

# State may decide fate of lead-tainted garbage

## Environmental commissioners take up case of smashed TV tubes accidentally sent to Creedmoor landfill

By Kevin Carmody  
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State environmental commissioners could decide today whether tons of garbage mixed with lead waste can remain at a Creedmoor municipal landfill, as their staff has recommended, in a case that has lingered since 1997 and attracted attention from state legislators, federal regulators and national business groups.

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The lead-tainted garbage, which was dug up this spring, now sits in 99 large containers at the Texas Disposal Systems landfill, and the Texas Commission on Environmental Quality staff has ruled that it is now nonhazardous and could be reburied there or at another conventional landfill.

At issue is whether debris originally designated as hazardous waste loses that designation if it is diluted after being mixed with nonhazardous garbage. The hearing begins at 1:30 p.m. in the commission's Austin headquarters, 12100 Park 35 Circle.

Penske Truck Leasing Inc. officials acknowledged in letters or government documents that the lead waste was hazardous after one of the company's 18-wheelers, carrying lead-laden television tubes, wrecked on Interstate 35 in 1997.

Now, Penske says, the waste is no longer hazardous, and may not have been to begin with, so the company bears no responsibility to send the lead-tainted garbage for treatment or disposal at a landfill licensed to accept hazardous waste.

Glenn Shankle, executive director of the environmental commission, has sided with Penske. Texas Disposal owner Bob Gregory has appealed Shankle's decision to the commissioners.

Gregory's lawyers argue that, under federal waste laws, a toxic waste classified as hazardous remains that way forever unless it's detoxified by treatment; Gregory says he wants the waste removed and disposed of in a legal way that would not leave him liable if it contaminates ground- water.

State Sen. Jeff Wentworth, R-San Antonio, who represents the district that includes the landfill, sides with Gregory.

"If this decision is allowed to stand, a dangerous precedent has been set," Wentworth wrote to the commissioners this month, echoing letters from 11 other legislators, including those who chair the Senate and House environmental committees.

Shankle and his assistants, after deciding in May that Penske violated federal and state law by allowing the broken TV tubes to be sent to the Texas Disposal landfill, have since reversed course, in part. During testimony at a legislative hearing Sept. 8, Deputy Director John Steib indicated it was unlikely that Penske would be fined.

Penske's lawyers will argue today that, even if the lead debris was technically hazardous waste when brought to the landfill -- Penske had some of the lead removed and sent to a hazardous waste landfill in 1998 -- the remainder became nonhazardous when it was mixed with thousands of tons of regular garbage.

"The results of the independent sampling recently conducted by the Executive Director confirm that this waste . . . is approximately 99 percent routine municipal solid waste," Pam Giblin of the Baker Botts law firm in Austin argued in the latest brief she filed for Penske. "Penske has cooperated fully with the commission. . . . In contrast, (Texas Disposal) has demonstrated rebellion and disrespect toward the TCEQ, ultimately suing to challenge the agency's actions."

The three commissioners could decide to vote today, delay action or opt not to vote on the issue, commission spokesman Andy Saenz said.

One of the seemingly few facts not in dispute is that, although the several hundred pounds of lead stayed in the landfill until this spring, it was highly unlikely in its diluted form to pose an environmental or health threat. Gregory acknowledged under cross-examination by Penske lawyers that, based on his decision to cover the lead waste with water-proof clay, and the design of his landfill, the lead was unlikely to leak out.

That admission, in a deposition for a related civil lawsuit, provided Shankle with additional justification for his decision to allow permanent disposal at Texas Disposal or most other landfills, argues William P. Johnson, another Baker Botts lawyer handling the case.

No so, counters Marianne Lamont Horinko, who was the acting administrator for the U.S. Environmental Protection Agency for five months last year and, as an assistant EPA administrator or a staff lawyer in both Bush administrations, spent five years overseeing enforcement of waste management laws.

Allowing a company to avoid paying for proper hazardous waste disposal, based on even the accidental mixing of lead with garbage, is a clear violation of federal hazardous waste regulations and the intent of Congress, which legally barred dilution for toxic metals such as lead because metals can accumulate in people and animals, Horinko said.

Congress also acted out of concern that allowing dilution of such wastes "would remove the incentive for generators to treat their wastes responsibly," Horinko wrote in a report to the commission for today's hearing.

Johnson, the lawyer for Penske, dismisses the significance of Horinko's report: "Now she's (just) a consultant working for Texas Disposal."

kcarmody@statesman.com; 912-2569