

## TDSL/TCEQ/PENSKE/ZENITH BACKGROUND INFORMATION

The events underlying this situation are largely undisputed. On October 9, 1997, a Penske 18-wheeler carrying about 1,248 Zenith color cathode ray tubes (“CRTs”) crashed on IH-35 near Buda, Texas, spilling its contents on the highway and the median ditch.<sup>1</sup> The truckload of Zenith CRTs was being transported from a Zenith plant near Chicago to a Zenith maquiladora television assembly facility in Mexico. Penske was transporting the CRTs under a Transportation Agreement<sup>2</sup> with Zenith that required Penske to treat any broken CRTs as D008 hazardous waste because under the federal Resource Conservation and Recovery Act (“RCRA”),<sup>3</sup> when damaged and discarded, they exhibit the toxicity characteristic due to high lead count.

After the accident, Penske’s driver initially misinformed the on-scene emergency responders that the damaged CRTs were not hazardous. Because Penske’s driver failed to timely notify anyone about the hazardous waste status of the CRTs, thousands of pounds of the toxic debris were sent to TDSL’s nearby non-hazardous municipal solid waste (“MSW”) landfill, which is not authorized to accept regulated quantities of hazardous waste. After receiving a written representation from the emergency response hauler verifying that the waste was not hazardous, TDSL accepted seven truckloads of accident debris containing the hazardous CRT waste (approximately 98 cubic yards). When TDSL was informed hours later that the CRT waste was, in fact, regulated hazardous waste, it refused to accept any more accident debris and immediately isolated the area of the landfill, which had received the commingled D008 hazardous CRT waste and MSW and removed the CRT accident debris and glass soiled MSW from the surface of the landfill working face. Notably, Penske properly managed the remainder of the accident debris not buried below the surface of the landfill working face (containing 80% of the broken CRTs) as D008 toxic characteristic hazardous waste and identified itself as the “generator” of the hazardous waste under RCRA.

There is no real dispute that the volume of lead-containing CRT debris generated as a result of the accident was D008 toxic characteristic hazardous waste under the applicable environmental regulations.<sup>4</sup> Federal and state law prohibits managing this type of toxic-

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<sup>1</sup> The city of Buda is in Hays County, approximately 10 miles south of downtown Austin and about 60 miles north of San Antonio.

<sup>2</sup> The Penske/Zenith Transportation Agreement states, in relevant part: “CRTs are not Hazardous Materials unless damaged” (emphasis added). Furthermore, the applicable Material Safety Data Sheet for the CRTs specifically identified damaged CRTs as D008 toxic-characteristic hazardous waste.

<sup>3</sup> 42 U.S.C. §§ 6901-6992. The United States Environmental Protection Agency (“EPA”) has authorized the Texas Commission on Environmental Quality (“TCEQ”) to enforce RCRA in Texas. EPA retains enforcement authority, however, to the extent that the TCEQ does not properly administer RCRA in specific situations. A primary purpose of RCRA is to ensure that listed and characteristic hazardous waste is not land disposed without proper treatment. See RCRA § 3004(d)(1), 42 U.S.C. § 6924(d)(1).

<sup>4</sup> A June 2002 proposed EPA rulemaking in which the agency summarizes how federal environmental laws in place at the time of the accident applied to CRT waste is instructive. In it, the EPA makes clear that CRT waste of the volume involved in the Penske/Zenith accident (*i.e.*, more than 220 lbs. for Conditionally Exempt Small Quantity Generators and 2,200 lbs. for small generators) is “subject to all the applicable hazardous waste regulations for generators under RCRA . . . including packaging and labeling . . . use of the hazardous-waste manifest, and recordkeeping and reporting.” Electronics manufacturers like Zenith are generally familiar with these rules and their

characteristic hazardous waste as non-hazardous waste, even if it has been diluted after the point of waste generation (the accident scene) by mixing it with regular MSW and clay soils such that the resulting commingled waste has a concentration of lead below the hazardous threshold. Thus, state and federal law requires that the D008 hazardous CRT waste generated in the Penske accident must be properly treated and disposed of at an authorized hazardous waste facility, regardless of subsequent dilution.

Because accepting regulated quantities of hazardous waste in violation of its permit and aiding and abetting the illegal disposal of hazardous waste at a non-hazardous waste facility is against the law,<sup>5</sup> TDSL demanded that Penske and Zenith acknowledge their “generator” responsibility under RCRA, remove the D008 CRT Waste under a proper hazardous waste manifest, and ship it to an approved hazardous-waste treatment and disposal facility for proper treatment and disposal. Neither of the generators have taken such action with respect to the D008 CRT Waste, MSW and cover soils (Commingled D008 Waste) that presently remains in storage at TDSL.

Over the course of approximately the last 9.7 years, one or both of the generators, Zenith and/or Penske, have insisted that TDSL is solely responsible for the Commingled D008 Waste because TDSL accepted the accident debris in violation of its landfill permit. They also have argued that since the D008 CRT Waste has been commingled with non-hazardous MSW, it no longer exhibits a hazardous characteristic and need not be treated as “hazardous” under the applicable environmental regulations.<sup>6</sup> Today, the Commingled D008 Waste comprises about 1,600 tons of material and remains stored on TDSL’s premises in 99 roll-off containers.<sup>7</sup> The efforts TDSL has undertaken to work around the Commingled D008 Waste while it remained in its landfill and then to safely contain and store it during the past 9 plus years have been extensive, disruptive to normal operations, and would have been unnecessary had either the CRT owner (LG Electronics/Zenith) or the transporter (Penske) complied with established and accepted socially responsible standards and the law.

Unfortunately, although the TCEQ started an investigation one month after the accident (November 5, 1997), the agency did not show any sign of resolving these fundamental regulatory issues until May 2004. At that time, TCEQ issued, for the first time, a Notice of Violation against Penske in which the TCEQ stated that “Penske failed to determine if a generated waste was a hazardous waste,” and “caused, suffered, allowed, or permitted [hazardous] waste to be disposed of at an unauthorized facility.” The TCEQ also found that TDSL had engaged in no misconduct under the applicable regulations. The following month, at the generators' urging, the TCEQ Executive Director (“ED”) accepted a proposal from Penske to dispose of the Commingled D008 Waste as non-hazardous “special waste,” rather than as hazardous waste.

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application to CRTs as a result of the exponential proliferation of television and computer video monitors and the growing need to dispose of them when damaged, broken or replaced by newer models.

<sup>5</sup> The U.S. Third Court of Appeals upheld criminal liability for aiding and abetting illegal disposal of hazardous waste under similar circumstances. See *United States v. Wasserson*, 418 F.3d 225 (3rd Cir. 2005).

<sup>6</sup> Both of these positions hinge on regulatory determinations not yet made by the TCEQ or EPA.

<sup>7</sup> The TCEQ authorized this type of secure storage on January 15, 2004 pending final treatment and disposal of the D008 hazardous CRT waste.

TDSL appealed this decision of the ED to the TCEQ Commissioners. On September 16, 2004, the TCEQ determined in *dicta* that (1) Penske was the “generator” of the D008 CRT Waste; (2) the D008 CRT Waste had to be treated and disposed of as D008 toxic-characteristic hazardous waste; and (3) proper disposal could be accomplished either by disposing of the entire mass of Commingled D008 Waste, or by physically segregating the D008 CRT Waste from the non-hazardous MSW and cover soils. The TCEQ rejected Penske’s invitation to find that TDSL was somehow at fault for allowing the CRT debris into its landfill.

After the TCEQ’s September 16, 2004 ruling granting TDSL’s Motions to Overturn, however, the ED issued another letter that authorized Penske to remove the 99 containers of Commingled D008 Waste as “hazardous waste,” but giving Penske the option of testing the debris mixture in each container to determine whether each load continued to exceed the hazardous threshold for lead. TDSL objected to the ED’s authorization because the D008 CRT Waste had been significantly diluted with MSW and clay cover soils and, therefore, could not legally be recharacterized as non-hazardous waste years after the D008 CRT Waste was generated at the accident scene. TDSL was particularly concerned because Penske reported that it intended to dispose of the Commingled D008 Waste as non-hazardous waste if selected samples from the mass of the significantly diluted Commingled D008 Waste did not test hazardous for lead. The ED’s authorization violates both state and federal law prohibiting dilution of toxic-characteristic hazardous waste in lieu of proper treatment and disposal, and TDSL refused to be a party to such a violation of law. TDSL appealed the ED’s latest authorization to the three TCEQ Commissioners. Chairman Kathleen Hartnett White did not receive a second to her motion to more specifically direct the ED and to approve TDSL’s motion to overturn a portion of the ED’s September 24, 2004 authorization, and TDSL’s appeal was overruled by operation of law.

TDSL appealed the ED’s authorization to the Travis County District Court, and in November 2005, following the ED’s declaration that no further enforcement action would be taken against the generators until court actions were concluded, TDSL formally petitioned EPA to withdraw the Texas RCRA hazardous waste program delegation for the TCEQ’s failure to enforce the applicable law. On May 16, 2006 EPA issued its Determination rejecting TDSL’s petition and, in doing so, established precedent not authorized by state or federal regulations. TDSL is joined by environmental groups in filing suit in three Federal Courts against EPA to overturn its Determination, which creates an inadvertent dilution exemption to hazardous waste management regulations. The ED has indicated he is awaiting a state district court to determine the facts necessary for the TCEQ to complete its enforcement action. The ED knows that a civil trial to determine damages is best served by a determination of fault from a regulatory agency. The lawyers and lobbyists for Penske and LG Electronics/Zenith have successfully worked to stop the normal enforcement process, so that a determination of fault and liability cannot be used against their clients in a civil trial for damages. They know that a judge and jury without RCRA experience will be incapable of understanding and applying this complicated environmental set of laws, which was not even allowed to be discussed in the first trial, ending in a mistrial. They prefer to ignore these laws and, instead, ask a jury to agree with them that TDSL could have just looked the other way and allowed them to leave their large quantity of hazardous waste in the TDSL landfill.