a series of carefully worded documents. It may take a reading of several documents to understand TCEQ's position.

More recently, TCEQ has stated that it will not pursue its enforcement action against the generators of the hazardous waste, despite the clear requirements of state and federal rules and the eight year of regulatory neglect. As other correspondence indicates, TCEQ takes the position that the mixture which contains the hazardous waste can be tested to reclassify it as a non-hazardous, rather than requiring that the mixture be disposed of as a hazardous waste or treated to eliminate any hazardous wastes.

The federal rules and the conflict that the TCEQ interpretation of Texas rules creates is explained in Exhibit 1. That document was prepared by Marianne Horinko, who served as Assistant Administrator of the Office of Solid Waste and Emergency Response (OSWER) at EPA from 2001 to 2004, and who helped develop the language in the federal rules in question.

TCEQ's interpretation of Texas law means that:

- 1) the State's legal authority conflicts with the description provided to EPA in the statements of authority by the Texas Attorney General pursuant to 40 C.F.R. §271.7,

- 2) the State program conflicts with EPA requirements for the consistent management of certain hazardous waste across the country as it fails to comply with the requirements that an authorized state program control all hazardous wastes that are required to be regulated under 40 C.F. R. part 261 pursuant to 40 C.F. R. §271.9,
- (3) the State program does not provide for adequate enforcement of compliance with federal requirements 42 U.S.C. §6962(b), and
- (4) the State program fails to comply with the terms of the Memorandum of Agreement required under 40 C.F.R. §271.8 because TCEQ did not advise EPA of the change in State interpretation of its rules and TCEQ failed to carry out its implementation and enforcement commitments under the MOA.

Background: TCEQ has been authorized to implement and enforce the standards for hazardous waste management under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. §6926 and EPA rules¹ (jointly referred to as “RCRA”). To petitioner’s knowledge, until 2004, TCEQ interpreted Texas law, as it applies to characteristically toxic hazardous waste, in the same fashion as EPA.

On October 9, 1997, a highway accident that involved a shipment of cathode ray tubes owned by Zenith Electronics Corporation and carried by Penske Truck Leasing, resulted in the generation of large quantities of a hazardous waste, which Penske initially represented to emergency response personnel to be a non-hazardous waste. (See Exhibit 2 to this Petition.) Some of the hazardous waste was shipped as a non-hazardous waste to TDSL's landfill as a result of this misrepresentation. Later, Penske and Zenith changed the classification and identified the waste as a D008 hazardous waste. They then managed the balance of the waste, which was not commingled with municipal solid waste and soils at the TDSL landfill, under state and federal hazardous waste laws.

¹ The Texas hazardous waste program was originally authorized by EPA on December 12, 1984. (49 Fed. Reg. 48,300).

Neither Penske nor Zenith has, however, taken responsibility to manage the hazardous waste that Penske caused to be shipped to TDSL under the classification as a non-hazardous waste and that was then commingled with the municipal solid waste and soil. Instead, the companies have sought approval from TCEQ to retest the mixture of their hazardous waste with municipal solid waste and soils and then dispose of the mixture as non-hazardous waste. In an effort to accommodate the generators, TCEQ has interpreted Texas law in conflict with federal law.

Not only has TCEQ's interpretation of Texas law damaged TDSL, it has established a precedent for the improper dilution of hazardous wastes in Texas. That decision will allow the shipment of a hazardous waste, improperly labeled as non-hazardous waste, to non-hazardous waste management facilities, not only in Texas but also in any other state. TCEQ is shifting the burden of proper management of certain hazardous wastes from the generator to the innocent receiver of waste, when the wastes are improperly classified by the generator. TCEQ is also shifting the risks of illegal management to such an innocent recipient of such wastes.

A summary of the facts that has led to this situation is provided in Exhibit 3. In brief, TCEQ has made a series of decisions that has culminated in two actions by the agency's Executive Director. On September 24, 2004, the Executive Director issued a letter that provided Penske with several options for management of the hazardous waste that remains at the TDSL facility. One alternative would, in essence, allow Penske to manage the commingled waste as hazardous until Penske tests the mixture and determines that the mixture does not exhibit toxic characteristics. (Exhibit 4) A reading of the responses by Penske and further documents of the Executive Director makes it clear that TCEQ is not requiring separation of the hazardous waste

from the mixture or any other legal treatment of the wastes, but simply allowing testing of the diluted or commingled waste so that the entire mixture can be reclassified as non-hazardous waste.

On October 12, 2005, the Executive Director issued a new letter that made it clear that TCEQ will not, under its interpretation of Texas law, enforce the requirements in federal law for the management of the Penske/Zenith hazardous wastes. (Exhibit 5) The letter is the latest attempt to convince TDSL to allow this hazardous waste, which remains at TDSL's facility, to be managed in violation of federal law. In essence, the Executive Director of TCEQ is trying to force TDSL to cause or contribute to a clear violation of federal law.

Interests of TDSL: TDSL clearly has strong interests in the resolution of the conflict created by TCEQ's interpretation of state law. Unless EPA requires proper management of the hazardous waste by Penske or Zenith, TDSL will remain in an impossible position. It will be subject to the risk of future legal action by EPA or others for participating in a violation of federal law.

TDSL is a Texas Corporation duly formed and operating under the laws of the State of Texas. TDSL owns and operates a Type I municipal solid waste landfill facility in Travis County, Texas, for the management and disposal of municipal solid wastes pursuant to authorizations granted by TCEQ, including MSW Permit No. 2123.

TDSL qualifies to file this petition and will qualify to appeal any denial of its petition because it is the party that has suffered the greatest harm from TCEQ's actions, including TCEQ's failure to interpret Texas law consistent with federal law. TDSL operates the landfill in Travis County to which the hazardous waste was improperly shipped by Penske/Zenith. TCEQ

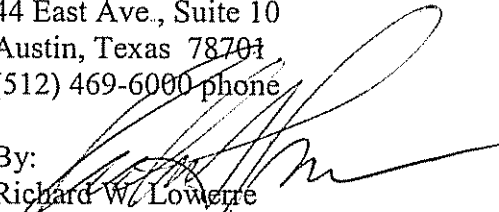
has authorized the hazardous waste to remain at TDSL, pending removal by Penske or Zenith for proper management as a hazardous waste. TDSL has now been required to safeguard the hazardous waste for 8 years.

Conclusion: Texas Disposal Systems Landfill, Inc. requests that, unless within 30 days from the date of this petition TCEQ has provided a new statement from the Texas Attorney General or other appropriate verification that Texas law, as interpreted by TCEQ, is equivalent to federal law, EPA act as follows:

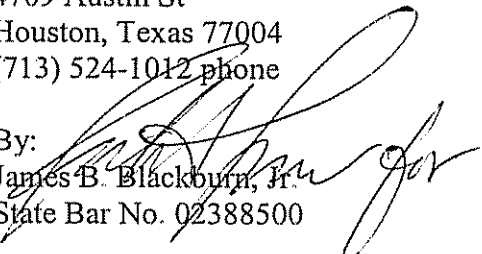
- 1) grant this petition, and
- 2) initiate formal proceedings to withdraw authorization of the Texas hazardous waste program pursuant to 40 C.F.R. § 271.23.

Respectfully submitted,

Lowerre & Frederick
Attorneys at Law
44 East Ave., Suite 10
Austin, Texas 78701
(512) 469-6000 phone

By: 
Richard W. Lowerre
State Bar No. 12632900

BLACKBURN & CARTER
Attorneys at Law
4709 Austin St
Houston, Texas 77004
(713) 524-1012 phone

By: 
James B. Blackburn, Jr.
State Bar No. 02388500

Attorneys for Petitioner