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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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CHIEF CLERKS OFFICE

TCEQ DOCKET NO. 2007-1019-IHW

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S (TDSL) PETITION TO REVIEW THE EXECUTIVE DIRECTOR'S ACTION AND ORDER PROPER DISPOSAL OF HAZARDOUS WASTE	§ § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

RESPONSE OF PENSKE TRUCK LEASING CO., L.P. AND PENSKE LOGISTICS, INC. TO TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S PETITION TO REVIEW THE EXECUTIVE DIRECTOR'S ACTION AND ORDER PROPER DISPOSAL OF HAZARDOUS WASTE

"First and foremost, do you think it's appropriate for the Texas Legislature to inject itself into an 8 year ongoing legal battle? * Last session, we told them that if they wanted to try these tactics, to file a bill that says this and we let it move through process. Yet, again, they've not done that. And I'd ask you to not allow this to happen."**

Rep. Dennis Bonnen, Chairman, House Committee on Environmental Regulation

"The issue should stop at this question: Does this bill affect a pending lawsuit? Is the purpose of this amendment to affect a pending lawsuit? The answer is yes. That should be the end of the discussion. We are not up here to try to pick sides in litigation and try to sway the outcome one way or another. * [W]hat I take a positive stand on, we don't impact pending litigation with legislation."**

Rep. Craig Eiland

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"There being 51 "ayes," 84 "nays," [TDSL's] motion to concur fails."

I. INTRODUCTION

The Texas Legislature — for the second session in a row — flatly rejected TDSL's efforts to retroactively change the law to help TDSL in its lawsuit against Penske[1] that has been pending for ten years in Hays County District Court. On the heels of its deserved

defeats in the Legislature and in a desperate attempt to manufacture a "victory" that it can use during the upcoming trial of that lawsuit, TDSL again asks the Commission to review the Executive Director's September 24, 2004 decision regarding disposal of the material stockpiled at TDSL. Without citing any authority — other than a footnote reference to "plenary power" — TDSL asks the Commission to revisit its prior determinations, which are currently on appeal at both the state and federal level, and therefore beyond the jurisdiction of the Commission to properly reconsider.

Amazingly, TDSL asks the Commission to undertake this impermissible second look at its prior determinations — without the benefit of a factual record or contested case hearing — and now rule as a matter of fact and law that Penske was the generator of waste and that the waste in question is a hazardous waste. Two things are obvious, but TDSL has admitted only one. What TDSL will admit, and what each and every test result establishes, is that the material TDSL has strategically kept hostage for almost ten years presents no environmental risk whatsoever at TDSL's facility.[2] What TDSL will not admit, but what its words and actions over the years clearly establish, is that what drives every misrepresentation (including the many in its Petition), every claim to protect the environment of Texas, every specious demand for enforcement and multi-million dollar fines, and every failed attempt in the Legislature, this Commission, the press and elsewhere, is the desire to advance its Hays County lawsuit outside of the courtroom.

Over TDSL's repeated objections, the Hays County lawsuit has finally been set for trial, in October 2007, and the trial judge has strongly indicated that TDSL will not get

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1 "Penske" refers to Penske Truck Leasing Co., L.P. and Penske Logistics, Inc.

2 Q. You are convinced, are you not, that these tubes present no environmental threat?
A. I am convinced that our facility can handle these tubes -- the presence of these tubes long-term.

(continued...)

another continuance. It appears therefore that this long ordeal will soon be resolved. But TDSL wants this Commission to trump the judicial process (both the lawsuit TDSL filed in Hays County and the appeals from the TCEQ actions TDSL filed in Travis County) by bypassing TCEQ procedures and handing TDSL a quick "victory" based on TDSL's perception of this Commission's "plenary powers." But just as the Legislature properly declined to affect the outcome of pending litigation, so too should this Commission in the reasoned and impartial exercise of its powers. Let us fairly try the case in October and get this over with.

It is difficult to know where to begin in responding to TDSL's Petition: the impropriety of TDSL's belated and unprecedented request that this Commission ignore due course[3] or process and decide these important matters at Agenda without the benefit of a complete record; the unsupported, unsupportable, and contradictory assertions of the Petition; the fact that TDSL admits that these very issues are already on appeal from this Agency; and TDSL's never-ending (and unsuccessful) efforts to have yet another arm of the Texas or federal government weigh in for the sole purpose of supporting TDSL's wild damage theories in the Hays County tort action it constantly delays. Instead, Penske has consistently offered a solution. It is a solution that will completely resolve all issues before the TCEQ, will allow the parties to try their tort case in October, and will finally put this matter to rest.

To set the context, the Executive Director issued a Notice of Violation ("NOV") to Penske in 2004, after which Penske attempted to remove the material for testing and proper disposal. Importantly, a NOV is not a finding of the TCEQ; it is an allegation and not a final determination that a violation occurred. Such final determinations are made by the Commissioners only after a full and fair hearing of the legal and factual issues in a contested

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Bob Gregory 12/10/03 Deposition, Exhibit A, at 38-9.

case proceeding. The NOV at issue here, like others issued by TCEQ, identifies "Alleged Violations" and offers "Recommended Corrective Action" for resolving them. The regulated community commonly resolves NOVs by taking the recommended corrective action, but this is neither proof nor admission of a violation. This is important to keep in mind because TDSL is asking the Commission to enter factual and legal findings against Penske based on a disputed NOV, without a factual record and in violation of Penske's rights to defend itself.

Penske did not believe that the NOV was appropriate based on the facts and law,[4] but it responsibly chose to attempt to comply with the recommended action in a good faith desire to resolve this long-standing dispute. After many such attempts and many refusals by TDSL to allow Penske to manage the material, the Executive Director finally and appropriately stated that "Penske has made appropriate attempts to address the NOV" and that he did "not plan to take further action on the NOV pending the resolution of this matter in court proceedings."[5]

Instead of pursuing its court actions or allowing the material to be removed for disposal, TDSL took the draconian step of seeking to have the United States Environmental Protection Agency ("EPA") withdraw this Commission's ability to manage hazardous waste in Texas.[6] As expected, TDSL lost that one, as it most certainly should have. In a dispositive ruling that was so bad for TDSL that it wholly failed to mention it in its current Petition, the EPA issued an opinion on May 16, 2006, squarely answering in Penske's favor the following legal question:

> Whether a RCRA characteristic hazardous waste mixed with non-hazardous material is still hazardous waste under RCRA and must

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3 Tex. Const. art 1, § 19.

4 A detailed and fully-supported chronology of the facts is attached as Exhibit B.

5 October 12, 2005 letter from Glenn Shankle to Pamela Giblin, counsel for Penske. Exhibit C.

6 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 ("Petition to Withdraw Authorization") and cover letter, Exhibit D.

> be treated and disposed of pursuant to RCRA land disposal restrictions even through the resulting mixture test below RCRA characteristic hazardous and land disposal restriction levels.[7]

TDSL argued that the resulting mixture of purported hazardous cathode ray tube waste ("CRT") and non-hazardous municipal solid waste ("MSW") was legally hazardous waste despite the fact that the mixed CRT/MSW did not exhibit a hazardous characteristic after proper testing.[8]

The EPA emphatically stated that TDSL's "interpretation of the law is incorrect."[9] The EPA held that if the mixed CRT/MSW waste stockpiled at TDSL "does not exhibit any characteristics of hazardous waste, then the waste would not be hazardous waste under RCRA."[10] The EPA concluded that "this is the interpretation followed by TCEQ" and that the "TCEQ has interpreted state law consistently with Federal law."[11]

The EPA's decision completely validated the Executive Director's September 24, 2004 decision, which allowed a testing option to determine whether the material is hazardous, and the Commission's December 1, 2004 decision, which refused to require the type of sorting TDSL claims is necessary. After reviewing a mountain of material supplied by TDSL,[12] the EPA agreed with the TCEQ and Penske that the waste at TDSL's facility is only hazardous if it tests hazardous. Both the Commission's and the Executive Director's decisions allowing Penske

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7 Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program ("EPA Determination"), Exhibit E, at p. 5. It is curious that while TDSL touts the fact that one of its experts worked for the EPA years ago, Petition at 7, it refuses to say anything at all about the recent dispositive ruling on these precise issues made by the very agency from which TDSL sought the ruling, the EPA. That is, unfortunately, the way TDSL operates. Another example will be provided below when discussing TDSL's legislative efforts that resulted in a floor vote of the Texas House of Representatives flatly rejecting (after heated criticism of TDSL's tactics from many representatives) yet another piece of legislation proposed by TDSL specifically designed to affect the outcome of the Hays County litigation. The DVD of that proceeding, attached as Exhibit E, is well worth viewing. Just as the vast majority of Legislators decided that they should not be affecting TDSL's legal case, this Agency should so decide. And make no mistake about it; that is what all of this is about.

8 *Id.* at p. 6.

9 *Id.* at p. 7.

10 *Id.*

11 *Id.*

to test and dispose of the waste in accordance with the test results are completely consistent with federal law as confirmed by the EPA.[13]

The EPA Determination can only be described as full vindication of the Executive Director's position that any CRT debris that was left in the landfill and that was inadvertently mixed with the trash that comprises the 1660 cubic yards that TDSL dug up and put in roll off boxes cannot be hazardous waste. All of the numerous tests performed on the waste prove that this material is not hazardous.[14]

Notwithstanding the provable fact that the material is not hazardous, Penske has always been ready to remove and dispose of the waste stockpiled at TDSL in accordance with the Executive Director's September 24, 2004 recommended corrective action. Specifically, Penske will remove the waste, transport the waste to a permitted facility, test the waste (again) in accordance with EPA protocol, and dispose of it in accordance with the test results. Penske will pay for the removal, transportation, testing, and disposal and will indemnify TDSL from any alleged Superfund/CERCLA liability related to the waste. Penske first made this offer to TDSL in 2004 and it has stood by it since that date.

How can TDSL justify blocking this approach? It cannot. TDSL, however, has and will continue to reject Penske's offer. While TDSL has and will manufacture excuses and a parade of horribles that will allegedly befall it if it agrees to release the waste, its true motivation is to create new "evidence" that it can use to help it during its October 2007 trial. Rather than resolve the matter, TDSL chooses to file more lawsuits, more appeals, more legislation, and

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12 *See* Petition (9 exhibits attached), Exhibit D; December 16, 2005 letter from TDSL counsel to EPA (10 attachments); December 17 letter from TDSL to EPA (more than two dozen attachments).

13 TDSL disagrees with both the TCEQ and the EPA and has filed three separate appeals of the EPA's decision to the Western District of Texas, the Fifth Circuit, and the Federal Circuit.

14 The testing is discussed in the Fact Chronology attached hereto at pages 12-14.

more TCEQ "petitions" designated to try to influence its weak litigation position. Basically, TDSL is holding the waste hostage so that it can increase its chances of winning its tort action. It's all about the lawsuit.

For the reasons set forth below, the Commission must not condone TDSL's games and TDSL's petition should be strongly rejected.

II. FACTS

Before further discussing the reasons this Commission should not entertain TDSL's Petition, Penske offers this general observation regarding TDSL's approach to the facts of this matter: TDSL suggests that the "record" it has presented in the Petition is sufficient for this Commission to determine at oral argument that the broad relief requested by TDSL must be immediately granted, even though there is no evidentiary record in this matter and TDSL provides no competent support for its factual allegations and it in many instances offers characterizations that differ completely from the facts. In this section, Penske describes: (1) the facts of this case; (2) recent developments, including TDSL's unsuccessful efforts at the Legislature; and (3) examples of the many misrepresentations in TDSL's Petition.

A. Chronology of Events

Exhibit B is a fully-supported fact chronology. The documents evidencing the statements in the chronology are set forth in a separate volume entitled "Penske Chronology Support." This chronology was prepared and submitted to the Commission in September of 2004.

B. Recent Developments

Since the April 2004 mistrial of the Hays County lawsuit,[15] TDSL has shown little interest in going back in front of a jury without first getting some post-incident help to try to prove its claim that anyone other than TDSL was responsible for accepting this material at its landfill.

(1) TCEQ Proceedings

Penske did not and does not agree that the NOV was appropriate and was and is fully prepared to contest any enforcement action, but Penske nevertheless worked with the TCEQ in an effort to deal appropriately with the material. Penske agreed to work with the TCEQ notwithstanding the fact that it was TDSL that was required to determine whether it could properly dispose of material brought to its landfill and that it approved for disposal material it knew it could not accept without proper documentation.[16]

Initially, the Executive Director allowed the material to be disposed of as special waste. By Order dated September 16, 2004, the Commission by a 2-1 vote overturned that decision and remanded the matter to the Executive Director. Thereafter, on September 24, 2004, the Executive Director provided Penske with the option of disposing of the material as hazardous waste or further testing to determine the extent to which the material is hazardous pursuant to the Commissioners' September 16, 2004 deliberations.[17] Although Penske immediately took steps to comply, once again TDSL blocked these efforts, filing a motion to overturn the Executive

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15 The mistrial was declared after a newspaper article that TDSL prompted was published that TDSL seeks to initiate, during a trial that was not going well for TDSL. Several jury members were aware of the article. The article commented on the facts and theories the judge kept out of evidence, including issues of who the generator was and those involving environmental regulations. TDSL has unsuccessfully tried for years to inject those enforcement issues into the Hays County lawsuit, and it is clearly still trying.

16 *See*, e.g., Exhibit F. Of course, the issue of the extent to which TDSL caused any of the damages it might be able to prove is an issue for the jury after a full and proper presentation of the evidence.

17 September 24, 2004 letter from Glenn Shankle to Marc E. Althen of Penske, Exhibit G.

Director's second decision, arguing that it was necessary to sift through the 1660 cubic yards to extract television tube glass.[18] TDSL also appealed the Executive Director's second decision to the District Court in Travis County an appeal this Commission has urged is not appropriate.[19] On December 1, 2004, this Commission refused to overturn its Executive Director. Claiming that this was a matter of utmost and immediate importance, TDSL again filed an appeal from the Commissioners' December 1, 2004 action to the District Court in Travis County on December 29, 2004. TDSL has not pushed those and the other appeals it filed to resolution in the several years they have been pending.[20]

After a great deal of this Commission's time and expense was spent on this private dispute, after many motions to overturn and numerous Travis County appeals, and after continued recalcitrance on TDSL's part, the Executive Director properly determined that Penske had done all it was expected to do in order to attempt to deal with the NOV. That decision was made in October 2005. It took TDSL twenty months to ask now that that decision be reviewed. And that was only after its EPA and Legislative strategies, discussed below, failed.

The timing of the current Petition for review of the Executive Director's October 2005 determination is certainly suspect. The trial court was ready to hear TDSL's case this month as TDSL had previously agreed. TDSL again sought to delay the trial and just three days after obtaining that continuance this Petition was filed!

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18 TDSL never did explain how Penske was to differentiate debris from this accident from any of the television debris TDSL admits it took on a daily basis from different sources.

19 Inconsistent with its current position that this Commission should rush to judgment on these issues at Agenda, TDSL has stated in each of its many appeals from this Commission's actions that it may need to seek discovery of facts necessary to the resolution of the appeals.

20 TDSL filed an improper Amended Petition in its appeal seeking declaratory relief on the issues it now asks this Commission to deal with at Agenda, and it filed a motion for summary judgment in March of 2006, but it never pursued it or any discovery on these appeals.

(2) TDSL's Failed EPA Strategy

TDSL's unsuccessful and embarrassing EPA strategy was and remains another serious and very expensive distraction for public servants and taxpayers, who find themselves dealing with and funding repeated responses to TDSL's groundless public pleas in further areas of its private claims. Once it heard that this Commission agreed with Penske that scientific testing was appropriate to determine whether a volume of material is actually hazardous, TDSL wasn't content just to appeal that to the District Court in Travis County. Amazingly, on November 14, 2005, TDSL stated in yet another frivolous filing as follows:

> The Texas hazardous waste program no longer qualifies for EPA approval.[21]

In that one sentence, TDSL debased this private matter to unprecedented depths. Because TDSL did not get its way, it demanded that the EPA withdraw the federal approval of the Texas RCRA program, stating:

> 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.[22]

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21 November 14, 2005 letter from TDSL to EPA, Exhibit D.

22 *Id.*

In its Petition to Withdraw Authorization, TDSL complained about TCEQ's reluctance to pursue enforcement against Penske because "TCEQ takes the position that the mixture which contains the hazardous waste can be tested to reclassify it as non-hazardous, rather than requiring that the mixture be disposed of as a hazardous waste or treated to eliminate any hazardous wastes."[23] In response, both the TCEQ and Penske disagreed with TDSL's spurious assertions.[24]

In its May 16, 2006 response, the EPA solidly agreed with the TCEQ and Penske that Texas is correctly managing the hazardous waste program. After analyzing TDSL's arguments, it unequivocally concluded:

> The Petitioner's interpretation of the law is incorrect. The federal interpretation of RCRA is that if a characteristic hazardous waste is mixed with non-hazardous solid waste, and that resulting mixture (other than wastes not at issue here such as benefication wastes) does not exhibit any characteristics of hazardous waste, then the resulting mixture is no longer characteristic hazardous waste. EPA did not intend the mixture rule to apply to characteristic hazardous wastes. This is evident in the plain language of the RCRA regulation covering the definition of solid and hazardous waste that states:
>
> (d) Any solid waste . . . is not a hazardous waste if it meets the following criteria:
> (1) In the case of any solid waste, it does not exhibit any of the characteristics of hazardous waste identified in subpart C of this part. . . .
>
> 40 C.F.R. § 261.3(d)(1).
>
> Contrary to Petitioner's claim, the "mixture rule" in 40 C.F.R. § 261.3(a)(2) does not apply to the mixture of wastes here. In 2001 EPA reaffirmed its regulatory definition of a listed "hazardous waste" to include, subject to certain exceptions, "a mixture of solid waste and one or more hazardous wastes **listed** in Subpart D of this part . . . ." 40 C.F.R. § 261.3(a)(2)(iv) (emphasis added); *see* 66 Fed. Reg. 27,266. This rule was ultimately upheld in *American Chemical Counsel v. EPA*, 337 F.3d 1060 (D.C. Cir.

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23 Petition to Withdraw Authorization, Exhibit D, at 3.

24 Not surprisingly, TDSL used this filing in support of yet another attempted delay of the Hays County lawsuit.

> 2003) (discussing EPA's policy behind why the mixture rule does not apply to characteristic hazardous waste). Thus, even if the solid waste and CRTs were a characteristic hazardous waste when added to the landfill, the exhumed waste, which presumably was a mixture of solid waste, CRTs, and landfill waste and cover, would not automatically be characteristic hazardous waste. If the exhumed waste at TDSL does not exhibit any characteristics of hazardous waste, then the waste would not be hazardous waste under RCRA.
>
> This is the interpretation followed by TCEQ for the exhumed waste. Since TCEQ has interpreted state law consistently with Federal law and TCEQ is properly exercising control over the operation of the program, EPA does not find-on the basis of the mixture rule-that cause exists to commence a proceeding for withdrawal of Texas' RCRA program.[25]

In TDSL's current Petition, it asks this Commission to require the Executive Director to take enforcement action against Penske. But in response to the Petition to Withdraw Authorization, this Commission agreed with Penske that such action on these facts and law is not required.[26] In the EPA Determination, the EPA confirmed its agreement:

> Petitioner argues that TCEQ's alleged actions mean the State's RCRA program "does not provide for adequate enforcement of compliance with federal requirements [at] 42 U.S.C. § 6962(b)...." Petition at 4. Again, Petitioner does not discuss how or why this allegation falls under any of the circumstances that may justify commencing a proceeding to withdraw a RCRA program. For purposes of EPA's analysis, however, this allegation could arguably fall under the withdrawal circumstances at 40 C.F.R. § 271.22(a)(3)(i), which states "[f]ailure to act on violations of...other program requirements," and (ii), which states "[f]ailure to seek adequate enforcement penalties..." While improper "dilution" of a characteristic hazardous waste under RCRA might be unlawful, dilution of a characteristic hazardous waste has nothing to do with whether the diluted or mixed waste is classified subsequently as a characteristic hazardous waste.

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25 EPA's Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program, May 16, 2006, Exhibit H, at 7.

26 December 16, 2005 letter from TCEQ to EPA, Exhibit I

> That there might have been a violation connected with "dilution" of the exhumed waste event (the facts are disputed) does not mean TCEQ must enforce against the violator. Indeed, EPA Region 6, which has oversight authority over states' enforcement activities, did review TCEQ's actions with regard to the truck accident and the exhumed waste as part of EPA Region 6's informal investigation. EPA Region 6 enforcement personnel believe that TCEQ's enforcement activity with respect to the exhumed waste was properly within TCEQ's discretion.
>
> While Petitioner may disagree with TCEQ's enforcement response in this case, EPA does not believe the allegations presented here provide any grounds to conclude that TCEQ's enforcement program fails to meet the requirements of 40 C.F.R. Part 271. Therefore, EPA does not find that cause exists to commence a proceeding for withdrawal of Texas' RCRA program on this basis.[27]

This EPA Determination and TDSL's amazing failure to discuss it in its Petition completely undermine TDSL's claims that the material is hazardous or that it must now be removed immediately (a strange argument in light of TDSL's refusal over the years to let go of this trash it has held hostage for so long). Notwithstanding this ruling, Penske is still willing to stand by its matter, as outlined above, at great expense to Penske. It is a responsible approach offered by a responsible company that has had its good name dragged through the mud for years by TDSL.

(3) The Legislature

TDSL has for years shown the same attitude toward the Legislature as it has shown toward this Commission. After the mistrial in 2004, TDSL went to work before the 79th Legislature, attempting at the last minute to slip amendments into bills that were designed by TDSL to help it win its lawsuit. These attempts failed when the amendments were properly

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[27] EPA Determination at 11. In a footnote to this quoted text, the EPA further stated: "Moreover, TCEQ's Executive Director stated that 'because this matter is best resolved in court, I do not plan to take further action on Penske's Notice of Violation pending the resolution of this matter in court proceedings.'" Letter (continued...)

declared not to be germane. In trying the same tactic before the 80th Legislature, Chairman Bonnen correctly and frustratingly pointed out the problems with this repeated approach after stating that the Legislature should not interfere with pending litigation:

> Mr. Howard are you aware of the fact that we found ourself in an extremely similar situation last session where the same parties that you're working with had filed a bill amended it in the Senate with this type of language and then brought it back to the House. They then were asked, I don't if you'd be surprised to know this but if they wanted to change their lawsuit in mid-stream by the legislative action, that they should file a bill at the beginning of session that does that and bring it forward. Are you aware of that?
>
> ***
>
> Thank you, Mr. Speaker, members. I want to first point out that I would be more than happy for Mr. Howard to simply not concur and take this bill to a conference committee and remove the Senate amendments in language. I'm not wanting to kill Mr. Howard's entire bill. He has made the choice that he does not want to go to that conference committee so it's an all or nothing game. As chair of Environmental Regulation, I want to read to you the transcript of a hearing that was held in my committee earlier this session. Rep Kimble, my good friend had a bill, House Bill 3547. Mr. Gary Newton who is the general counsel for TDS testified before my committee.
>
> ***
>
> ___ I, I can appreciate what Mr. Merritt would be horrified if Mr. Newton's comments being to the membership here. I asked Mr. Newton if he wanted to make this bill retrospective in the Senate like they did last session, I just want to read you the transcript.
>
> Let me ask you this, Mr. Newton, last session some very interesting tactics were taken at the end of session to address ongoing legal fights that you are in.
>
> Mr. Newton: Yes, sir. Myself, I have no desire to let this bill out of this committee if that kind of shenanigans occur again in the future.

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dated December 16, 2005, from Glenn Shankle, Executive Director, TCEQ, to Carl Edlund, Director, EPA Region 6 Multimedia Planning and Permitting Division."

Is there any reason to believe that that's going to happen with this type of a bill?

Mr Newton: Last session, ___ Smith had House Bill 580.

I said I know exactly what happened last session. That implied the authorities for the Counties to remove ___ hazardous waste just as the current bill we are discussing does. We did sponsor an amendment on the Senate side that was different from this one. I said, I understand that.

Mr. Newton: Okay.

And then that amendment was taken off in conference and I stated I know exactly what occurred. I didn't ask you what occurred. I asked you if this is going to be used as a vehicle to try and usurp the legal process you are stuck in currently?

Mr. Newton answered: We are not trying to usurp the legal process whatsoever. We are trying to pass this legislation that would give us the tool if this ever happened again.

I understand so you, so you're not going to change this bill to have it at in a retrospective fashion and end your legal battle?

Mr. Newton says: It is not my intent to do that.

To do that?

No. Not to do that. Thank you very much.

Mr. Newton testified before my committee that they would not be using bills as vehicles and then changing them in the Senate as they did last session, they are now doing exactly that again this session with this amendment with this bill but they are going even further.

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Last session, we told them that if they wanted to try these tactics, to file a bill that says this and we let it move through process. Yet, again, they've not done that. And I'd ask you to not allow this to happen.

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As the attached DVD (Exhibit E) from which these quotes were taken establishes, several other House Members objected to these tactics of TDSL, and an overwhelming majority of the House voted to reject TDSL's efforts to have the Legislature help it try to prove its case that Penske and Zenith, but not TDSL, were responsible for what TDSL knowingly allowed to enter its landfill (and stay there for almost ten years now).[28]

C. The "Anti-Facts" of TDSL's Petition

It is not possible to point out all of the misstatements contained in TDSL's position. With regard to the facts of the 1997 incident and its aftermath, we refer the Commission to the Chronology attached hereto. However, several misrepresentations by TDSL deserve special attention here.

- At page 4 and 5 of its Petition, TDSL wants the Commission to believe that TDSL has had valid "authorization" to "store" for many years this material it claims is hazardous. If in fact it were hazardous, TDSL has violated the law in not removing it. It says it has authorization to keep it "pending removal by the generator," but has cited no such authorization, because there is none.

- At page 5, TDSL says it is "well-documented that a substantial amount of D008 CRT waste from the accident is contained within the D008 waste." In fact, not a single one of the hundreds of tests performed by TDSL, Penske and the TCEQ have detected D008. Robert Zoch's report and his "calculation" that "more than 18.1% of the original amount of D008 CRT waste remains in the 99 roll-off containers" is, to put it charitably, totally unfounded, as a several hour deposition of Mr. Zoch established. TDSL says, but

[28] The vote concerned amendments to House Bill 3581, an effort to create a cause of action and recovery of attorneys fees for "discarding refuse on property that is not authorized for that activity." Details can be found at: http://www.capitol.state.tx.us/BillLookup/history.aspx?LegSess=80R&Bill=HB3581. TDSL also attempted to have a bill passed that would amend the Civil Practice and Remedies Code to allow it to recover attorneys fees in this lawsuit. That effort was also rejected. See history of Senate Bill 2057 at http://www.capitol.state.tx.us/BillLookup/history.aspx?LegSess=80R&Bill=SB2057. It is interesting that TDSL's General Counsel, Gary Newton (the same person about whom Rep. Bonnen complained as referenced above), was the only witness to testify about (in support of) this bill that was clearly designed by TDSL to bolster its claim in the Hays County action, even though the Committee that heard the testimony (on which TDSL's counsel sits, but apparently recused himself) voted to do away with the public notice requirement. When TDSL counsel was asked how it was the Mr. Newton got notice of this hearing when the rest of the world did not, TDSL did not respond, nor has it done so to date.

can't show by way of any of the test results, that "there are thousands of pounds of toxic characteristic hazardous lead waste in the 99 roll-off containers." Does it really expect this Commission to believe that all of these tests missed these "thousands of pounds?"

- In the first full paragraph on page 7 of TDSL's Petition TDSL mischaracterizes the action of the Commissioners at the September 16 hearing.[29] It is obvious why there is no citation to any support for those statements that the Commissioners somehow made those rulings. It is disingenuous for TDSL to argue to this Commission that it has already ruled in TDSL's favor on the issues TDSL wants it to rule on now. If in fact a majority of the Commissioners had ruled as TDSL asserts they did on September 16, 2004, it surely would have prevailed in the December 1, 2004 argument. But even TDSL admits that it lost that round.

- TDSL says at page 8 that a disposal option proposed by Penske that involved scientific testing "would violate State and federal law and expose TDSL and its customers to intolerable risk of liability." Again, this is pure fiction. It would not violate the law, as the EPA Determination clearly establishes. And the old TDSL argument that it would be liable if it hired or allowed someone else to remove it except under a hazardous waste manifest is and never has been supportable. If TDSL did not become liable when it accepted the accident debris, mixed it with trash, excavated some of it the next day, pushed it across its landfill, buried it in lining, and then excavated it and stores it in rolloff boxes since the eve of trial in 2004, is inconceivable how it could face liability if it allowed someone to take it and test it to determine the appropriate disposal method.

- TDSL claims at page 9 that its roll off boxes are deteriorating and that action is therefore required. No support is offered for this bald assertion or for TDSL's unjustified insistence on holding this waste hostage at its facility. TDSL's own conduct has put the waste in

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29 TDSL states:

> In the course of their public consideration and granting of TDSL's Motions to Overturn, the Commissioners stated: (1) that Penske was the generator of the D008 waste; (2) that the D008 CRT waste had to be disposed of as hazardous waste; and (3) that proper disposal could be accomplished either by disposing of the entire mass of D008 CRT waste commingled with MSW and landfill cover soils as hazardous waste or by segregating the D008 CRT waste from the nonhazardous waste as had originally been done with the remainder of the debris after the accident. The TCEQ Commissioners rejected Penske's invitation to find that TDSL was somehow at fault for allowing the CRT debris into its landfill.

this situation, and TDSL, without any Commission action can address any problems created by its storage. [30]

- Finally, TDSL states at page 10, footnote 12, that "TDSL has not sought to advance this judicial review [of its appeals to Travis County from this Commission's actions] as it suspects that a court would ultimately decide that this case involves complex environmental regulatory issues that must be finally resolved by the TCEQ." It also makes reference to the "generalist judges" of the Travis County District Court. This is a new one. When TDSL was seeking yet another delay of the Hays County trial because of the pendency of the Travis County appeals, it made quite a different representation to the trial judge. Then, TDSL represented that TDSL would aggressively pursue those important appeals so as not to delay trial of the Hays County case.[31] Now TDSL admits in its Petition that "TDSL has not sought to advance this judicial review...." The new suggestion that the Travis County courts, which routinely handle complex appeals from this and other agencies, are somehow incapable of handling the appeals TDSL filed is absurd, and it also flies in the face of diametric statements made by TDSL.[32]

III. ARGUMENT

A. A Generalized Notion Of "Plenary Powers" Does Not Permit The Commission To Adjudicate This Issue After A Discussion At Agenda

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30 TDSL admits that at least the latter is true, in stating at page 10 of its Petition: "Indeed, unless the TCEQ first acts clearly and decisively to interpret and enforce the hazardous waste regulations for which it has primary responsibility, the court and jury will be left without the most authoritative guidance as to what these complex environmental laws mean." Two quick responses come to mind. First, the EPA has already authoritatively so ruled in agreement with the TCEQ and Penske. Second, the trial court has made it very clear that any pronouncements the TCEQ may make have no role in the Hays County action. But TDSL has not given up on interjecting enforcement issues into the tort action, and that is why we are dealing with this now, not because of any alleged deteriorating boxes.

31 February 27, 2006 Transcript, Exhibit J, at pp. 12-13.

32 *See, e.g.*, Plaintiff's Motion to Stay, Exhibit K, at 2 ("As Judge Gary Steel recognized during the first trial in this case, Travis County is the proper forum for resolution of this fundamental legal issue arising under Texas environmental statutes."); Id. at 3 ("The legal interpretation of Texas environmental law relative to a key aspect of this litigation is currently pending in Travis County District Court, sitting in an appellate capacity, in the various appeals from certain actions taken by TCEQ in this matter."); Plaintiff's Reply in Further Support of Motion to Stay, Exhibit L, at 12 ("Allowing the statutory and regulatory issues fundamental to this case to be decided in the only forum capable of resolving them (i.e., Travis County) will substantially shorten the time needed for pretrial and trial in this Court by eliminating arguments over the legal effect of undisputed facts.").

In light of the above, it is clear that TDSL is attempting to get the help it desperately needs to try to win its Hays County lawsuit. It is equally clear that this Commission should not allow the bypassing of proper procedures for determining the rights and obligations of the parties. The Executive Director has correctly decided that enforcement action is not necessary on the facts and law of this matter. This Commission has already decided that the sorting of material that TDSL contends is required is not necessary. The EPA has ruled squarely in support of the TCEQ and Penske that TDSL is wrong. What support, then, does TDSL have for the very unusual demand that this Commission make these findings without any factual record by way of a contested case proceeding? It only has a general notion of "plenary powers" based on a one page order from the Travis County District Court (ironically, the same court it incorrectly claims consists of generalist judges who apparently cannot handle environmental issues).

In the Asarco order,[33] the court simply held that the TCEQ had the right *sua sponte* to refer an air permitting matter to a contested case hearing. It is difficult to see how even TDSL can find a way to use that as its support for the exercise of this Commission's plenary power to decide all of these issues at Agenda without an evidentiary hearing.

Of course, the practical problem with the approach urged by TDSL is that it would allow any party to bring any issue of any nature directly to the Commissioners at Agenda repeatedly. It would open the floodgates to all sorts of direct pleas bypassing the contested case process and other procedures designed to protect a party's due cause and procedural rights. It would foster the fact or appearance of favoritism, politics and the avoidance of careful

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[33] Attached as Exhibit M.

consideration of important issues without the development of a thorough record. This is clearly an approach that must be rejected.

B. As TDSL Has Many Times Stated These Issues Are Already On Appeal and This Commission May Not Again Rule On The Issues It Has Already Ruled On

Against this backdrop — two rulings by the Commission in 2004; seven consolidated appeals pending in Travis County District Court; three appeals pending in federal court; and an October 2007 trial pending in Hays County District Court — TDSL has filed yet another petition to overturn portions of the Executive Director's September 24, 2004 decision. TDSL asked the Commission to "clarify" that the waste stockpiled at TDSL cannot be sampled, tested, and disposed of in accordance with the test results as allowed by the Executive Director's September 24, 2004 determination.[34] Because this issue has already been addressed and is squarely on appeal in both state and federal court, the Commission should summarily dismiss TDSL's Petition.[35] Allowing TDSL to constantly revisit this issue wastes the Commission's valuable time and resources, violates the law, and is against sound public policy.

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34 Petition at 13.

35 In Hays County, TDSL has repeatedly argued that the issues raised in its current Petition are already pending in the Travis County appeals and the EPA action. For example, in its Motion to Stay, Exhibit K, TDSL stated:

> That fundamental legal issue is whether or not D008 toxic characteristic hazardous waste can be diluted in lieu of treatment and then be disposed of as non-hazardous waste. That issue is currently being litigated in Travis County, Texas, on appeal from various actions of the Texas Commission on Environmental Quality ("TCEQ" or "Commission"). TDSL has also filed a federal petition with the United States Environmental Protection Agency ("USEPA") regarding this legal question because the USEPA has authority over the TCEQ hazardous waste program.

In Plaintiff's Reply in Further Support of Motion to Stay, Exhibit L, at 5, 7-8, TDSL again argued that the issues pending in the Travis County appeals and the EPA action are the same issue involved here:

> In the Travis County proceedings, the court will determine (among other things) the following: 1. whether the hazardous CRT waste in its commingled state remains D008 toxic characteristic hazardous waste; 2. if so, whether one or more Defendants are considered the "generator" of that D008 toxic characteristic hazardous waste under state and federal law; 3. whether, as the "generator" of

(continued...)

TDSL's request that the Commission re-examine its December 1, 2004 decision is fundamentally flawed as a matter of law because it asks the Commission to alter a prior decision that is currently on appeal. "It is settled that once an administrative order becomes final, an agency has no inherent authority to reexamine it. *Young Trucking. Inc. v. Railroad Commission of Texas*, 781 S.W.2d 719, 721 (Tex. App. - Austin 1990, no writ).

The Texas Supreme Court held that "[p]ermitting relitigation offends the policy reasons supporting the doctrines of res judicata and collateral estoppel." *Coalition of Cities for Affordable Utility Rates v. Public Utility Comm'n of Texas*, 798 S.W.2d 560, 565 (Tex. 1990).[36] Unless expressly allowed by statute or in limited situations of changed circumstances, an administrative agency cannot reconsider a previous final order. *Coalition of Cities*, 798 S.W.2d at 565; *Ramirez v. Texas State Board of Medical; Examiners*, 99 S.W.3d 860, 864-865 (Tex. App. - Austin 2003, pet. denied); *West Texas Utilities Company v. Public Utility Commission of Texas*, 896 S.W.2d 261, 269 (Tex. App. - Austin 1995, writ dism'd); *Young Trucking, Inc. v. Railroad Comm'n of Texas*, 781 S.W.2d 719, 721 (Tex. App.--Austin 1990, no writ); *Al-Jazrawi v. Texas Bd. of Land Surveying*, 719 S.W.2d 670, 671 (Tex.App.-Austin 1986, writ refused

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> that D008 toxic characteristic hazardous waste, one or more Defendants were required to treat and dispose of it in an authorized hazardous-waste facility;
>
> ***
>
> Likewise at stake in the Travis County proceedings is a claim for (among others) the following declaratory relief: * * * .* once the D008 toxic characteristic hazardous CRT waste was classified as "hazardous waste," its classification cannot be changed by commingling such waste with non-hazardous municipal solid waste;

36 It is well settled that common-law doctrines preventing re-litigation apply to administrative decisions as well as civil courts. United States v. Utah Mining and Construction Co., 384 U.S. 394, 421-22 (1966) ("[w]hen an administrative agency is acting in a judicial capacity . . . . the courts have not hesitated to apply res judicata to enforce repose."); Painters District Council v. Edgewood Contracting Co., 416 F.2d 1081, 1084 (5th Cir. 1969) ("[t]he policy considerations which underlie res judicata — finality to litigation, prevention of needless litigation, avoidance of unnecessary burdens of time and expense — are as a relevant to the administrative process as to the judicial."); Coalition, 798 S.W.2d at 564-565.

n.r.e.); *South Texas Indus. Services, Inc. v. Texas Dept. of Water Resources*, 573 S.W.2d 302, 304 (Tex.Civ.App.-Austin 1978, writ refused n.r.e.).

In fact, Texas Government Code § 2001.1775 specifically prohibits an agency from modifying its decision in a contested case while the decision is under judicial review. *See* V.T.C.A., Government Code § 2001.1775; *see also Railroad Commission of Tex. v. Continental Bus System, Inc.*, 616 S.W.2d 179, 184 (Tex. 1981) ("The rule is sound that the Railroad Commission may not change an order after it loses jurisdiction by an appeal."). Preventing re-litigation protects both the agency and the parties from expensive and time-consuming duplicitous proceedings. Here the record is clear — TDSL is subjecting Penske to needless and duplicative litigation in an attempt to help TDSL in its tort case pending in Hays County, Texas.

There is no provision in the Administrative Procedure Act, the Water Code, or the Texas Health and Safety Code authorizing the Commission to reconsider its prior decision upholding the Executive Director's September 24, 2004 order, especially while that matter is under judicial review. *See* Tex. Gov't Code § 2001.001 *et seq*; Tex. Water Code § 5.001 *et seq.*; Tex. Health & Safety Code § 361.001 *et seq*. To the contrary, the Commission may only reconsider its prior decision in a contested case hearing if a party timely files a motion for rehearing. *See* Tex. Gov't Code §§ 2001.144, 2001.146. Once the Commission's decision becomes final, it can only be further reviewed if the aggrieved party property appeals the decision to the Travis County District Court. *See* Tex. Gov't Code 2001.171; Tex. Water Code 5.354;m Tex. Health & Safety Code § 361.321.

Moreover, TDSL has failed to present any evidence of changed circumstances justifying the Commission revisiting its prior decision. Simply arguing — again — that the Executive Director's decision was wrong does not constitute changed circumstances. *Cf. Al-*

Jazrawi v. Texas Bd. of Land Surveying, 719 S.W.2d 670, 672 (Tex.App.-Austin 1986, writ refused n.r.e.) (noting that the "changed circumstances" exception "occurs most frequently wherein the agency is empowered to create an entity or to issue a license but refuses to do so. At a later time the agency may perhaps reopen the matter upon a showing of changed circumstances."); *Public Utility Com'n of Texas v. Texas Telephone Ass'n,* 163 S.W.3d 204, 218-19 (Tex.App.-Austin 2005, no pet.) (holding that a new rule promulgated after the agency order was issued constituted "changed circumstances.").

Moreover, TDSL's unsubstantiated assertion that the roll-off boxes have "deteriorated" or may require re-application of a liner does not constitute "changed circumstances" requiring another vote at Agenda. The condition of the roll-off boxes has nothing to do with the legal issues raised by TDSL that are currently on appeal. If TDSL needs to add lining, move the material to another roll-off container, or move the material indoors to prevent leakage, it can seek authority from the TCEQ to take these actions. Or better yet, TDSL can simply allow Penske to remove the waste in accordance with the Executive Director's September 24, 2004 order that has been validated by both the TCEQ and the EPA. TDSL's continuing decision to hold the waste hostage does not constitute "changed circumstances" necessitating re-litigating the legal issues on appeal.

As such, Penske requests that the Commission summarily deny TDSL's request for a consideration at Agenda and deny TDSL's Petition as required by law.

C. The Request To Review The October 2005 Action Of The Executive Director Is Untimely

To the extent the Petition could in any way be construed as a request that this Commission review the Executive Director's October 2005 letter declining to take any further

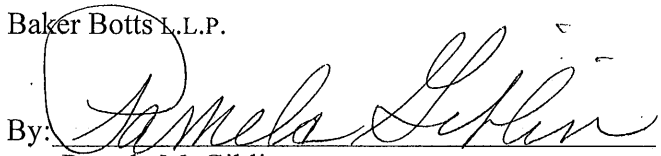
actions against Penske pending decision by the courts, TDSL was required to file its Petition within the time periods provided by 30 TAC § 50.139, as it has on many previous occasions.

IV. CONCLUSION

This Commission should not tolerate TDSL's efforts to seek TCEQ support for its litigation strategy in a private dispute and should instead let the parties fairly present the evidence to a jury for a final disposition of this matter. These issues are not appropriate for disposition by the Commission at Agenda.

Respectfully submitted,

Baker Botts L.L.P.

By: 

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Certificate of Service

A true and correct copy of the foregoing has been served on all of the following parties as indicated on July 11, 2007.

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00001

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS * IN THE DISTRICT COURT
LANDFILL, INC., *
3 Plaintiff, *
*
4 VS. * OF HAYS COUNTY, TEXAS
*
5 PENSKE TRUCK LEASING CO., *
L.P., PENSKE LOGISTICS, *
6 INC., ZENITH ELECTRONICS *
CORP., ZENITH ELECTRONICS *
7 OF TEXAS, INC., and HARRY *
ERNEST McCAIN, *
8 Defendants. * 207TH JUDICIAL DISTRICT

9

10 **********

11 VIDEOTAPED DEPOSITION OF

12 BOBBY GREGORY

13 TAKEN DECEMBER 10, 2003

14 **********

15 VIDEOTAPED DEPOSITION of BOBBY GREGORY, produced as a

16 witness at the instance of the Defendants Penske Truck

17 Leasing Co., L.P., Penske Logistics, Inc., and Harry Ernest

18 McCain, and duly sworn, was taken in the above-styled and

19 numbered cause on the 10th day of December, 2003, from

20 2:11 p.m. to 6:09 p.m., before Janet L. Hamm, CSR in and for

21 the State of Texas, reported by machine shorthand, at the

22 law offices of George & Donaldson, L.L.P., 1100 Norwood

23 Tower, 114 West Seventh Street, Austin, Texas, pursuant to

24 the Texas Rules of Civil Procedure and the provisions stated

25 on the record or attached hereto.

1 correct? That's an element that's covered by Pierce
2 Chandler with regard to the compaction efficiency; isn't
3 that right?
4 A That is dealt with by Mr. Chandler's testimony.
5 Q I'm talking about the damages --
6 A Stigma.
7 Q -- as relating to stigma. Tell me some of the
8 obstacles that you've had to face between October 9 and
9 today that support a damages claim relating to stigma or
10 harm to reputation.
11 A We've had to deal with the presence of the TV tubes
12 in our facility on numerous occasions by having to explain
13 the situation of how we are dealing with the process of
14 getting them out of the landfill. We've had to identify
15 that we have hazardous waste in our landfill. It was placed
16 there -- without going into the whole story, the course of
17 this accident and how it has, we believe, not
18 environmentally impacted our facility and how we will assure
19 long-term that it will not environmentally impact our
20 facility by removing the -- by removing the tubes.
21 MR. CHRISTIAN: May I hear the answer, please?
22 (The last answer was read by the reporter.)
23 Q (By Mr. Christian) You are convinced, are you not,
24 that these tubes present no environmental threat?
25 A I am convinced that our facility can handle these

1 tubes -- the presence of these tubes long-term.

2 Q Right.

3 A The environmental threat to the -- to the outside

4 environment is one thing. The threat to the facility and

5 the way it's perceived and the way the agency treats us and

6 the way customers treat us, I am not convinced that the

7 world believes that the facility can handle that.

8 Q Okay. So you've got two issues: You've got the

9 fact and you've got the perception. And I want to put the

10 perception aside for a minute and just talk about the fact.

11 You agree with me, do you not, that these tubes, given the

12 manner in which you do business and given the manner in

13 which your landfill is designed, constructed and operated,

14 present no threat of environmental harm? Would you agree

15 with that?

16 A I am convinced of that myself for our facility, but

17 that fact -- that perception becomes fact if other people

18 don't believe it.

19 Q All right. I'm going to get to the perception in a

20 minute, but let me first deal with the issue that you just

21 raised about the obstacles. One of the obstacles you said

22 was that you need to explain the situation. List the people

23 you've had to explain that situation to.

24 A I've had to explain it to different people within

25 the agency, the TCEQ.

Exhibit A — Fact Chronology

1997 Accident

1. On October 9, 1997, a Penske truck that was transporting new television picture tubes owned by Zenith braked and swerved to avoid a car that had crossed the median from northbound to southbound I-35 near Buda, Texas.[1] The Penske truck tipped over and slid down an exit ramp.[2] There is no dispute that the driver who crossed the median, not Penske, caused the accident.[3] In fact, after the accident the driver who crossed the median ran over and hugged the Penske driver and thanked him for saving his life.[4]

2. It is not clear how many, if any, tubes were broken as a result of the accident itself.[5] It is clear that cleanup contractors not hired by or affiliated in any way with Penske caused the picture tubes to spill from the truck and waste to be generated during the course of uprighting the truck and clearing the debris from the accident scene.[6]

3. Minutes after the accident, Texas Public Safety Officer Brian Acker arrived at the scene.[7] He was the "on scene commander" in charge of the activities in the aftermath of the

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[1] (Ex. 1, McCain Deposition at 71.4 – 71.25; Ex. 2, McCain Trial Transcript at 355.16 – 358.14)

[2] *Id.*

[3] (Ex. 3, Acker Trial Transcript at 141.5 – 142.6; Ex. 1, McCain Deposition at 166.15 – 168.15)

[4] (Ex. 2, McCain Trial Transcript at 359.2 – 360.2; Ex. 1, McCain Deposition at 166.15 – 168.15)

[5] (Ex. 4, Villapando Trial Transcript at 319.25 – 320.13; Ex. 2, McCain Trial Transcript at 360.3 – 360.20; Ex. 3, Acker Trial Transcript at 140.19 – 140.25; Ex. 5, Lee Machen Trial Transcript at 268.10 – 268.12)

[6] (Ex. 1, McCain Deposition at pp. 111.17 – 112.13, 112.24 – 113.7, 170.12 – 170.24, 175.13 – 180.25; Ex. 2, McCain Trial Transcript at 360.21 – 365.3; Ex. 4, Villapando Trial Transcript at 319.25 – 320.13, 321.17 – 321.24; Ex. 5, Lee Machen Trial Transcript at 246.11 – 247.9, 254.23 – 254.25; Ex. 6, Vallejo Deposition at p. 44.1 – 44.21; Ex. 7, Vallejo Trial Transcript at 900.17 – 900.24; Ex. 3, Acker Trial Transcript at 141.1 – 141.4, 145.10 – 145.19)

[7] (Ex. 3, Acker Trial Transcript at 97.2 – 97.10)

accident.[8] Penske played no role in the clean-up of the accident, the selection of the transporter, or the decision to send the accident debris to TDSL.[9]

4. Harry McCain, the Penske driver, was asked by Trooper Acker if he was hauling "haz-mat" or "hazardous materials," a term defined under the Department of Transportation regulations.[10] Mr. McCain answered correctly and truthfully that he was not.[11] It is undisputed that the intact television picture tubes that Mr. McCain was transporting for Zenith were not hazardous materials or hazardous waste.[12]

5. Mr. McCain was not asked any further questions regarding the characteristics of the television picture tubes.[13] Specifically, Mr. McCain was never asked if the accident debris (broken picture tubes, packaging materials, soils, and other debris) co nstituted a hazardous waste.[14]

6. Officer Acker called Special Automotive ("Special"), a wrecker service, to assist in the cleanup.[15] While Special was uprighting the truck, the side gave way, and the tubes fell out.[16]

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[8] (Ex. 8, Acker Deposition at 77.10 – 78.19; Ex. 3, Acker Trial Transcript at 116.22 – 117.2, 135.22 – 136.7; Ex. 2, McCain Trial Transcript at 360.21 – 361.3)

[9] (Ex. 2, McCain Trial Transcript at 364.6 – 365.3; Ex. 1, McCain Deposition at pp. 111.17 – 112.13, 113.24 – 114.3; 170.12 – 170.24, 179.22 – 180.25; Ex. 5, Lee Machen Trial Transcript at 246.11 – 247.9; Ex. 6, Vallejo Deposition at p. 21.15 – 22.3; Ex. 7, Vallejo Trial Transcript at 900.17 – 900.24)

[10] (Ex. 3, Acker Trial Transcript at 150.8 – 150.18; Ex. 2, McCain Trial Transcript at 351.9 – 352.9)

[11] *Id.*

[12] (Ex. 3, Acker Trial Transcript at 140.16 – 18; Ex. 2, McCain Trial Transcript at 351.9 – 351.19; Ex. 9, Reske Trial Transcript at 530.16 – 530.25; Ex. 10, Newton Deposition (7/25/2003) at 309.18 – 309.25; Ex. 11, James Gregory Deposition at p. 120.7 – 120.23; Ex. 12, Allen Deposition at 124.12 – 124.23; Ex. 13, Chandler Deposition at 91.11 – 91.16)

[13] (Ex. 2, McCain Trial Transcript at 351.20 – 353.6)

[14] (Ex. 2, McCain Trial Transcript at 351.9 – 353.6, 365.10 – 365.23; Ex. 12, Allen Deposition at 124.12 – 124.19)

[15] (Ex. 8, Acker Deposition at p. 27.5 – 27.21; Ex. 5, Lee Machen Trial Transcript at 250.24 – 251.7, 252.8 – 252.11)

7. A front-end loader was brought in to clean up the tubes.[17] The front-end loader brought in from the Texas Department of Transportation ("TxDOT") ran over and broke many tubes during the clean up.[18]

8. Rather than piling the material in the vicinity of the accident, as suggested by TxDOT, Special decided to take it away for disposal.[19] Officer Acker relied on Special to choose the disposal site.[20] Special asked Alfred Vallejo and M&M Trucking to go to the scene to remove the material.[21] Mr. Vallejo made the decision to take the tubes to TDSL because he had used that landfill before.[22] No one else had a say in the decision.[23] The debris was taken to TDSL by trucks lined up by Mr. Vallejo and M&M Trucking.[24]

9. Penske did not hire Special, TxDOT, Mr. Vallejo, or M&M Trucking and played no role in the decision to send the accident debris to TDSL.[25]

Disposal of the accident debris at TDSL

10. On the day of the accident, Penske worked diligently to assess the damage at the accident scene and take appropriate action. At 3:38 p.m., Penske personnel spoke with Zenith

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[16] (Ex. 1, McCain Deposition at pp. 175.13 – 180.25; Ex. 4, Villapando Trial Transcript at 319.25 – 320.13, 321.17 – 321.24; Ex. 2, McCain Trial Transcript at 361.21 – 363.11; Ex. 3, Acker Trial Transcript at 145.10 – 145.19; Ex. 5, Lee Machen Trial Transcript at 254.23 – 254.25)

[17] (Ex. 2, McCain Trial Transcript at 363.12 – 364.5)

[18] (Ex. 2, McCain Trial Transcript at 363.12 – 364.5; Ex. 1, McCain Deposition at pp. 112.24 – 113.7, 178.13 – 180.25; Ex. 6, Vallejo Deposition at p. 44.1 – 44.21; Ex. 3, Acker Trial Transcript at 141.1 – 141.4)

[19] (Ex. 14, Lee Machen Deposition at pp. 52-53, 75-76; Ex. 5, Lee Machen Trial Transcript at 189.23 – 190.7, 255.8 – 255.22)

[20] (Ex. 8, Acker Deposition at p. 85.2 – 85.25; Ex. 3, Acker Trial Transcript at 138.9 – 138.13)

[21] (Ex. 15, Judy Machen Deposition at pp. 12.23 – 13.24; Ex. 7, Vallejo Trial Transcript at 868.19 – 869.4)

[22] (Ex. 6, Vallejo Deposition at p. 21.2 – 22.3; Ex. 7, Vallejo Trial Transcript at 873.14 – 874.5, 894.25 – 895.3, 900.17 – 900.24)

[23] (Ex. 6, Vallejo Deposition at p. 21.15 – 22.3; Ex. 7, Vallejo Trial Transcript at 900.17 – 900.24)

[24] (Ex. 10, Newton Deposition (07/24/2003) at p. 108.13 – 108.24)

[25] (Ex. 2, McCain Trial Transcript at 364.6 – 365.3; Ex. 5, Lee Machen Trial Transcript at 246.11 – 247.9; Ex. 6, Vallejo Deposition at p. 21.15 – 22.3; Ex. 7, Vallejo Trial Transcript at 900.17 – 900.24; Ex. 1, McCain Deposition at pp. 111.17 – 112.13, 170.12 – 170.24, 179.22 – 180.25)

personnel and learned that broken television tubes were possibly hazardous.[26] At 4:03, Penske contacted the Texas Natural Resources Conservation Commission ("TNRCC") (predecessor to the Texas Commission on Environmental Quality ("TCEQ")) and informed it that the tubes contained lead and could be hazardous.[27]

11. At 4:08, the first dump trucks arrived at TDSL.[28] At 4:33, Penske spoke with Jim Gregory at TDSL and informed him that the load could be hazardous.[29] If TDSL had required a manifest or had inspected or held the loads for twenty-five minutes in order to contact Penske, Zenith, or state regulators, it could have avoided disposing of any accident debris into its landfill.

12. TDSL, however, accepted the accident debris for disposal without any contract, manifest, shipping document, or communication whatsoever with or from Penske or Zenith.[30]

13. In addition, at the time it accepted the accident debris, TDSL knew the debris contained broken television picture tubes (among other debris) and that television tubes contained lead.[31] Significantly, TDSL knew that it could accept television tubes in small quantities, but not larger quantities.[32]

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[26] (Ex. 16, Tony Marinello letter, October 16, 1997. TDSL claims that Penske was warned that broken tubes might contain hazardous waste earlier in the day and in a transportation agreement with Zenith. Penske disputes these claims.)

[27] (Ex. 17, Verbal Spill Incident Checklist)

[28] (Ex. 11, James Gregory Deposition at pp. 114.1 – 114.13; Ex. 18, Bob Gregory Deposition (05/29/2003) at pp. 224.24 – 225.19)

[29] (Ex. 11, James Gregory Deposition at p. 60.24 – 61.6; Ex. 18, Bob Gregory Deposition (05/29/2003) at pp. 224.24 – 225.19)

[30] (Ex., 11, James Gregory Deposition at pp. 25.25 – 26.17, 36.20 – 37.8, 122.3 – 123.17, 126.6 – 128.20, 132.19 – 133.8; Ex. 18, Bob Gregory Deposition (5/29/2003) at pp. 211.7 – 211.22 and Bob Gregory Deposition (2/10/2004) at pp. 273.20 – 274.7; Ex. 10, Newton Deposition (7/24/2003) at p. 200.20 – 200.24 and Newton Deposition (7/25/2003) at 308.9 – 308.16, 312.19 – 313.1)

[31] (Ex. 18, Bob Gregory Deposition (5/29/2003) at p. 273.5 – 273.14; Ex. 10, Newton Deposition (07/24/2003) at p. 205.22 – 205.25, 207.14 – 207.22, 208.17 – 208.25; Ex. 19, Hermann Trial Transcript at 983.10 – 983.18. 984.6 – 984.10)

[32] (Ex. 11, James Gregory Deposition at pp. 153.6 – 154.18; Ex. 19, Hermann Trial Transcript at 938.18 – 939.10)

14. Notwithstanding this knowledge, TDSL did not pass that information along to any of its employees.[33] Furthermore, TDSL failed to hold the accident debris in order to contact Penske, Zenith, or state regulators before allowing the accident debris past its gatehouse.[34] Instead, TDSL rushed seven dump-truck loads (98 cubic yards) of undocumented accident debris into its landfill.[35]

15. TDSL claims that it spoke with one person before accepting the waste.[36] TDSL alleges that Jim Gregory of TDSL spoke with Alfred Vallejo, an occasional hauler of construction debris to TDSL who helped arrange for dump trucks the day of the accident.[37] Mr. Vallejo, however, denies that he discussed the characteristics of the waste with Mr. Gregory.[38] Thus, at best TDSL spoke with one person, the dump-truck arranger, before rushing an unusually large load of TV tube debris into the working face of its landfill. At worst, TDSL spoke with no one.

16. There is no dispute that TDSL did not attempt to speak with Penske, Zenith, DPS, the Buda Fire Department, or the TNRCC about the characteristics of the undocumented waste before accepting the waste for disposal.[39]

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[33] (Ex. 18, Bob Gregory Deposition (5/29/2003) at p. 273.5 – 273.19; Ex. 19, Hermann Trial Testimony 984.17 – 985.3)

[34] (Ex. 11, James Gregory Deposition at p. 121.23 – 123.17; Ex. 10, Newton Deposition (7/24/2003) at 191.12 – 191.19)

[35] (Ex. 20, Jim Gregory's "Diary and Work Record" at TDS 02377; Ex. 19, Hermann Trial Transcript 1017.4 – 1017.16, 1101.2 – 1101.4)

[36] (Ex. 11, James Gregory Deposition at pp. 24.3 – 24.18, 26.23 – 27.15, 34.12 – 34.19, 37.4 – 38.23, 104.7 – 104.22)

[37] *Id.*

[38] (Ex. 7, Vallejo Trial Transcript at 884.11 – 884.22, 887.9 – 889.15)

[39] (Ex. 19, Hermann Trial Transcript at 1079.12 – 1079.19; Ex. 11, James Gregory Deposition at 25.25 – 26.17, 26.23 – 27.4, 34.12 – 34.19, 36.20 – 37.8, 37.4 – 38.23, 122.3 – 123.17, 126.6 – 128.20, 132.19 – 133.8; Ex. 18, Bob Gregory Deposition (5/29/2003) at pp. 211.7 – 211.22 and Bob Gregory Deposition (2/10/2004) at pp. 273.20 – 274.7; Ex. 10, Newton Deposition (7/24/2003) at p. 200.20 – 200.24 and Newton Deposition (7/25/2003) at 308.9 – 308.16, 312.19 – 313.1)

Removal of the accident debris from TDSL

17. On the day of the accident, TDSL disposed of 98 cubic yards of accident debris consisting of television picture tubes, packaging materials, soils, and other materials from the scene of the accident.[40] In other words, the 98 cubic yards did not consist purely of damaged tubes; rather, the waste was a mixture of broken tubes and all of the other debris and materials generated at the scene of the accident.

18. After Penske told TDSL to stop dumping the accident debris into the landfill's working face, a company called Code 3 was hired to complete the clean-up process and remove all remaining debris from the accident scene.[41] Code 3 removed the remaining debris from the accident scene and placed the debris into four lined roll-off containers.[42] The four roll-offs were stockpiled (not disposed of) at TDSL awaiting further instructions.

19. On October 10, 1997 (the day after the accident), TDSL removed approximately 80 cubic yards of television-tube glass and waste mixed with the television-tube glass from its working face.[43] TDSL used both heavy machinery and hand-picked out the television-tube glass.[44] TDSL placed the 80 cubic yards of television-tube glass debris into roll-off containers and stockpiled the roll-offs with the four other roll-offs from the accident scene.[45]

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[40] (Ex. 21, Code 3 Segregation Report; Ex. 19, Hermann Trial Transcript at 1101.9 – 1102.6; Ex. 22, Newton Trial Transcript at 1279.20 – 1280.5; Ex. 11, James Gregory Deposition at 251.25 – 252.4; Ex. 18, Bob Gregory Deposition (10/13/2003) at p. 20.22 – 21.1)

[41] (Ex. 23, Code 3 to Penske letter, November 24, 1997)

[42] (Ex. 23, Code 3 to Penske letter, November 24, 1997; Ex. 21, Code 3 Segregation Report; Ex. 19, Hermann Trial Transcript at 1100.23 – 1101.01; Ex. 22, Newton Trial Transcript at 1292.9 – 1292.18)

[43] (Texas Disposal Systems Landfill, Inc.'s Brief in Support of Motions to Overturn ("Motion to Overturn Brief") at p. 5 ("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."); Ex. 20, Jim Gregory's "Diary and Work Record" at TDS 02377 ("We spent the whole day working on the 98 yds of hazardous that was dumped over the entire area. We loaded up 2 40 yds with stuff from the wreck that the 7 small dump trucks dumped on our working face."))

[44] (Ex. 18, Bob Gregory Deposition (10/13/2003) at 16.24 – 17.21)

[45] *Id.*

20. After TDSL's removal of all visible glass, approximately 18 cubic yards of accident debris remained disposed of in TDSL's landfill on the day after the accident. Because TDSL removed all visible television-tube glass and waste mixed with television-tube glass from its working face, it is highly questionable whether any leaded glass remained in the working face of TDSL's landfill. TDSL has never proved, or even bothered to prove, that any appreciable lead remained after its excavation the day after the accident.

21. It is clear that on the day after the accident, the overwhelming majority of the accident debris were stockpiled (not disposed of) in seven roll-off containers (approximately 280 cubic yards) at TDSL awaiting final disposal.[46] In February 1998, Code 3 was hired to separate the "hazardous" portion of the accident debris waste stockpiled in the roll off containers from the non-hazardous portion.[47] It separated two roll-offs of what it conservatively considered "hazardous" waste, including glass-containing soil.[48] The five remaining roll-offs contained the "non-hazardous" accident debris.[49]

22. On March 23, 1998, the two roll-offs containing the television-tube glass were shipped to Texas Ecology ("TECO") for disposal.[50] The remaining roll-offs were sent to a municipal solid waste facility for disposal.[51]

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[46] Code 3's records indicate that it removed four roll-off containers of debris from the accident scene on October 9, 1997. Code 3's records further indicate that it sorted through seven roll-off s stockpiled at TDSL in February, 1998. Based on these records, it is likely that TDSL removed three, not two, roll-offs of television-tube glass debris from its working face on the day after the accident.

[47] (Ex. 21, Code 3 Segregation Report, January 19, 1998)

[48] (Ex. 21, Code 3 Segregation Report, January 19, 1998; Ex. 19, Hermann Trial Transcript at 1101.5 – 1101.8)

[49] (Ex. 21, Code 3 Segregation Report, January 19, 1998; Ex. 22, Newton Trial Transcript at 1292.9 – 1292.18)

[50] (Ex. 18, Bob Gregory Deposition (10/13/2003) at 32.13 – 32.23; Ex. 22, Newton Trial Transcript at 1399.2 – 1399.12)

[51] (Ex. 18, Bob Gregory Deposition (10/13/2003) at 32.13 – 32.23; Ex. 22, Newton Trial Transcript at 1292.9 – 1292.18, 1399.2 – 1399.12)

23. On April 2, 1998, TECO tested a representative sample of the television-tube glass and soil-glass mixture using the Toxicity Characteristic Leaching Procedure ("TCLP") method. It detected no leachable lead in the sample at a reporting level of 0.1 ppm.[52] To reiterate, TECO conducted the test on the "worst" part of the accident debris that was collected in two roll-offs. Thus, the only data on the accident debris itself (in fact, the worst part of the debris) shows that the material TDSL accepted for disposal was not a hazardous waste.

TNRCC Inspection

24. The TNRCC was responsive and involved in the appropriate disposal of the accident debris from day one. Jim Gregory testified that he notified Mr. Ben Milford at the TNRCC immediately after TDSL had disposed of the seven dump trucks loads of potentially hazardous waste.[53] Representatives from Penske and/or Zenith spoke with Mr. Milford at approximately 5:30 p.m. on the day of the accident.[54] Mr. Milford then immediately contacted TDSL and personally visited the accident scene.[55]

25. On November 5, 1997, the TNRCC requested that Penske provide a description of the incident and documentation of the proper disposal of the waste generated.[56]

26. On December 2, 1997, Marc Althen, Senior Vice President at Penske, wrote a letter to Chris Smith at the TNRCC detailing Penske's plan to remove the "stockpiled waste" stored at TDSL's landfill.[57] As stated, Penske's contractor removed the stockpiled waste contained in the seven roll-off containers on March 23, 1998.

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[52] (Ex. 24, TECO Test Results)

[53] (Ex. 11, Jim Gregory Deposition at p. 71.4 – 71.24)

[54] (Ex. 25, Milford Deposition at 61.11 – 63.24, 64.7 – 64.23)

[55] *Id.*

[56] (Ex. 26, TNRCC to Penske letter, November 5, 1997)

[57] (Ex. 27, Penske to TNRCC letter, December 2, 1997)

27. On May 20, 1998, Marc Althen informed Ben Milford that the stockpiled waste had been removed from TDSL and provided Mr. Milford with copies of the transportation manifests.[58] Penske took all precautions and removed and disposed of the stockpiled waste as hazardous.[59] Later testing by the disposal facility, TECO, confirmed that the waste was in fact non-hazardous.[60]

28. On May 21, 1998, TNRCC Regional Inspector Ben Milford issued an inspection report to TDSL stating that: "The TNRCC allowed the spill waste that was inadvertently deposited in the landfill to remain there."[61] Ben Milford testified that the report meant that TDSL could permanently dispose of the tubes, not simply temporarily store the tubes.[62]

29. On June 10, 1998, the TNRCC issued a spill report that stated that "the TNRCC allowed them [TV tube debris] to remain in the landfill."[63] Again, Ben Milford testified that the TNRCC "allowed it [the waste] to stay there just like any other waste."[64]

TDSL agreed that the waste could remain at its landfill

30. Like the TNRCC, TDSL agreed in 1998 that the waste could remain at its landfill.

31. On January 28, 1998, Mr. Gary Newton (TDSL's general counsel) sent Mr. Gerald Bolmer (TNRCC Waste Evaluation Section) a draft request to classify the waste as Class 1, non-hazardous waste and permanently dispose of the waste in TDSL's landfill.[65] Mr. Newton testified that he spoke with the TNRCC and they "didn't have any problem" with the material

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[58] (Ex. 28, Penske to TNRCC letter, May 20, 1998)

[59] *Id.*

[60] (Ex. 24, TECO Test Results)

[61] (Ex. 29, TNRCC Inspection Report, May 21, 1998)

[62] (Ex. 25, Milford Deposition at 47.24 – 49.13)

[63] (Ex. 30, TNRCC Spill Report, June 10, 1998)

[64] Ex. 25, Milford Deposition at 67.20 – 68.8)

[65] (Ex. 31, Newton to Bolmer facsimile, January 28, 1998)

remaining in the landfill.[66] Bob Gregory agreed that TDSL could permanently dispose of the waste with special authorization from the TNRCC, and that the TNRCC "would and could allow them [the waste] to remain if we requested it."[67]

32. On February 3, 1998, TDSL wrote Penske a letter offering to resolve the incident with Penske and permanently dispose of the material in its landfill. TDSL stated that "[n]ow it appears that the TNRCC is willing to allow the tubes to remain in the TDSL landfill without further testing."[68] TDSL attached a draft request for Penske's signature asking the TNRCC for approval to permanently dispose of the material at TDSL.[69]

33. On February 6, 1998, Penske responded to TDSL and stated that it agreed to send the "written request to the Texas Natural Resource Conservation Commission ("TNRCC") for permission to permanently dispose of the television tubes already in place at the landfill."[70] Penske also agreed to pay for and remove all the material stockpiled in the roll-off boxes at TDSL.[71]

34. The proposed resolution, however, fell through for one reason — money. TDSL demanded approximately $320,000 in alleged damages and Penske refused to pay this amount.[72] The parties agreed that the remaining television tube debris could be disposed of at TDSL with TNRCC authorization, but could not agree on monetary terms.[73]

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[66] (Ex. 10, Newton Deposition (07/24/2003) at p. 224.4 – 224.21)

[67] (Ex. 18, Bob Gregory Deposition (05/29/2003) at 164.7 – 164.21, 189.14 – 189.24)

[68] (Ex. 32, TDSL to Penske, February 3, 1998)

[69] *Id*

[70] (Ex. 33, Penske to TDSL, February 6, 1998)

[71] *Id.*

[72] (Ex. 32, TDSL to Penske, February 3, 1998; Ex. 33, Penske to TDSL, February 6, 1998)

[73] *Id.*

35. After Penske refused to pay TDSL $320,000 in alleged damages, TDSL sued Penske in February, 1998.

TDSL's claims that the TCEQ failed to act are false

36. TDSL's claim that the TCEQ failed to act timely is simply false. In early 1998, Penske removed the waste stockpiled in the roll-offs as requested and the TNRCC allowed the 18 cubic yards of disposed-of waste to remain safely in TDSL's landfill, which is permitted to accept such waste. Neither Penske nor TDSL was under any obligation to ever remove the 18 cubic yards of waste disposed of at TDSL's landfill.

37. While TDSL could have allowed the 18-cubic yards to remain at its landfill in accordance with the TNRCC's decision in 1998, this would have conflicted with TDSL's litigation strategy to sue Penske and Zenith to recover millions in alleged damages.

38. TDSL did not seek further TNRCC or TCEQ involvement until six years later in March, 2004, on the eve of trial in its lawsuit against Penske, Zenith, and Harry McCain (the Penske driver). From February 1998 through March 2004, TDSL pursued common-law tort claims against Penske, Zenith, and McCain in an effort to recover millions in an opportunistic lawsuit.[74] TDSL continues to pursue its claims against Penske and Zenith seeking to recover over seven and a half million dollars in alleged damages and attorneys' fees.[75]

39. In January 13, 2004 (on the eve of an earlier trial setting) Bob Gregory sent Wade Wheately a letter with many questions including "Does the attached TNRCC Oil or Hazardous Substances Spill or Discharge Report signed June 10, 1998, which states that, 'The TNRCC

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[74] TDSL sued but later settled with Dax Taylor (the Mustang driver who caused the accident).

[75] (Ex. 34, TDSL's Eleventh Supplemental Responses to Request for Disclosure Under Rule 194.2)

allowed them to remain in the landfill,' in any way ***require*** TDSL to permanently keep the generator designated hazardous waste in the TDSL landfill against its will?"[76]

40. On January 15, 2004, Mr. Wheatley responded that "given the environmental considerations associated with this waste material being managed in your landfill, it is ***acceptable*** to place the referenced waste material into transport containers and to ship the waste material to an authorized facility."[77]

41. TDSL then voluntarily choose to remove the municipal solid waste from its facility. Neither the TCEQ nor Mr. Wheatley stated that TDSL was required to remove the municipal solid waste.

42. Rather, TDSL fabricated an alleged "emergency" situation by digging up the municipal solid waste and placing it into roll-off boxes 11 days before a scheduled trial as a litigation strategy. Until Penske received the NOV, the TCEQ had allowed the waste to remain safely disposed of at TDSL's site and Penske had previously complied with all TCEQ requests by removing the waste stockpiled in the roll-off containers.

Excavation and testing of municipal solid waste

43. In early 2004, over six years after TDSL removed all but 18 yards of the accident debris from its landfill, TDSL voluntarily excavated approximately 1600 cubic yards of waste from the landfill and placed it into 99 roll-offs. TDSL excavated all the waste it had received on October 9, 1997 even though there was no indication that any leaded glass from the accident remained in the landfill after TDSL's removal of all visible glass the next day.

44. While it was being removed from the landfill, it was sampled by Penske's contractor SKA Consulting LP ("SKA"). The result of the sampling performed by SKA, as well

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[76] (Ex. 35, Gregory letter to Wheatley, January 13, 2004) (emphasis added)

[77] (Ex. 36, Wheatley letter to Gregory, January 15, 2004) (emphasis added)

as the sampling later performed by the Executive Director, confirm that the waste is non-hazardous. In fact, out of the numerous representative samples tested, none detected leachable lead greater than 0.1 mg/L.[78]

45. The waste has remained in the roll-offs at the landfill since that date as TDSL made no arrangements for its disposal. TDSL alleges that Penske and Zenith must remove all 1600 cubic yards as hazardous waste, despite the testing results to the contrary from TECO, SKA, and the Executive Director.

TDSL holds the excavated municipal solid waste hostage

46. Although Penske continues to believe that it did not violate any rule and that the material does not need to be removed from TDSL's landfill — a fact borne out by the TNRCC's conclusion years ago that the material could remain in the TDSL landfill and the results of recent testing by Penske and the TCEQ — on June 1, 2004, Penske proposed a plan for the removal and disposal of the waste from the TDSL landfill as a non-hazardous waste at another permitted municipal solid waste landfill in accordance with the actions requested of it by the Executive Director on May 13, 2004.[79]

47. That plan was approved by the Executive Director on June 18, 2004, and specific authorization was granted by the Executive Director for disposal of the waste as a special waste in any one of seven permitted landfills on June 30, 2004.[80]

48. Penske's efforts culminated in final preparations for the pick up of the waste by its contractor USA Environment on July 7, 2004.[81] TDSL, however, refused to allow access to the landfill for removal of the waste unless the waste was managed as a hazardous waste.[82]

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[78] (Ex. 37, SKA Testing Results)

[79] (Ex. 38, Penske to TCEQ, June 1, 2004)

[80] (Ex. 39, TCEQ to Penske, June 18, 2004, and Ex. 40, TCEQ to Penske, June 30, 2004)

49. In response to TDSL's refusal to allow Penske to remove the waste, the TCEQ performed independent representative sampling and testing of the waste.[83] On July 12, 2004, the Executive Director collected 20 representative samples of the waste in the roll-offs. The testing of those samples by MicroLife Laboratories, Ltd. further confirms the non-hazardous character of the stored waste, with no TCLP result exceeding 0.092 mg/L.[84] TDSL, however, has again refused to allow Penske to remove the waste unless the waste is managed as a hazardous waste.[85]

50. TDSL actions crystallize what this dispute is about – TDSL would rather keep the waste and claim it is hazardous in an effort to improve its chances of recovering millions in a civil lawsuit than allow Penske to dispose of the waste as non-hazardous pursuant to TCEQ's approved disposal plan.

TDSL sues the TCEQ

51. Instead of rejoicing that the waste is non-hazardous and facilitating the removal of the waste, on July 9 and July 22, 2004, TDSL filed motions to overturn the Executive Director's decisions on the classification of the waste. A hearing is schedule on TCEQ's motions on September 16, 2004.

52. On July 19, TDSL appealed the Executive Director's ruling classification of the waste and sued the TCEQ in Travis County District Court.

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[81] (Ex. 41, Penske to TDSL, July 1, 2004)

[82] (Ex. 42, Penske letter to TCEQ, July 7, 2004)

[83] (Ex. 43, TCEQ letter to TDSL, July 8, 2004, and Ex. 44, TCEQ letter to Penske, July 13, 2004)

[84] (Ex. 45, MicroLife Testing Results; Ex. 46, TCEQ letter to Penske, July 23, 2004, and Ex. 47, TCEQ letter to TDSL, July 28, 2004)

[85] (Ex. 48, TDSL letter to Penske, July 27, 2004)

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 12, 2005

Ms. Pamela M. Giblin
Baker Botts, LLP
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, Texas 78701-4287

Dear Ms. Giblin:

I am responding to your recent letter regarding the May 13, 2004 notice of violation (NOV) issued by the Texas Commission on Environmental Quality to Penske Truck Leasing Co., L.P. (Penske) in connection with the spill investigation at IH-35 South near Exit 221 in Buda, Hays County. You believe that Penske has done everything in its power to address this NOV and state that Penske now intends to proceed with obtaining a trial date in the pending Hays County litigation to allow a court to ultimately decide the disputed issues in this matter.

I agree that Penske has made appropriate attempts to address the NOV. Further, notwithstanding the briefings filed, meetings convened and hearings held before this agency, a number of relevant issues remain in dispute and are unresolved. In my view, these matters are best resolved in court. Given these circumstances, I do not plan to take further action on the NOV pending the resolution of this matter in court proceedings.

Sincerely,

Glenn Shankle
Executive Director

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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 & Rodriquez, 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 filed 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 rules[1] (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,

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Attorneys for Petitioner

Exhibit 1

BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

TCEQ DOCKET NO 2004-0984-IHW-E

REPORT OF MARIANNE LAMONT HORINKO

SEPTEMBER 8, 2004

1 IDENTIFICATION

My name is Marianne Lamont Horinko, 4710 Benjamin Cross Court, Chantilly, Virginia, 20151, telephone 202-997-3318.

2. CREDENTIALS

From 2001 to 2004, I served as Assistant Administrator of the Office of Solid Waste and Emergency Response (OSWER) at the U.S. Environmental Protection Agency (EPA), including service as Acting Administrator of EPA from July through November, 2003. OSWER is the office responsible for administration of the federal Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) programs. From 1992 to 2001, I served as President of Clay Associates, Inc (and Executive Vice President and General Counsel of its predecessor organization, Don Clay Associates, Inc.), a national environmental consulting firm specializing in hazardous waste policy. From 1990 to 1992 I served as Attorney Advisor to Don Clay, the Assistant Administrator for OSWER, responsible for RCRA and CERCLA policy. From 1986 to 1990 I practiced law at Morgan, Lewis & Bockius, specializing in RCRA and CERCLA. From 1983 to 1985 I was a staff scientist at ENVIRON Corporation, specializing in risk assessment and environmental regulation. A copy of my resume is attached as Exhibit A.

3. SUBJECT MATTER

This report provides my expert opinion as to the regulatory status of commingled hazardous waste, generated as a result of the traffic accident on I-35 involving damage to

approximately 1,248 color television cathode ray tubes (CRTs) from a Penske Truck Leasing Co., L.P. truck on October 9, 1997 in Hays County, Texas, and municipal solid waste at the Texas Disposal Systems Landfill (TDSL).

4. GENERAL SUBSTANCE OF MENTAL IMPRESSIONS AND OPINIONS AND BRIEF SUMMARY OF BASIS FOR THEM

A. FRAMEWORK FOR REGULATION OF HAZARDOUS WASTE UNDER RCRA

Since 1980, EPA has developed a comprehensive regulatory framework under Subtitle C of RCRA for identifying, transporting, treating, storing, and disposing of hazardous waste. The regulations (set forth at 40 C.F.R. Part 261-299) center around two broad objectives: to prevent releases of hazardous wastes and constituents through a comprehensive and conservative set of management requirements (commonly referred to as "cradle-to-grave" management), and to minimize the generation and maximize the legitimate reuse, recycling, and treatment of hazardous waste and constituents.

The RCRA regulations generally apply to any "solid waste." EPA defines "solid waste" as garbage, refuse, sludge, or other discarded material (including solids, semi-solids, liquids, and contaminated gaseous materials). If a material is a "solid waste," the generator must then determine if it is a "hazardous waste." *It is the responsibility of the generator either to test the waste or use its knowledge of the waste to make a determination about its properties, either before or at the time of generation.* EPA generally defines hazardous waste as either "listed"

waste, which is a specific waste stream designation based upon the specific hazardous properties of that waste stream, or "characteristic" waste, which is a generic waste stream that exhibits a characteristic of hazardous waste There are four categories of characteristic waste: ignitable, corrosive, reactive, and toxic. For toxic wastes, EPA has published a schedule of concentration levels for leachability testing of specific toxic chemicals, above which wastes are deemed to be hazardous.

The RCRA statute further mandates that hazardous wastes be treated to minimize threats to human health and the environment prior to land disposal. EPA has developed a set of regulations, the Land Disposal Restrictions (LDR), that apply to each listed and characteristic hazardous waste to ensure that they are treated properly prior to land disposal. These regulations are needed to fulfill the intent of the law that hazardous wastes be treated so as to "substantially reduce the toxicity of the waste or migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized." RCRA Section 3004(m)(1). *In other words, it is not permissible to simply dilute a waste in order to reduce the toxicity below the characteristic leachate level, the waste must be treated to comply with the law.*

B. THE SPILLED CRTS FROM THE PENSKE TRUCK WERE HAZARDOUS WASTES UNDER RCRA

In the instant matter, the CRTs being shipped by Penske ceased being useful products and became "discarded" (and thus, solid wastes under RCRA) when the Penske truck accident

occurred at approximately 12:51 p.m on October 9, 1997 (This situation is analogous to the train derailment which occurred in California in the early 1990s involving a spill of metam sodium, a toxic pesticide; in that situation, EPA testified that the pesticide product became discarded and thus, subject to RCRA when the train left the tracks.) Under its contractual arrangement with the shipper, Zenith Electronics Corporation (Zenith), Penske was on official notice that any discarded CRTs would be hazardous waste because of their high lead content. Zenith routinely managed all of their other discarded CRTs as D008 hazardous waste. Furthermore, contractual arrangements between Zenith and Penske specified that any discarded CRTs would be managed as D008 waste. Thus, both Zenith and Penske had knowledge that the materials would be hazardous if discarded, and at the time the CRTs spilled from the truck and were no longer usable as intended or for other purposes, they became discarded under RCRA. (Indeed, EPA itself specified that discarded commercial CRTs are hazardous D008 waste in a rule proposing to exempt recycling of CRTs under certain conditions to safeguard their handling from the hazardous waste management requirements. 67 Fed Reg. 40508)

Zenith's assertion that the CRTs are essentially harmless is mistaken. In fact, EPA is on the record as having great concern about the growing amount of CRT waste - that is why the Agency proposed the CRT recycling rule, to keep the discarded CRTs out of landfills. EPA also convened a stakeholder group, the National Environmental Product Stewardship Initiative, to develop consensus on how to stop disposal of discarded CRTs. Last year California enacted legislation to mandate CRT recycling, and a number of states are considering landfill bans on CRTs.

Both Zenith, as the owner of the CRTs, or Penske, as the operator of the truck carrying the CRTs, could be considered the "generator" for purposes of RCRA. As generator of a solid waste, Penske had the obligation to determine whether the material was "hazardous" under RCRA upon occurrence of the accident and then ensure its proper treatment and disposal Thus, Penske should have either relied upon its knowledge to report the materials as hazardous, or tested the spill materials to determine actual hazard, prior to allowing the spilled materials to be sent to a municipal landfill in error

Penske was also obliged to provide proper notification to public authorities under CERCLA that a release of a hazardous substance above its reporting threshold had occurred Public safety officials responding to the traffic accident relied upon the Penske driver's misrepresentation that the CRT waste (i.e., shattered glass materials containing leachable lead) was not hazardous to send the materials to the TDSL facility in error. Penske's assertion that the emergency responders and receiving facility were responsible for the hazardous waste designation runs counter to the RCRA rules, which rely upon generator testing or knowledge.

At the time of the truck accident, the discarded CRTs should have been managed as D008 hazardous waste. After the passage of several hours and upon realizing its error, Penske appears to have taken some proper steps to correct its error and to ensure responsible and legal management of the waste CRTs (other than those that had been placed into the landfill face because of the truck driver's misrepresentation). Penske headquarters, prior to discovering the error, caused seven dump truck loads to be taken to TDSL and unloaded at the landfill face.

Thereafter, after Penske's notification to TDSL that the discarded CRT waste was hazardous, two dump trucks originally directed to TDSL from the accident scene were returned to the scene. Penske mobilized a licensed hazardous waste handler, Code 3, to containerize these two dump truck loads and the remaining discarded CRT waste in rolloff boxes, separate out the CRT waste, and manage it as hazardous waste. However, Penske is irresponsible in not managing the mixture of municipal solid waste and hazardous waste as D008 hazardous waste. Once the hazardous waste characteristic attaches at the point of generation under EPA's rules (i.e , the accident scene in this instance), that waste code carries through until the materials are properly treated to remove the hazardous waste characteristic and meet the LDR requirements. As discussed below, simply diluting the hazardous waste to reduce the levels of toxic constituents below the characteristic is impermissible.

The September 2, 2004 letter from Charles J. Sheehan, EPA Regional Counsel, Region 6 (Dallas) to Lydia Gonzalez Gromatzky, TCEQ supports this reading of the regulations. Sheehan correctly notes that a waste which does not meet the characteristic levels at the point of generation does not require disposal in a RCRA Subtitle C hazardous waste landfill. Sheehan further emphasizes that improper dilution, such as mixing with municipal solid waste, may not be used to achieve these levels and avoid adequate treatment under RCRA., and a regulating agency may take such enforcement action as is necessary to ensure that proper treatment of such waste occurs.

C. MIXING THE SPILLED HAZARDOUS WASTE WITH MUNICIPAL SOLID WASTE DOES NOT DEFEAT THE MATERIALS' HAZARDOUS WASTE DESIGNATION UNDER RCRA

The RCRA statute expressly mandates that hazardous waste be treated to minimize threats prior to land disposal. This statutory requirement applies to both listed and characteristic wastes In promulgating the regulatory treatment levels for each RCRA waste stream, EPA divided the task into manageable packages or "thirds." The treatment standards for characteristic wastes were included in the so-called "third-thirds" rulemaking (note that the designation of wastes into each "third" was something of a misnomer, given that the last "third"actually contained much more than a third of the RCRA waste streams).

In promulgating the "third-thirds" rule, which contained the LDR standards for characteristic wastes, EPA faced the dilemma of whether to set treatment standards for these waste streams that might be below the characteristic concentration levels. In other words, could EPA mandate treatment to levels below which the waste was clearly hazardous? EPA found that soundest reading of the RCRA statute would indeed require such treatment, noting the "statutory goals and policies of seeking to reduce the uncertainties inherent in the land disposal of hazardous waste by substituting a system whereby hazardous wastes are pretreated in such a way that minimizes threats to human health and the environment." 54 Fed. Reg. 48490.

In reaching this policy result, EPA recognized that the characteristic of toxicity is defined by levels higher than the health-based levels that have been the basis for delisting many

hazardous wastes. In other words, the toxicity characteristic concentration levels are those at which the wastes clearly present a substantial hazard, and that lower levels also may pose a hazard. In addition, characteristic wastes may also contain other hazardous constituents, and only by mandating treatment beyond simply removing the characteristic will allow EPA to reach these other hazardous chemicals. EPA indicated that this broad reading of its statutory authority was the only way to reduce the characteristic waste's toxicity and mobility in a way that further minimizes the threat to human health and the environment. Indeed, EPA noted that this reading was the only way to implement the Congressional admonition against dilution in lieu of treatment.

More critically, EPA also addressed the important issue of whether dilution could be used to defeat the hazardous waste characteristic - not just meet the LDR standards. EPA specifically stated: "It is not permissible to dilute a waste to render it non-hazardous in lieu of proper treatment under section 3004(m)" of RCRA. 54 Fed Reg. 48495. In reaching this conclusion - that characteristic toxic wastes cannot be mixed with non-hazardous wastes in order to render them non-hazardous - EPA noted that its authority to mandate LDR treatment standards below the characteristic level would be largely meaningless if a person could dilute the waste to remove the characteristic rather than treating it. The legislative history of the statute clearly indicates Congress' intention that dilution not be used as a substitute for treatment, noting that "a prohibition of this type of dilution is particularly important where regulations are based on concentrations of hazardous constituents." Id. In the final "third-thirds" rule, EPA found that "in many cases dilution simply increases the volume of the waste without reducing or

immobilizing the mass of hazardous constituents," and that "characteristic wastes may also contain significant concentrations of other hazardous substances." 55 Fed. Reg. 22653 Thus, the Agency "adheres to the position that the act of impermissibly diluting a prohibited waste so that it no longer exhibits a characteristic (or is rendered delistable) is illegal." 55 Fed. Reg. 22666. The dilution prohibition clearly applies to removing the characteristic, not just complying with the RCRA land disposal restrictions.

Penske's assertion that EPA conclusively asserted that the currently containerized mixture of characteristic toxic waste and non-hazardous waste that was impermissibly diluted is automatically non-hazardous under the "third-thirds" rule is also wrong. Indeed, such a policy result would be contrary to the RCRA statute and also detrimental to the environment. Allowing Penske to classify all of the material as non-hazardous and dispose of the material without treatment violates the RCRA statutory mandate that hazardous waste be treated to minimize threats to human health and the environment. Any other result would remove the incentive for generators to treat their wastes responsibly, as well as allow them to reap an unfair economic benefit by evading the costs of proper waste management and disposal. Penske was responsible for the generation of hazardous waste and for potentially allowing hazardous waste to be disposed in a manner that may have caused risk to human health had TDSL not immediately isolated and stored the waste for proper treatment and disposal. Penske's preferred disposal option, to place the waste in a nonhazardous waste landfill, does nothing to reduce the toxicity or volume of waste material - it simply moves the problem to another hazardous waste landfill. Irresponsible behavior should not be rewarded by selecting, and the Texas Commission on

Environmental Quality (TCEQ) approving, the path of least resistance.

D. FAILURE TO MANDATE PROPER TREATMENT AND DISPOSAL OF THIS MATERIAL PLACES TDSL AND ITS CUSTOMERS AT UNFAIR RISK OF SUPERFUND LIABILITY AND EXPOSURE TO CITIZEN SUIT LITIGATION

The Superfund law places liability of cleanup of releases of hazardous substances upon four classes of individuals: Owners of facilities from which there has been a release; operators of such facilities; transporters of the hazardous substances; and those who "arranged for disposal" (or generators) of such substances. Liability is strict, joint, and several, meaning that each of those entities is potentially liable for the entire cost of cleanup. Cleanup of a Superfund site can be extremely expensive, often in excess of $25 million per cleanup. Many municipal solid waste landfills have ended up on the Superfund National Priorities List, in part because of the erroneous engineering perspective in past decades that the best way to dispose of hazardous waste was to mix it with MSW (at that time, it was viewed that MSW would act as a "sponge" for the hazardous waste. We now know, of course, that the hazardous waste simply leaked through the landfill and the large volume of MSW simply rendered the cleanup much more expensive.

Liability under Superfund attaches regardless of the concentration of the hazardous substances in the waste. As a result, simply removing the RCRA toxicity characteristic and rendering the hazardous waste more dilute does nothing to ameliorate potential Superfund

liability. If Penske is allowed to remove this material and improperly dispose of it, resulting in future cleanup under Superfund, TDSL and the generators of the associated MSW may be potentially liable for the entire costs of the cleanup. Furthermore, such liability may attach regardless of whether the site where the waste was disposed ends up on the National Priorities List. Under the Superfund law, not only the Federal government, but also the state, a local government, or even private parties can sue to recover the costs of cleanup. Furthermore, the RCRA statute also includes a citizen suit provision, under which TDSL could be liable for cleanup resulting from any "imminent and substantial endangerment" caused by the improperly-managed waste. As a result, assurances from the state that it will not pursue TDSL for any cleanup costs do not insulate TDSL from any other prospects of future liability for improper management of the Penske waste.

E. PENSKE SHOULD ASSUME RESPONSIBILITY FOR ITS MIXTURE OF HAZARDOUS AND SOLID WASTE BY REMOVING THE MATERIALS FROM THE TDSL PREMISES TO AN AUTHORIZED HAZARDOUS WASTE DISPOSAL FACILITY AND DETERMINING WHAT TYPE OF TREATMENT IS APPROPRIATE PRIOR TO LAND DISPOSAL IN ORDER TO MEET THE RCRA REQUIREMENT TO MINIMIZE THREATS

The TCEQ, as the state agency authorized to administer the RCRA statute in this case, should require that Penske utilize the same approach to the materials at issue here as the other discarded hazardous wastes generated at the truck accident scene. That is, Penske should hire a licensed hazardous waste contractor to remove the discarded material mixed with other waste to an authorized hazardous waste facility, manifested as D008 hazardous waste. The licensed

contractor should then assist Penske and regulatory authorities in determining the appropriate treatment protocols and disposal options that will comply with the RCRA requirement that wastes be treated to minimize threats, reduce the toxicity and volume of material, and ensure proper disposal.

While I believe the law mandates treatment of the co-mingled materials as a hazardous waste, even if the Commission assumes for the sake of argument that there exists some flexibility under the law, they should still adhere to this course of action for a number of compelling policy reasons. Most important, of course, is protect the public health, ensure treatment to minimize threats consistent with RCRA, and disincentivize impermissible dilution. The Commission should also send a strong message that cavalier attitudes toward improper waste management and irresponsible corporate stewardship such as Zenith's and Penske's won't be tolerated in the state of Texas. Finally, the Commission should take steps to ensure that emergency responders and responsible actors helping out after an accident are insulated from liability for their actions. Thus, the proper course of action is to manifest the waste to a licensed RCRA hazardous waste handler and determine through proper testing and analysis whether treatment will immobilize the lead.

5. LIST OF DOCUMENTS, REPORTS, AND DATA COMPILATIONS THAT HAVE BEEN RELIED UPON IN PREPARATION OF THIS REPORT

A list of documents, reports, and data compilations that have been relied upon in preparation of this report is attached as Exhibit B. Should additional material or facts come to

light, I reserve the right to amend my opinion

Respectfully submitted,

Marianne Lamont Horinko

EXHIBIT A:

Marianne Lamont Horinko

Marianne L Horinko is a Visiting Scholar at the Environmental Law Institute, a non-profit organization devoted to the study of U.S and international environmental law. She is an internationally-recognized author and speaker on the topics of environmental cleanup policy, hazardous waste regulation, waste reduction and recycling, emergency response and homeland security, and "brownfields" revitalization.

Ms Horinko was named Assistant Administrator for the Office of Solid Waste and Emergency Response at the U.S. Environmental Protection Agency by President George W Bush in June 2001, a position she held until June 2004. She served as Acting EPA Administrator from July through November, 2003 during the interim between Administrators Christine Todd Whitman and Michael O. Leavitt.

During her tenure as Assistant Administrator, Ms. Horinko refocused the goals of her office around five major priorities: Homeland Security/Emergency Response; One Clean-up Program; Land Revitalization; Energy Recovery, Recycling & Waste Minimization; a Retail Environmental Initiative (the Resource Conservation Challenge) and Workforce Development.

Following the events of September 11, Ms. Horinko learned that she had both war time and peace time responsibilities, and spent her first few months at EPA in the unprecedented and unexpected

role of assisting in environmental cleanup activities at Ground Zero in lower Manhattan, the Pentagon in Washington DC, and the U.S. Capitol due to anthrax contamination. In 2003, as National Program manager, she oversaw EPA's response to the Columbia Space Shuttle Disaster As a result of these experiences, she has led the way in crafting the groundbreaking National Approach to Response

She brought new approaches to environmental protection using partnerships, flexibility and innovation to create environmental improvement. The Brownfields program, signed into law by President Bush in 2002, is a model for many of her efforts, as it is the embodiment of these new approaches to environmental protection. Under her leadership, the budget for the Brownfields program more than doubled.

During the first Bush Administration, Ms. Horinko was Attorney Advisor to Don Clay, EPA's Assistant Administrator for Solid Waste and Emergency Response. In that capacity she was responsible for RCRA regulatory issues and Superfund reauthorization. Subsequently, she served as President of Clay Associates, Inc., a national environmental policy consulting firm, where she launched the RCRA Policy Forum, a membership organization comprised of federal and state governments, environmental groups, Hill staff, and industries interested in furthering constructive dialogue to improve the nation's waste programs.

Ms. Horinko is an alumna of the University of Maryland, College Park (B.S. in analytical chemistry, 1982) and Georgetown University Law School (J D , 1986). From 1986 to 1990, Ms Horinko was an attorney at Morgan, Lewis & Bockius, involved in the areas of pesticides and hazardous waste

counseling, Clean Water Act and Superfund litigation, and environmental audits in connection with business transactions She was responsible for both the Superfund Settlements Project and the Information Network for Superfund Settlements, a policy group of over 120 companies, law firms, and other organizations aimed at cooperative efforts to streamline cleanups

She is married and has two children.

Bio Dated 8/17/04

EXHIBIT B - List of materials reviewed or relied upon in developing report

1 U.S Environmental Protection Agency, "Land Disposal Restrictions for Third Third Scheduled Wastes," Final Rule, 55 Fed. Reg 22520

2 U.S. Environmental Protection Agency, "Land Disposal Restrictions for Third Third Scheduled Wastes," Proposal Rule, 54 Fed. Reg 48372.

3. May 25, 2004 Letter to Bob Gregory, TDSL from Glenn Shankle, TCEQ re: Zenith Cathorde Ray Tubes (CRT); Truck accident of October 9, 1997 and subsequent handling of CRT waste accident debris at the accident scene and at the TDSL landfill; TCEQ Permit No. 2123; Travis County.

4. TCEQ Docket No. 2004-0984-IHW-E, Penske Truck Leasing Co., L.P.'s Response to Texas Disposal Systems Landfill, Inc.'s Motions to Overturn, August 2, 2004.

5. June 30, 2004 Letter to John Steib, TCEQ from Gary Newton, TDSL re: June 18, 2004 letter to Marc Althen of Penske Truck Leasing Co. on Hazardous CRT Waste and Penske's Request for Authorization for Disposal of a Special Waste.

6 October 10, 1997, Fax from Charles J. Smith, Jr., Penske Truck Leasing, to Jim Gregory, Texas Dispoal Systems Landfill, noting Penske as generator of spilled materials.

7. November 5, 1997 Letter from Chris Smith, TCEQ to Mark Althen, Penske Truck Leasing, re: Penske Truck Leasing Spill Located at South IH-35 near Buda, Hays County, Texas.

8. December 2, 1997 Letter to Chris Smith, TCEQ from Marc Althen, Penske Truck Leasing re: Penske Logistics Spill IH-35 Near Buda, Harp County, Texas.

9. January 15, 2004 Letter to Bob Gregory, TDSL from Wade Wheatley, TCEQ re:

Commingled Cathode Ray Tube Regulated Hazardous Waste, Texas Disposal Systems Landfill, Inc., TCEQ Permit No. MSW-2123, Travis County, Texas.

10. May 12, 2004 Letter to Glenn Shankle, TCEQ from Kerry Russell, Russell, Moorman, and Rodriguez, L.L.P. re: May 6, 2004 TDSL Meeting.

11. May 13, 2004 Letter to Brian Hard, Penske Truck Leasing from Glenn Shankle, TCEQ re: Notice of Violation for the Sill Investigation at IH-35 South, near Exit 221, Buda, Hays County, Texas.

12. May 13, 2004 Letter to Bob Gregory, TDSL from Glenn W. Shankle, TCEQ re: Zenith Cathode Ray Tubes (CRT); Accident of October 9, 1997.

13. May 14, 2004, Opinion of Keith Hopson, Attorney-at-Law

14. September 2, 2004 Letter to Lydia Gonzalez Gromatsky, TCEQ from Charles J. Sheehan, Regional Counsel, EPA Region 6.

15. June 1, 2004 Letter to John Steib, TCEQ from Marc Althen, Penske Truck Leasing re: Proposed Removal Plan, Notice of Violation dated May 13, 2004, Spill Investigation at IH-35 South, near Exit 221, Buda, Hays County, Texas.

16. June 4, 2004, Report of Robert M. Zoch, Jr., P.E.

17. June 16, 2004, Letter to Lydia Gonzalez-Gromatsky, TCEQ from Gary Newton, TDSL re: Response to May 20, 2004 letter regarding Cathode Ray Tube Regulated Hazardous Waste, TCEQ Permit No. MSW-2123, Travis County Texas.

18. June 18, 2004 Letter to Marc E. Althen, Penske Truck Leasing from John F. Steib, Jr., TCEQ.

19. June 21, 2004 Request for Authorization for Disposal of a Special Waste from Waste

Management, Inc to TCEQ

20 Penske/Zenith Hazardous Waste Handling General Timeline

21. TCEQ Docket No 2004-0984-IHW-E, In the Matter of the Authorization of Disposal of Waste as Special Waste Issued by the Executive Director, Executive Director's Response to Texas Disposal Systems Landfill, Inc.'s Motion to Overturn

22 TCEQ Docket No. 2004-0984-IHW-E, In the Matter of the Authorization of Disposal of Waste as Special Waste Issued by the Executive Director, Zenith Electronics Corporations's Response to Motion to Overturn.

23. July 28, 2004 Letter to Bob Gregory, TDSL from John Steib, TCEQ

24. July 28, 2004 Letter to Gary T. Newton, TDSL from Michael A. Duff, Penske Truck Leasing.

25. July 27, 2004 Letter to Mike Duff, Penske Logistics from Gary Newton, TDSL re: Response to your July 23, 2004 letter.

26. July 23, 2004 Letter to Gary Newton, TDSL from Michael A. Duff, Penske Truck Leasing.

27. July 8, 2004 Letter to Bob Gregory, TDSL from John F. Steib, Jr., TCEQ.

28. 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., Texas Disposal Systems Landfill, Inc.'s Motion to Overturn the Executive Director's June 30, 2004 Decision.

Exhibit 2

PENSKE
Truck Leasing

MARC E. ALTHEN
VICE PRESIDENT
ENVIRONMENTAL SERVICES

December 2, 1997

Mr. Chris Smith
Waste Program Manager
Texas Natural Resources Conservation Commission
Region 11
1921 Cedar Bend, Suite 150
Austin, TX 78758-5336

RECEIVED
DEC 3 1997
TNRCC-Field Operations
Austin Region 11

Re: Penske Logistics Spill IH-35
Near Buda, Harp County, Texas

Dear Mr. Smith:

This letter shall serve as Penske Logistics' written response to your November 5, 1997 letter.

On October 9, 1997, a Penske Logistics tractor-trailer had an accident in Buda, TX near exit 221 on IH-35 South, Hays County, at approximately 1:00 p.m. In response to the accident, Mr. Brian Acker of the Texas Public Safety Commission, dispatched Automotive Wrecker Service to the accident scene. During Automotive Wrecking Service's attempt to upright the trailer portion of the vehicle, the side of the trailer apparently gave way and some of the contents of the trailer, namely television picture tubes, spilled onto the roadway and the side of the road.

Mr. Acker requested Automotive Wrecking Service pick up and dispose of the boxes and the television picture tubes. M&M Trucking Co. was hired by Automotive Wrecking Services to load and transport the boxes to a local municipal landfill owned by Texas Disposal System.

At approximately 4:50 p.m., the Penske Spill Coordinator was advised of the incident by its branch office.

At approximately 5:05 p.m., the Penske Spill Coordinator contacted TX NRCC's Austin Regional Office and reported the incident to Mr. Art Norman. During this call, Mr. Norman was advised that the trailer contained approximately 1,200 picture tubes which contained lead and phosphorous and, if broken, would be a hazardous waste.

At approximately 5:35 p.m. Penske's Spill Coordinator contacted Mr. Acker and Texas Disposal System's Vice President, Mr. Jim Gregory, and advised them that the waste was hazardous and could not be disposed of in a non-hazardous landfill. During the call, it was decided that the landfill would stockpile the material until proper disposal arrangements could be made. However, Mr. Gregory informed Penske's representative that the landfill had already disposed of two loads of the tubes.

During the same time frame, Jodi Gonzales of Hays County Emergency Management, provided Penske with the names of two potential emergency response companies. Penske immediately contacted one of these companies, Code 3, and hired them to conduct the cleanup.

Code 3 arrived on the scene at approximately 8:00 p.m. and completed the cleanup at 2:30 a.m. on October 10, 1997. The remaining spilled materials (broken cathode ray tubes, fiberboard cartons, and wrapping) were placed into several roll-on/off containers and transported to the Texas Disposal System to await proper disposal.

On October 10, 1997 Edward Villaltando of the Hays County Texas Department of Transportation confirmed that the waste had been properly cleaned up and that no further action was required.

As of today, Penske is attempting to properly dispose of the remaining stockpiled waste at a permitted hazardous waste disposal site.

If you have any questions, please contact me at the letterhead address.

Sincerely,

Marc E. Althen

MEA:csk
L1112597.mea

cc: R. T. Traub

Exhibit 3

EXHIBIT 3

Summary of the Facts Associated with the Generation of Hazardous Waste by Penske and Zenith.

On October 9, 1997, a highway accident involving a truck owned by Penske Truck Leasing Co., L.P. and operated by Penske Logistics, Inc. ("Penske") resulted in the generation of a waste comprised of over 1000 damaged or broken cathode ray tubes ("CRTs"). (Exhibit 2) These CRTs were owned by Zenith Electronics Corporation ("Zenith"). The CRTs were being transported between Zenith's manufacturing plants pursuant to a contract between Zenith and Penske Logistics. This contract included an agreement that Penske would indemnify Zenith. To perform the contract, Penske leased the truck from Penske Truck Leasing, which also provided logistical and accident handling services to Penske Logistics.

Because of the nature of the broken and discarded CRTs, and its substantial lead content, the resulting waste (the "CRT Waste") was and remains a toxic characteristic hazardous waste, a "D008" waste. At the accident scene, however, the Penske Logistics driver initially misrepresented the CRT waste as a non-hazardous waste. Penske did not inform accident response personnel that the broken CRTs needed to be managed as hazardous waste until more than 6 truck loads of the CRT waste had been sent to TDSL's facility.

Yet, before the accident in October 1997, other loads of Zenith CRTs had been broken or damaged while being transported, and Zenith has arranged to dispose of the waste from those accidents as D008 hazardous waste in authorized hazardous waste landfills. Moreover, the transportation agreement between Zenith Electronics and Penske Logistics, entered into months before the accident, recognized the hazardous nature of the CRTs if they were broken or discarded. The agreement placed the burden on Penske to assure proper disposal.

Nevertheless, instead of taking the CRT Waste to a facility authorized to accept hazardous wastes, Penske initially designated the CRT Waste as non-hazardous waste and allowed the CRT Waste to be taken to the municipal solid waste landfill operated in Travis County by TDSL. Upon later notification by Penske that the CRT Waste was in actuality a hazardous waste, TDSL refused to accept additional loads of CRT Waste and isolated the hazardous CRT waste that had been commingled in the working face with municipal solid wastes and soils.

When Penske and Zenith corrected the original erroneous classification of the CRT Waste, it classified the waste as D008 hazardous waste. Penske and Zenith took that action after some of the CRT Waste was delivered to TDSL's facilities and placed in its landfill. The remainder of the CRT Waste was then apparently managed by Penske and Zenith properly as a hazardous waste and shipped to a facility authorized to accept hazardous waste.

The CRT Waste that was accepted by TDSL prior to proper classification of the waste is currently at TDSL's facilities in a mixture; i.e. the hazardous CRT waste, mixed with municipal solid waste and clay cover soil. It is still awaiting proper removal and management by Penske and/or Zenith. In the meantime, TDSL was authorized by TCEQ to containerize this mixture and leave at the TDSL facility.

TDSL has repeatedly requested that TCEQ require Penske or Zenith to remove the CRT waste and properly manage it as a hazardous waste. TCEQ has refused to do so in a way that complies with federal law for the management of hazardous waste. For example, Penske requested and

TCEQ approved the use of a manifest for the waste that would have allowed Penske to claim that it was not the generator of the hazardous waste.

TCEQ's most recent actions can be summarized as follows:

On May 13, 2004, the Executive Director of TCEQ issued an enforcement letter notifying Penske that Penske had violated Texas law by failing to determine that the waste it generated and sent to TDSL's facility was a hazardous waste. (Exhibit 6)

Thus, TCEQ had found that Penske was the generator of the hazardous (D008) waste. The attached October 12, 2005 letter, however, indicates that TCEQ does not intend to pursue enforcement of this violation.

On June 18, 2004, the Executive Director of TCEQ issued a letter to Penske authorizing disposal of the hazardous D008 waste along with the municipal waste with which it had been commingled as non-hazardous waste. (Exhibit 7)

On June 30, 2004, the Executive Director of TCEQ issued a follow-up letter regarding methods for disposal of the commingled waste. (Exhibit 8)

On September 16, 2004, the Commissioners of TCEQ reversed the actions of the Executive Director, granting TDSL's Motion to Overturn the decision and appearing to interpret state law consistent with federal law. (Exhibit 9)

On September 24, 2004, the Executive Director of TCEQ issued a new letter that provided several options to Penske for management of the hazardous waste that remains at TDSL's facilities. One option would allow the commingled waste to be managed as a hazardous "until such time as it is conclusively determined that no D008 waste at the level that is characteristically hazardous remains." (Exhibit 4). Based on further documents, it is clear that the Executive Director actually intended to return to his original position so that Penske and Zenith could manage the commingled waste, i.e. the mixture of the original CRT waste, the municipal solid waste and soil, as a non-hazardous waste if samples from the mixture were analyzed and the mixture did not test as a hazardous waste. No separation of the CRT waste in the mixture would first be required.

On December 1, 2004, the Commission took no action on TDSL's Motion to Overturn the improper alternative in the September 24, 2004 decision of the Executive Director and, thus, allowed that decision of the Executive Director to remain in effect.

On October 12, 2005, the Executive Director issued a letter that made it clear that TCEQ would not pursue its May 13, 2004 enforcement action. (Exhibit 5) In essence, the Executive Director of TCEQ has taken the official position that Penske does not have to comply with the clear language of state and federal rules for the proper treatment or disposal of the mixture of the CRT hazardous waste with the soils and municipal solid waste from TDSL's landfill.

Exhibit 4

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 24, 2004

Mr. Marc E. Althen
Senior Vice President
Penske Truck Leasing.
P.O. Box 563
Reading, Pennsylvania 19603-0563

Dear Mr. Althen:

On May 13, 2004, the Texas Commission on Environmental Quality (TCEQ) issued Penske Truck Leasing (Penske) a Notice of Violation (NOV) in connection with the spill investigation at IH-35 South near Exit 221 in Buda, Hays County. This NOV required Penske to take certain corrective actions. On June 18, 2004, on my behalf, John Steib, Deputy Director for the Office of Compliance and Enforcement, approved your proposed plan for removal and disposal of the waste located at the Texas Disposal Systems Landfill (TDSL) as special waste. TDSL filed a Motion to Overturn my decision in this matter. On September 16, 2004, the Commission issued an order overturning my decision and remanding this matter.

I now exercise my authority to act in this matter, and by this letter, I am requiring the following actions of Penske. No later than October 27, 2004, Penske must remove all of the waste currently stored in the 99 roll-off containers at the TDSL facility. This waste must be manifested as hazardous waste and disposed of at a permitted hazardous waste facility. Alternatively, Penske may pursue the actions discussed at the September 16th hearing relating to the assessment and any necessary extraction of the waste in the roll-off containers. If Penske pursues this approach, all activities associated with the assessment, characterization and extraction of the contents of the roll-off containers must be conducted at a separate authorized facility in a manner that ensures protection of human health and the environment. Specifically, Penske must ensure compliance with all RCRA requirements, including land disposal restrictions for any D008 waste triggering those requirements. In any case, the roll-off containers must be removed from the TDSL facility by October 27, 2004, and the waste manifested as hazardous waste until such time as it is conclusively determined that no D008 waste at the level that is characteristically hazardous remains.

Upon completion of this activity, but no later than 90 days from the date of this letter, please submit all documentation necessary to demonstrate that the waste was properly disposed of in accordance with all applicable rules and regulations. Please submit this information to:

Ms. Anna Rodriguez, Special Assistant
Office of Compliance and Enforcement
Texas Commission on Environmental Quality
P.O. Box 13087, MC 163
Austin, Texas 78711-3087

If you have any questions, please feel free to contact Mr. John F. Steib, Jr.,Deputy Director, Office of Compliance and Enforcement at (512) 239-5718.

Sincerely,

Glenn Shankle, Executive Director
Texas Commission on Environmental Quality

cc: Ms. Pam Giblin, Baker Botts, LLP
Mr. John F. Steib, Jr., Deputy Director, TCEQ Office of Compliance and Enforcement
Mr. Robert Gregory, Texas Disposal Systems

Exhibit 5

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 12, 2005

Ms. Pamela M. Giblin
Baker Botts, LLP
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, Texas 78701-4287

Dear Ms. Giblin:

I am responding to your recent letter regarding the May 13, 2004 notice of violation (NOV) issued by the Texas Commission on Environmental Quality to Penske Truck Leasing Co., L.P. (Penske) in connection with the spill investigation at IH-35 South near Exit 221 in Buda, Hays County. You believe that Penske has done everything in its power to address this NOV and state that Penske now intends to proceed with obtaining a trial date in the pending Hays County litigation to allow a court to ultimately decide the disputed issues in this matter.

I agree that Penske has made appropriate attempts to address the NOV. Further, notwithstanding the briefings filed, meetings convened and hearings held before this agency, a number of relevant issues remain in dispute and are unresolved. In my view, those matters are best resolved in court. Given these circumstances, I do not plan to take further action on the NOV pending the resolution of this matter in court proceedings.

Sincerely,

Glenn Shankle
Executive Director

Exhibit 6

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 13, 2004

CERTIFIED MAIL # 7002 0860 0000 9040 7278
RETURN RECEIPT REQUESTED

Mr. Brian Hard, President
Penske Truck Leasing
P.O. Box 563
Route 10-Green Hills
Reading, PA 19603-0563

Re: Notice of Violation for the Spill Investigation at IH-35 South, near Exit 221, Buda, Hays County, Texas

Dear Mr. Hard:

On October 9, 1997, the Texas Commission on Environmental Quality (TCEQ) responded to a tractor-trailer accident at the above-referenced location. The TCEQ has continued the investigation of the incident to assure environmental compliance with applicable requirements of the Texas Water Code, the Texas Administrative Code and the Code of Federal Regulations. The information obtained in the investigation indicates that violations have occurred regarding the management of the waste material generated during the incident. Enclosed is a summary which lists the investigation findings. Please submit to this office by July 13, 2004, a written description of corrective actions taken and the required documentation demonstrating that the cathode ray tube contaminated solid waste at the Texas Disposal Systems Landfill has been removed and properly disposed of at an authorized facility.

In the enclosed listing we have cited applicable requirements, including TCEQ rules. If you would like to obtain a copy of the applicable TCEQ rules, you may contact any of the sources listed in the enclosed brochure entitled "Obtaining TCEQ Rules." Copies of applicable federal regulations may be obtained from either of the following offices:

U.S. Government Printing Office
Texas Crude Building
801 Travis Street
Houston, Texas 77002
713/228-1187 (phone)

U.S. Government Printing Office
Room 1C-50
Federal Building
1100 Commerce Street
Dallas, Texas 75242
214/767-0076 (phone)

The TCEQ appreciates your assistance in this matter. We anticipate that you will resolve this matter as required in order to protect the State's environment.

If you or members of your staff have any questions, please feel free to contact me at (512) 239-3900.

Sincerely,

Glenn W. Shankle, Acting Executive Director
Texas Commission on Environmental Quality

GS/bem

cc: Mr. Michael A. Duff, Penske Truck Leasing, Reading, PA
Mr. Douglas Y. Christian, Reed Smith, 2500 One Liberty Place, 1650 Market Street, Philadelphia, PA 19103-7301
TCEQ Austin Regional Office

Enclosure: Summary of Investigation Findings

SUMMARY OF INVESTIGATION FINDINGS
Penske Truck Leasing Co., L.P., Penske Logistics, Inc.
Spill Investigation Located at IH-35 South, Near Exit 221, Buda, Hays County, Texas
Incident Date: October 9, 1997

NOTICE OF VIOLATIONS

1. 30 Tex. Admin. Code §330.4(b) / 30 Tex. Admin. Code §335.2(a) / 30 Tex. Admin. Code §335.2(b) and Tex. Admin. Code §335.43(a)

30 Tex. Admin. Code §330.4(b)
In accordance with the requirements of subsection (a) of this section, no generator, transporter, owner or operator of a facility, or any other person may cause, suffer, allow, or permit wastes to be stored, processed, or disposed of at an unauthorized facility or in violation of a permit.

30 Tex. Admin. Code §335.2(a)
No person may cause, suffer, allow, or permit any activity of storage, processing, or disposal of any industrial solid waste or municipal hazardous waste unless such activity is authorized by a permit, amended permit, or other authorization...

30 Tex. Admin. Code §335.2(b)
In accordance with the requirements of subsection (a) of this section, no generator, transporter, owner or operator of a facility, or any other person may cause, suffer, allow, or permit its wastes to be stored, processed, or disposed of at an unauthorized facility or in violation of a permit.

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.

Alleged Violation
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.

Recommended Corrective Action
To resolve this alleged violation, the approximately 1,600 tons (99 plastic-lined and covered rolloff transport containers) of commingled cathode ray tube contaminated solid waste that resulted from Penske's actions must be removed from the Texas Disposal Systems Landfill (TDS) and disposed of at an authorized facility. Penske has until July 13, 2004 to remove and properly dispose of this waste and provide a written description of corrective action taken and the required documentation demonstrating that compliance has been achieved for the outstanding alleged violation.

2. 30 Tex. Admin. Code §335.62

30 Tex. Admin. Code §335.62
Hazardous Waste Determination and Waste Classification. A person who generates a solid waste must determine if that 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.

Alleged Violation
Failure to determine if a generated waste was a hazardous waste.

Recommendation Corrective Action
There is no corrective actions for this alleged violation.

Exhibit 7

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 18, 2004

Mr. Marc E. Althen
Senior Vice President
Penske Truck Leasing
P. O. Box 563
Reading, Pennsylvania 19603-0563

Dear Mr. Althen:

We have received your recent letter describing your proposed plan for removal and disposal of waste located at the Texas Disposal Systems Landfill (TDSL). This waste was generated as result of emergency response cleanup activities related to an accident involving a Penske Truck Leasing (Penske) truck carrying Zenith picture tubes. Penske submitted the plan in response to a Notice of Violation issued by the Texas Commission on Environmental Quality (TCEQ) dated May 13, 2004.

According to your letter, Penske proposes the following actions:

- Transfer the contents of the 99 roll-offs to 30-yard end dump transportation vehicles over a two-day period in June 2004.
- Transfer and dispose of the waste as Municipal Solid Waste in the Class I cell at the BFI Tessman Road Landfill.
- Submit written documentation of completion of removal and disposal activities to TCEQ by July 13, 2004.

Please note that, based on our discussions, we understand that you are proposing to dispose of the waste as a special waste. We have reviewed your plan and approve your approach of transferring the waste from the TDSL facility and disposing of it as special waste. We also understand that you will ensure that the wastes are disposed of at a facility authorized to accept special wastes. Before the waste can be disposed of as a special waste, you must receive approval from the TCEQ. To receive authorization for disposal, please complete TCEQ Form 0152 (Request for Authorization for Disposal of a Special Waste) and submit it to the MSW Permits Section, Waste Permits Division, TCEQ, P.O. Box 13087, MC 124, Austin, Texas 78711-3087. You may also fax the completed form to (512) 239-6000.

Please also note that regarding the transfer of roll-off contents, we do have concerns about the potential for odors and particulates generated as a result of transfer of the materials from the roll-offs to the 30 yard end dump transportation vehicles. Removal of the roll-offs in their current state would address this concern. An alternative approach would entail Penske achieving consent from TDSL for the unloading and transfer of the waste on its site and we would expect that appropriate measures to mitigate odors and particulates would be undertaken.

We look forward to receiving your completion report by July 13, 2004 as required in the May 13, 2004 Notice of Violation. Please feel free to contact me at (512) 239-5100 if you have any questions.

Sincerely,

John F. Steib, Jr., Deputy
Office of Compliance & Enforcement
Texas Commission on Environmental Quality

Exhibit 8

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 30, 2004

Mr. Marc E. Althen
Penske Truck Leasing Co., L.P.
Route 10 Green Hills
P.O. Box 563
Reading, PA 19603-0563

Re: Notice of Violation
Proposed Removal Plan dated May 13, 2004

Dear Mr. Althen:

This letter is in response to your letter of June 28, 2004 requesting acknowledgment of the approval given by the Texas Commission on Environmental Quality (TCEQ) in a letter dated June 18, 2004, signed by Mr. John Steib, Deputy Director, for disposal of the above waste material as a special waste and to concur that the landfills listed in your letter meet the requirements of that letter. The landfills listed below have Class 1 industrial non-hazardous waste cells and are authorized to accept municipal solid waste (MSW) special waste.

1. Covel Gardens Landfill, San Antonio TX - MSW permit 2093
2. Atascocita Landfill, Humble, TX - MSW permit 1307
3. Itasca Landfill, Itasca TX - MSW permit 241
4. U.S. Ecology Landfill, Robstown TX - Industrial Hazardous Waste permit 50052
5. Newton County Landfill, Mauriceville TX - MSW permit 2242
6. Safety Kleen Landfill, Altair TX - MSW permit 203
7. CSC Disposal and Landfill, Avalon TX - MSW permit 1209

The Brazos County Landfill in College Station, Texas, MSW permit 1444C is not listed because it does not have a cell to accept Class 1 industrial non-hazardous waste.

Although the above cited landfills meet the criteria of the June 18, 2004 TCEQ letter the landfills are not required to accept the waste. Please be reminded that each landfill may require additional information before acceptance.

For any questions concerning this authorization, you may call (512) 239-2334. Mailing address: Municipal Solid Waste, MC-124, P.O. Box 13087, Austin, TX 78711-3087.

Sincerely,

Wade M. Wheatley, P.E., Director
Waste Permits Division

WMW/ETB

Exhibit 9

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

RECEIVED
SEP 20 2004

September 16, 2004

TO: Persons on the attached mailing list

RE: Penske Truck Leasing Co., L.P.
TCEQ Docket No. 2004-0984-IHW-E
An Interim Order Concerning Motions to Overturn

Attached is a copy of an order issued by the Commission regarding the above-referenced matter.

Should you have any questions, please contact Cynthia Zapata of the Texas Commission on Environmental Quality's Office of the Chief Clerk (MC 105) at (512) 239-4517.

Sincerely,

LaDonna Castañuela
Chief Clerk

LDC/cz

Enclosure

Mailing List
Penske Truck Leasing, L.P.
TCEQ Docket No. 2004-0984-IHW-E

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE STATE OF TEXAS
COUNTY OF TRAVIS
I hereby certify that this is a true and correct copy of a Texas Commission on Environmental Quality document, which is filed in the permanent records of the Commission. Given under my hand and the seal of office on SEP 17 2004

LaDonna Castanuela, Chief Clerk
Texas Commission on Environmental Quality

AN INTERIM ORDER concerning Motions to Overturn regarding the Executive Director's June 18, 2004 and June 30, 2004 letters allowing Penske Truck Leasing Co., L.P. to dispose of commingled picture tube waste as municipal solid waste special waste; TCEQ Docket No. 2004-0984-IHW-E.

On September 16, 2004, the Texas Commission on Environmental Quality (Commission) evaluated during its public meeting the Motions to Overturn filed by Texas Disposal Systems Landfill, Inc. concerning the Executive Director's June 18, 2004 and June 30, 2004 letters allowing Penske Truck Leasing Co., L.P. to dispose of commingled picture tube waste as municipal solid waste special waste. The Commission also considered responses/briefs to the motions and replies/briefs to those responses.

After considering the written filings, oral argument, and responses to questions during the public meeting, the Commission determined that the Motions to Overturn should be granted and that the matter should be remanded to the Executive Director.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

1. The Motions to Overturn filed by Texas Disposal Systems Landfill, Inc. are GRANTED; and

2. This matter is hereby REMANDED to the Executive Director.

Issue date: SEP 16 2004

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Kathleen Hartnett White

Kathleen Hartnett White, Chairman

Please visit the Office of the Chief Clerk for this file.

1 NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS) IN THE 207TH
LANDFILL, INC.,)
3 Plaintiff,)
)
4 vs.) DISTRICT COURT OF
)
5 PENSKE TRUCK LEASING CO.)
L.P. AND PENSKE)
6 LOGISTICS, INC. AND)
ZENITH ELECTRONICS CORP.)
7 AND ZENITH ELECTRONICS OF)
TEXAS, INC. AND HARRY)
8 ERNEST MCCAIN AND)
DAX DAVID TAYLOR,)
9 Defendants.) HAYS COUNTY, TEXAS

10 ----------

11 ORAL DEPOSITION OF
JIM W. GREGORY
MAY 28, 2003

12 ----------

13 ORAL DEPOSITION OF JIM W. GREGORY, produced as
14 a witness at the instance of the Defendants, and
15 duly sworn, was taken in the above-styled and
16 numbered cause on May 28, 2003, from 9:21 a.m. to
17 5:48 p.m., before Renee DeYoung, CSR in and for the
18 State of Texas, reported by method of machine
19 shorthand, at the law offices of George &
20 Donaldson, 1100 Norwood Tower, 114 West Seventh
21 Street, Austin, Texas, pursuant to the Texas Rules
22 of Civil Procedure and the provisions stated on the
23 record or attached hereto.
24
25

COPY

1 Q. Did you look at this document on the
2 scene?
3 A. I have never seen this document before,
4 no, sir.
5 Q. And you didn't ask to look at the bill of
6 lading at the scene. Is that correct?
7 A. No, sir.
8 Q. Did you know, back in 1997, that you can
9 take certain items in small quantities that you
10 cannot take in larger quantities?
11 A. Yes, sir.
12 Q. Did you train your employees in that
13 regard?
14 A. Yes, sir.
15 Q. What did you tell them generally about
16 that?
17 A. Well, you're taxing my memory again here
18 now.
19 Q. That's okay.
20 A. But they're called small quantity
21 generators. And I believe that that threshold or
22 that number is -- under 220 pounds, you're
23 considered a small quantity generator. And once it
24 gets over that amount, then it falls into a
25 different category.

Q. Including, possibly, hazardous waste?

A. Yes, sir, I believe that's correct.

Q. So you were fully aware of that issue back in October of 1997. Correct?

A. Yes, sir, I think so.

Q. What are some of the items that you can take in small quantities but not in these larger quantities? Just give me some examples, please.

A. Just examples would be like paints, batteries.

Q. Florescent tubes?

A. Fluorescent tubes would fall into that category.

Q. Computer monitors?

A. I'm not exactly sure if computer monitors fall into that category. I would think that they would, but I'm not exactly sure. Televisions would fall under that category, I would think.

Q. And you knew that back in 1997?

A. Yes, sir.

Q. Tell me, sir, why that did not raise a red flag in your mind, when more than a thousand TV tubes were heading in your direction?

MR. DONALDSON: Object to form.

A. Because I knew that we had accepted TV

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 24, 2004

Mr. Marc E. Althen
Senior Vice President
Penske Truck Leasing.
P.O. Box 563
Reading, Pennsylvania 19603-0563

Dear Mr. Althen:

On May 13, 2004, the Texas Commission on Environmental Quality (TCEQ) issued Penske Truck Leasing (Penske) a Notice of Violation (NOV) in connection with the spill investigation at IH-35 South near Exit 221 in Buda, Hays County. This NOV required Penske to take certain corrective actions. On June 18, 2004, on my behalf, John Steib, Deputy Director for the Office of Compliance and Enforcement, approved your proposed plan for removal and disposal of the waste located at the Texas Disposal Systems Landfill (TDSL) as special waste. TDSL filed a Motion to Overturn my decision in this matter. On September 16, 2004, the Commission issued an order overturning my decision and remanding this matter.

I now exercise my authority to act in this matter, and by this letter, I am requiring the following actions of Penske. No later than October 27, 2004, Penske must remove all of the waste currently stored in the 99 roll-off containers at the TDSL facility. This waste must be manifested as hazardous waste and disposed of at a permitted hazardous waste facility. Alternatively, Penske may pursue the actions discussed at the September 16th hearing relating to the assessment and any necessary extraction of the waste in the roll-off containers. If Penske pursues this approach, all activities associated with the assessment, characterization and extraction of the contents of the roll-off containers must be conducted at a separate authorized facility in a manner that ensures protection of human health and the environment. Specifically, Penske must ensure compliance with all RCRA requirements, including land disposal restrictions for any D008 waste triggering those requirements. In any case, the roll-off containers must be removed from the TDSL facility by October 27, 2004, and the waste manifested as hazardous waste until such time as it is conclusively determined that no D008 waste at the level that is characteristically hazardous remains.

Upon completion of this activity, but no later than 90 days from the date of this letter, please submit all documentation necessary to demonstrate that the waste was properly disposed of in accordance with all applicable rules and regulations. Please submit this information to:

Ms. Anna Rodriguez, Special Assistant
Office of Compliance and Enforcement
Texas Commission on Environmental Quality
P.O. Box 13087, MC 163
Austin, Texas 78711-3087

If you have any questions, please feel free to contact Mr. John F. Steib, Jr., Deputy Director, Office of Compliance and Enforcement at (512) 239-5718.

Sincerely,

Glenn Shankle, Executive Director
Texas Commission on Environmental Quality

cc: Ms. Pam Giblin, Baker Botts, LLP
Mr. John F. Steib, Jr., Deputy Director, TCEQ Office of Compliance and Enforcement
Mr. Robert Gregory, Texas Disposal Systems

FILED
06 MAY 17 PM 12: 14
REGIONAL HEARING CLERK
EPA REGION VI

Docket No: W/Petition-TX/RCRA-06-2006-0001

Determination as to Whether Cause Exists to Withdraw the Texas RCRA Program

RESPONSE TO THE PETITION
May 16, 2006

This is the determination as to whether cause exists for the United States Environmental Protection Agency Region 6 ("Region") to commence proceedings for withdrawing authorization of Texas' hazardous waste program managed by the Texas Commission on Environmental Quality ("TCEQ") under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 3006(e), and 40 C.F.R. Parts 271.22 and 271.23, as requested by Texas Disposal Systems Landfill, Inc. ("TDSL" or "Petitioner").

Background

On November 14, 2005, TDSL submitted its "Petition of Texas Disposal Systems Landfill, Inc. to U.S. Environmental Protection Agency for Withdrawal of Approval of the Hazardous Waste Program of the State of Texas" (hereinafter the "Petition") to the EPA Administrator and EPA Region 6 Regional Administrator. The Regional Administrator has been delegated the authority to take action relative to the authorization of Texas' hazardous waste program pursuant to RCRA (referred to by the Petition as the "hazardous waste program" of the State of Texas). *See* EPA Delegation Authority number 8-7, 1200 TN 350 (May 11, 1994) (State Hazardous Waste Programs); *See also* 40 C.F.R. § 272.2201 (Texas State-administered program: final authorization).

On December 7, 2005, the Region forwarded a copy of the Petition to TCEQ stating that the Region was beginning an informal review of the Petition and requesting that TCEQ forward to the Region any response or information TCEQ might have concerning the Petition. The Region received a response from TCEQ on December 16, 2005, with ten attachments. TDSL also sent in two subsequent letters regarding the Petition. In a letter dated December 29, 2005, TDSL responded to a letter dated December 16, 2005, from Pamela Giblin, counsel for Penske Truck Leasing Co., L.P. ("Penske") to Troy Hill, Associate Director, EPA Region 6 RCRA Programs Division. In a letter dated January 24, 2006, TDSL responded to a letter dated December 15, 2005, from Glenn Shankle, Executive Director of TCEQ, to Carl Edlund, Director, EPA Region

6 Multimedia Planning and Permitting Division. The Region thereafter commenced its informal investigation into the allegations of the Petition pursuant to 40 C.F.R. §§ 271.22 and 271.23, reviewing these and other documents. This informal investigation is now complete.

Framework for Review of a Petition to Withdraw Approval of an Authorized State RCRA Program

Congress established within RCRA provisions for promulgating regulations to effectuate state program development, for authorizing state programs, and for withdrawing state program authorization. RCRA §§ 3006(a), (b), and (e).

Pursuant to RCRA § 3006(a), EPA promulgated 40 C.F.R. Part 271. Particularly relevant to reviewing this Petition is 40 C.F.R. § 271.23(b)(1) which provides:

> The Administrator may order the commencement of withdrawal proceedings . . . in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part as set forth in § 271.22. . . . The Administrator shall respond in writing to any Petition to commence withdrawal proceedings. He may conduct an informal investigation of the allegations in the Petition to determine whether cause exists to commence proceedings under this paragraph (271.23(b)) . . . . (Emphasis added.)

Whether to order the commencement of withdrawal proceedings or conduct an informal investigation of the allegations in a petition are both within the discretion of EPA. The Region here, however, has conducted an informal investigation of the allegations of the Petition regarding TCEQ's authorized RCRA program to determine whether cause exists to commence withdrawal proceedings. In order to make this determination, EPA looked to the provisions of 40 C.F.R. § 271.22(a), which specify circumstances under which withdrawal may be appropriate:

> (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 including:
>
> (i) Failure of the State to promulgate or enact new authorities when necessary; or
>
> (ii) Action by a State legislature or court striking down or limiting State authorities.

(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;
   (ii) Repeated issuance of permits which do not conform to the requirements of this part; or
   (iii) Failure to comply with the public participation requirements of this part.

(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;
   (iii) Failure to inspect and monitor activities subject to regulation.

(4) When the State program fails to comply with the terms of the Memorandum of Agreement required under § 271.8.

EPA has analyzed the Petition allegations within the framework of this regulation. However, Petitioner does not specifically explain how its allegations establish that the State's program no longer meets the requirements of 40 C.F.R. Part 271. Petitioner only cites to 40 C.F.R. § 271.22(a) generally as the bases for why it believes cause exists to commence a proceeding to withdraw. It is difficult for EPA to evaluate this general assertion without any discussion of the specific bases for withdrawal, such as those listed in 40 C.F.R. §§ 271.22(a)(1)-(a)(4).

Authorizing a hearing to withdraw any state's program is a serious matter and should occur only where there are reliable facts and support for the allegations. While EPA must ensure that each state is maintaining a program in accordance with the statute and regulations cited above, EPA also must be mindful of the significant impact on the states of having to respond to these petitions and defend its implementation of its authorized program in a possible hearing. Authorizing such a proceeding should not be done lightly. Each petition requires the relevant state agency to incur significant costs to defend its implementation of the program, costs both in terms of funds and staff time. These are resources that would be otherwise directed to developing and issuing permits or in pursuing and prosecuting violations of environmental programs. Further, two courts have noted that: "[w]ithdrawal of authorization for a state [RCRA] program is an "extreme" and "drastic" step . . . ." *U.S. v. Power Engineering Company*, 303 F.3d 1232, 1238 (10th Cir. 2002) (citing *Waste Management of Illinois v. EPA*, 714 F.Supp. 340, 341 (N.D. Ill. 1989)). Furthermore, EPA believes there must be a broad programmatic concern with a state program in order to support a finding that the state program fails to comply with the requirements of 40 CFR Part 271, rather than issues associated with a single incident.

Summary of Petitioner's Allegations for Withdrawal of the RCRA Program

Petitioner's allegations that TCEQ misinterprets the rules stems from a highway accident involving a truck hauling 19-inch color televisions and more specifically, the disposition of the debris from that accident, particularly cathode ray tubes ("CRTs") contained in the televisions. Penske was shipping the televisions for Zenith Electronics Corporation ("Zenith"). The accident debris was hauled to TDSL which is a RCRA municipal solid waste landfill (not a hazardous waste landfill). Petitioner alleges the CRTs contained in the televisions are characteristic hazardous waste under RCRA for toxicity for lead. At least some of the CRTs were mixed with non-hazardous accident debris, solid waste, and soil when they were placed into the face of the TDSL landfill. This mixture of solid waste and CRTs was subsequently removed from the landfill, sorted for visible CRT parts which were taken to another facility, and the remaining removed waste ("exhumed waste") was containerized at TDSL. Many of the Petitioner's allegations of fact, if not all of them, are adamantly disputed by Penske and Zenith in ongoing civil litigation and appeals of administrative decisions.

The Petitioner has alleged many facts in the Petition and argues that Texas' RCRA program conflicts with all four of the circumstances from 40 C.F.R. § 271.22, quoted above. For purposes of EPA's determination, however, it is not necessary to determine the veracity of all of the factual allegations because the Petitioner's argument is a legal one–TCEQ's alleged misinterpretation of the law. Petitioner argues that because of this alleged TCEQ misinterpretation of the law, each of the circumstances of 40 C.F.R. § 271.22 are met. Although Petitioner fails to specifically describe how its allegations meet any one of the circumstances, the gravaman of the Petition is that "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." Petition at 2.

Question of Law

In light of the factual disputes and the litigation, EPA does not believe it is appropriate to act as the finder of fact. This is particularly true in the context of remediation such as here. Authorized states are encouraged to reasonably interpret their authorized programs. The Petition can thus be decided as a question of law. In a letter dated January 24, 2006, to EPA Region 6, TDSL apparently agreed that the issue is a question of law. In that letter TDSL stated:

> The facts are discussed in detail in the Petition, but in general the legal issues for EPA boil down to whether, under Federal law, these characteristic toxic hazardous wastes [allegedly the CRTs] can be treated as non-hazardous waste once mixed with other wastes.

Letter dated January 24, 2006, from Richard W. Lowerre and James B. Blackburn, Jr., attorneys for TDSL, to Carl Edlund, Director, EPA Region 6 Multimedia Planning and Permitting Division, at 1 (emphasis in original). Essentially, TDSL argues that the core issue is a legal rather than factual one. Thus, EPA believes it is appropriate to simply answer the legal question, which is: whether a RCRA characteristic hazardous waste mixed with non-hazardous material is still hazardous waste under RCRA and must be treated and disposed of pursuant to RCRA land disposal restrictions even though the resulting mixture tests below RCRA characteristic hazardous and land disposal restriction levels.[1]

Analysis of the Petition

Petitioner contends that TCEQ has wrongly interpreted the RCRA regulations regarding what is a characteristic hazardous waste and whether that waste must be treated before land disposal.

Regulatory Background

RCRA "is a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with . . . rigorous safeguards and waste management procedures." *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 331, 114 S.Ct. 1588, 1590, 128 L.Ed.2d 302 (1994). RCRA requires EPA to regulate the identification, disposal, and treatment of "hazardous waste," which is defined as a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may: (1) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. 42 U.S.C. § 6903(5). "Solid waste" is defined as any "discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial [or] commercial . . . operations." *Id.* § 6903(27).

RCRA requires EPA to develop and promulgate circumstances for identifying the characteristics of hazardous waste and for listing hazardous waste. 42 U.S.C. § 6921(a). EPA must take into account "toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics." *Id.* EPA must "promulgate regulations identifying

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[1] EPA is analyzing the Petition using the cites to the EPA regulations for convenience, but the operative Subtitle C regulations are those adopted by Texas and authorized by EPA.

the characteristics of hazardous waste, and listing particular hazardous wastes (within the meaning of section 6903(5) of this title), which shall be subject to the provisions of this subchapter." *Id.* § 6921(b)(1). Therefore, pursuant to 42 U.S.C. § 6921, EPA hazardous wastes fall into two categories: (1) they possess one of the four hazardous characteristics identified by the EPA in 40 C.F.R. Part 261, Subpart C (ignitability, corrosivity, reactivity, or toxicity), or; (2) they have been found to be hazardous as a result of an EPA rulemaking. *See id.* § 261.3(a)(2)(i) (1991); *see id.* Part 261, Subpart D ("listed wastes"). The first category of hazardous waste is often referred to as "characteristic" hazardous waste. The second category is often referred to as "listed" hazardous waste.

Both characteristic hazardous wastes and listed hazardous wastes are subject to regulation under Subtitle C of RCRA, which applies stringent management standards to the generation, transportation, treatment, storage, and disposal of hazardous waste. *See* 42 U.S.C. §§ 6921 and 6925. However, as one can see from the statutes and regulations discussed above, "characteristic" and "listed" hazardous wastes are two very distinct categories of hazardous waste and are regulated differently by EPA.

The Mixture Rule

The Petitioner questions TCEQ's interpretation of the RCRA "mixture rule." 40 C.F.R. § 261.3(a)(2). Petitioner argues that the proper interpretation of RCRA means that "mixing the spilled hazardous waste with municipal solid waste does not defeat the materials' hazardous waste designation under RCRA." Petition Exhibit 1, at 8. In other words, Petitioner argues that if a waste is a characteristic hazardous waste and that waste is mixed with non-hazardous material, the resulting mixture is still characteristic hazardous waste, even if it does not exhibit any characteristics of hazardous waste. Petitioner alleges that TCEQ failed to regulate the exhumed waste consistent with this interpretation.

Petitioner does not discuss how or why this allegation falls under any of the circumstances that may justify commencing a proceeding to withdraw a RCRA program. For purposes of EPA's analysis, however, this alleged misinterpretation of law could arguably fall under the circumstance at 40 C.F.R. § 271.22(a)(2)(i), which states "when the operation of the State program fails to comply with the requirements of this part, including: (i) [f]ailure to exercise control over activities required to be regulated under this part . . . ." The alleged misinterpretation would be that TCEQ did not exercise control over the CRT waste as a hazardous waste.[2]

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[2] This alleged misinterpretation would not fall under 40 C.F.R. § 271.22(a)(1), regarding legal authority, because Petitioner alleges that the language in TCEQ's rules at issue "is essentially the same as the language in EPA's rules . . . ." Thus, the question is not one of whether TCEQ has the appropriate legal authority. 40 C.F.R. §§ 271.22(a)(3)

The Petitioner's interpretation of the law is incorrect. The federal interpretation of RCRA is that if a characteristic hazardous waste is mixed with non-hazardous solid waste, and that resulting mixture (other than wastes not at issue here such as benefication wastes) does not exhibit any characteristics of hazardous waste, then the resulting mixture is no longer characteristic hazardous waste. EPA did not intend the mixture rule to apply to characteristic hazardous wastes. This is evident in the plain language of the RCRA regulation covering the definition of solid and hazardous waste that states:

> (d) Any solid waste . . . is not a hazardous waste if it meets the following criteria:
>
> > (1) In the case of any solid waste, it does not exhibit any of the characteristics of hazardous waste identified in subpart C of this part . . . .

40 C.F.R. § 261.3(d)(1).

Contrary to Petitioner's claim, the "mixture rule" in 40 C.F.R. § 261.3(a)(2) does not apply to the mixture of wastes here. In 2001 EPA reaffirmed its regulatory definition of a listed "hazardous waste" to include, subject to certain exceptions, "a mixture of solid waste and one or more hazardous wastes **listed** in Subpart D of this part . . . ." 40 C.F.R. § 261.3(a)(2)(iv) (emphasis added); *see* 66 Fed. Reg. 27,266. This rule was ultimately upheld in *American Chemical Counsel v. EPA*, 337 F.3d 1060 (D.C. Cir. 2003) (discussing EPA's policy behind why the mixture rule does not apply to characteristic hazardous waste). Thus, even if the solid waste and CRTs were a characteristic hazardous waste when added to the landfill, the exhumed waste, which presumably was a mixture of solid waste, CRTs, and landfill waste and cover, would not automatically be characteristic hazardous waste. If the exhumed waste at TDSL does not exhibit any characteristics of hazardous waste, then the waste would not be hazardous waste under RCRA.

This is the interpretation followed by TCEQ for the exhumed waste. Since TCEQ has interpreted state law consistently with Federal law and TCEQ is properly exercising control over the operation of the program, EPA does not find–on the basis of the mixture rule–that cause exists to commence a proceeding for withdrawal of Texas' RCRA program.

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and (4) are discussed in other sections of this determination, *infra*.

Land Disposal Restrictions

TDSL also argues that if the alleged TCEQ interpretation of the law stands, and the exhumed waste may be considered non-hazardous even if it does not exhibit a characteristic of hazardous waste, that "[n]o treatment would be required prior to disposal." Petition at 2. EPA assumes for the purpose of this determination that TDSL is arguing that TCEQ has misinterpreted the Land Disposal Restrictions rules found at 40 C.F.R. Part 268 ("LDRs"). Again, Petitioner does not discuss how or why this allegation falls under any of the circumstances that may justify commencing a proceeding to withdraw a RCRA program. For purposes of EPA's analysis, however, this second alleged misinterpretation of law regarding LDRs could arguably fall under 40 C.F.R. § 271.22(a)(2)(i), which states "when the operation of the State program fails to comply with the requirements of this part, including: (i) [f]ailure to exercise control over activities required to be regulated under this part . . . ."[3]

Regarding LDRs, 40 C.F.R. § 261.2(d) provides:

> (d) Any solid waste . . . is not a hazardous waste if it meets the following criteria:
>
> > (1) In the case of any solid waste, it does not exhibit any of the characteristics of hazardous waste identified in subpart C of this part. (However, wastes that exhibit a characteristic at the point of generation may still be subject to the requirements of part 268 [land disposal restrictions], even if they no longer exhibit a characteristic at the point of land disposal.)

40 C.F.R. § 261.3(d)(1) (emphasis added).

Thus, land disposal restrictions may apply to once-characteristic hazardous wastes that no longer exhibit a characteristic when they are disposed. *Chemical Waste Management v. EPA*, 976 F.2d 2, at 14, 16 (D.C. Cir. 1992). If a waste as generated exhibits a characteristic, it ordinarily must meet LDR treatment standards before it may be land disposed, even if it no longer exhibits a characteristic (or is otherwise hazardous) at the time of disposal.

EPA has also adopted special land disposal restriction rules for remediation wastes. See 63 FR 28,566, 28,602-28,622 (May 26, 1998) (contaminated soils); 57 FR

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[3] *See* footnote 2, as to why EPA believes 40 C.F.R. § 271.22(a)(1) does not apply. *See* discussion, *infra*, as to (3) and (4).

37,194, 37,211-37,243 (August 18, 1992) (contaminated debris).[4] These include fact-dependent principles as to what the point of generation is for such wastes, which in turn determines whether land disposal restrictions apply, and if so, which ones. See. e.g. 63 FR at 28,617-28,620.

Here, a number of critical facts remain in dispute and will not be resolved until litigation, or resolution in another forum such as alternative dispute resolution, is concluded. These include whether the initial waste (the amalgamation of CRTs and soil picked up after the accident) exhibited a characteristic, the extent to which CRTs were removed from that amalgamated mixture, whether as a result of this removal the waste ultimately exhumed from the landfill is deemed to be newly generated for purposes of LDRs, and the contents of the exhumed waste. All of these facts bear on if and when LDRs apply, and if so, which specific treatment standards would be applicable.

Assuming LDRs apply, there are two treatment standards which are potentially applicable. The first is for D008 wastes generally (wastes exhibiting the characteristic for lead). This standard is 0.75 mg/l using the Toxic Characteristic Leaching Procedure ("TCLP") (plus meeting treatment standards for other hazardous constituents present in the waste matrix). 40 C.F.R. § 268.40 Table.

The second of these standards are separate LDR treatment standards for soils and debris. Since many spill residues are either soil or debris, it would seem at least possible that the mixture initially picked up here would be one or the other. Treatment standards for soils subject to LDR are ten times the universal treatment standard for the constituent at issue, or a 90 % reduction in mobility for that constituent. *See* 40 C.F.R. §§ 268.49 (c)(1) (B) and (C). For lead, this would be a level of 7.5 mg/l measured by the TCLP (or a 90 % reduction in mobility from lead levels in the waste as-generated). Treatment standards for debris are work practices (such as separating the contaminating fraction from otherwise inert dirt) rather than numerical levels. 40 C.F.R. § 268.45. The State of Texas has provided EPA TCLP data from samples of the exhumed waste and none of these reported data exceed any of the potentially-applicable LDR treatment standards. Thus, even assuming that LDRs apply to the initial mixture, and continue to apply to the exhumed waste, the exhumed waste potentially can be legally land disposed, regardless of which (if any) of the potential LDRs apply.

Because the facts are in dispute, this matter is in litigation, and the waste has not

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[4]"Soil," among other things, means "a mixture of [soil] with liquids, sludges, or solids which is inseparable by simple mechanical removal processes and is made up primarily of soil by volume . . . ."; and "debris" includes "solid material exceeding a 60 mm particle size such as manufactured objects, plant or animal matter, or geologic material. *See* 40 C.F.R. §§ 268.2(k) and (g).

been disposed of at this time, it is unclear what position TCEQ would take regarding LDRs for this truck accident and the exhumed waste.[5] It is also unclear that this answer has a practical consequence if the exhumed waste meets any of the treatment standards which could be applicable. Thus, EPA finds no basis at this time to conclude that TCEQ's approach to the LDR regulations is contrary to the requirements of 40 C.F.R. Part 271, nor does EPA believe TCEQ has done anything in this situation to suggest a programmatic conflict between the state and federal LDR regulations. Therefore, EPA does not find that cause exists to commence a proceeding for withdrawal of Texas' RCRA program on this basis.

Impermissible Dilution of the Waste

TDSL's Petition also argues that: "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." Petition at 2 (emphasis added). As stated previously, Petitioner does not discuss how or why this allegation falls under any of the circumstances that may justify commencing a proceeding to withdraw a RCRA program. Like the interpretation of law regarding whether the exhumed waste is hazardous and the interpretation of law regarding LDRs, for purposes of EPA's analysis, this third alleged misinterpretation of law regarding dilution could arguably fall under 40 C.F.R. § 271.22(a)(2)(i), "when the operation of the State program fails to comply with the requirements of this part, including: (i) [f]ailure to exercise control over activities required to be regulated under this part . . . ."[6]

A person is prohibited from diluting "a restricted waste . : . as a substitute for adequate treatment to achieve compliance with [the applicable treatment standard] to otherwise avoid a prohibition in subpart C of the part, or to circumvent a land disposal prohibition imposed by RCRA section 3004." 40 C.F.R. § 268.4. On January 15, 2004, TCEQ sent a letter to TDSL stating that: "40 Code of Federal Regulations Section 268.3 prohibits dilution as a means to render a characteristic hazardous waste as non-hazardous." This letter indicates that TCEQ interprets the law consistently with EPA's interpretation. EPA has no reason to believe TCEQ has taken a position contrary to EPA regulations. Therefore, EPA does not find that cause exists to commence a proceeding for withdrawal of Texas' RCRA program on this basis.

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[5] EPA understands that TCEQ proposes sending the waste to a facility that would further test the exhumed waste to see if it exhibits a characteristic (a level less than the treatment standards for soils, e.g. 5.0 mg/l TCLP versus the treatment standard for soil of 7.5 mg/l TCLP, as explained in the previous paragraph) and make a disposal determination.

[6] *See* footnote 2, as to why EPA believes 40 C.F.R. § 271.22(a)(1) does not apply. *See* discussion, *infra*, as to (3) and (4).

TCEQ's Enforcement Discretion

Petitioner argues that TCEQ's alleged actions mean the State's RCRA program "does not provide for adequate enforcement of compliance with federal requirements [at] 42 U.S.C. § 6962(b) . . . ." Petition at 4. Again, Petitioner does not discuss how or why this allegation falls under any of the circumstances that may justify commencing a proceeding to withdraw a RCRA program. For purposes of EPA's analysis, however, this allegation could arguably fall under the withdrawal circumstances at 40 C.F.R. § 271.22(a)(3)(i), which states "[f]ailure to act on violations of . . . other program requirements," and (ii), which states "[f]ailure to seek adequate enforcement penalties . . . " While improper "dilution" of a characteristic hazardous waste under RCRA might be unlawful, dilution of a characteristic hazardous waste has nothing to do with whether the diluted or mixed waste is classified subsequently as characteristic hazardous waste.

That there might have been a violation connected with "dilution" of the exhumed waste event (the facts are disputed) does not mean TCEQ must enforce against the violator. Indeed, EPA Region 6, which has oversight authority over states' enforcement activities, did review TCEQ's actions with regard to the truck accident and the exhumed waste as part of EPA Region 6's informal investigation. EPA Region 6 enforcement personnel believe that TCEQ's enforcement activity with respect to the exhumed waste was properly within TCEQ's discretion.[7]

While Petitioner may disagree with TCEQ's enforcement response in this case, EPA does not believe the allegations presented here provide any grounds to conclude that TCEQ's enforcement program fails to meet the requirements of 40 C.F.R. Part 271. Therefore, EPA does not find that cause exists to commence a proceeding for withdrawal of Texas' RCRA program on this basis.

The Memorandum of Agreement and Memorandum of Understanding (MOA/MOU)

Petitioner alleges that TCEQ's actions justify commencing withdrawal proceedings pursuant to 40 C.F.R. § 271.22(a)(4): "[w]hen the State program fails to comply with the terms of the Memorandum of Agreement required under § 271.8." EPA and the Texas Natural Resources Conservation Commission (now TCEQ) entered into a

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[7] Moreover, TCEQ's Executive Director stated that "because this matter is best resolved in court, I do not plan to take further action on Penske's Notice of Violation pending the resolution of this matter in court proceedings." Letter dated December 16, 2005, from Glenn Shankle, Executive Director, TCEQ, to Carl Edlund, Director, EPA Region 6 Multimedia Planning and Permitting Division.

Memorandum of Agreement (MOA) on March 27, 2003, and a Memorandum of Understanding (MOU) on April 1, 1999. These documents entail 24 pages of agreements. Nowhere in the Petition, however, does Petitioner state any term or section of the MOA/MOU with which the TCEQ program fails to comply. For this reason alone, the Petition fails to allege enough facts to justify withdrawal of TCEQ's RCRA program. *See U.S. v. Power Engineering Company*, 303 F.3d 1232, 1238 (10th Cir. 2002); *Waste Management of Illinois v. EPA*, 714 F.Supp. 340, 341 (N.D. Ill. 1989).

The MOA/MOU do generally require that the Texas RCRA program be consistent with the federal RCRA statue and its associated regulations. The MOA states that the Regional Administrator will assess the State's administration of the hazardous waste program for consistency with RCRA. MOA § III.A. And, the MOU has provisions for EPA to review the State's enforcement program's performance. MOU § IV. As discussed above, on the whole, Texas' RCRA program is consistent with the federal RCRA statute, regulations, and TCEQ here enforced within the ambit of its discretionary authority. For this reason also, TCEQ's RCRA program does comply with the MOA/MOU entered into pursuant to 40 C.F.R. § 271.8. Therefore, EPA does not find that cause exists under 40 C.F.R. § 271.22(a)(4) to commence a proceeding for withdrawal of Texas' RCRA program on this basis.

Determination Concerning the RCRA Petition

For the above stated reasons, I have determined that the Petition before me does not provide cause to order the commencement of withdrawal proceedings and I therefore deny the Petition.

Richard E. Greene
Regional Administrator
EPA Region 6

Dated: 09-16-06

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 16, 2005

Mr. Carl Edlund, Director, P.E.
Multimedia Planning and Permitting Division
Environmental Protection Agency Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Re: Petition for Withdrawal of Texas' Resource Conservation and Recovery Act Program, dated November 14, 2005, Docket No: W/Petition-TX/RCRA-06-2006-0001

Dear Mr. Edlund:

I'm in receipt of your recent letter advising the Texas Commission on Environmental Quality (TCEQ) of the Environmental Protection Agency's (EPA) informal investigation of Texas Disposal Systems Landfill's (TDSL) Petition (Petition) for Withdrawal of Program Approval for Texas Resource Conservation and Recovery Act (RCRA) Hazardous Waste Program. As set forth in your letter, the agency is afforded the opportunity to examine the petition and provide any information or comments that it believes are relevant to the matter. Accordingly, attached are the following items:

1) Lawsuits filed by TDSL and Penske Truck Leasing Co., L.P. (Penske) against the TCEQ[1];
2) The Executive Director's Original and Supplemental Responses to TDSL's July 9, 2004 Motion to Overturn (MTO);
3) EPA's September 2, 2004 letter to the TCEQ concerning disposal of wastes under RCRA;
4) The Executive Director's September 24, 2004 letter to Penske concerning the Commission's September 16, 2004 Order;
5) The Executive Director's October 19, 2004 letter of clarification to TDSL concerning the September 24, 2004 letter to Penske;
6) Transcript of Commission's Consideration of TDSL's October 18, 2004 MTO on December 1, 2004;
7) The Executive Director's October 12, 2005 letter to Penske;
8) Federal rulemaking preambles relating to the Mixture Rule and Land Disposal Restriction (LDR) Dilution Prohibition (55 FR 22520, June 1, 1990; 62 FR 64636
9) at 64644, December 8, 1997; 63 FR 25886, May 26, 1998; and 66 FR 27266, May 16, 2001); and

[1] An Agreed Order of Consolidation signed by the parties on 12/5/05; the Court ordered the following seven causes of action - Cause Nos. GN402245, GN403433, GN403519, GN403551, GN403900, GN404119, and GN404231 - be consolidated into one action under Cause No. GN402245.

10) EPA Guidance Documents, FAXBACKs 11173, 12030, 13164 and 11140 relating to the Mixture Rule and LDR Dilution Prohibition.

I will not belabor the extensive and differing legal interpretations that have been advanced by the parties and the unique circumstances which have given rise to this petition; the various legal arguments are fully articulated in the attached seven causes of action. Rather, I will focus on the fundamental issue of this dispute which is whether or not the waste currently stored in the 99 roll-off containers at TDSL's facility is hazardous. Based on the facts and applicable RCRA regulations, it is appropriate to classify the co-mingled waste as non-hazardous as the available analytical data indicates that the waste does not exhibit a hazardous characteristic. This does not reflect a change in the agency's interpretation of applicable RCRA rules, including the Mixture Rule (40 CFR §261.3) and the LDR Dilution Prohibition (40 CFR §268.3). Importantly, it is consistent with EPA's applicable rules, preambles and FAXBACKs. The TCEQ has and continues to comply with the RCRA Delegation Memorandum of Agreement.

To briefly recap, on October 9, 1997, an accident involving a truck operated by Penske that was transporting television picture tubes owned by Zenith Electronics Corporation (Zenith) resulted in approximately 98 cubic yards, including approximately 200 picture tubes, of accident-related debris being deposited on the working face of TDSL's facility. The following day, approximately 80 cubic yards of accident debris was removed from the landfill, with the focus being the visible picture tube waste, and taken to an authorized facility by Penske. The vast majority of the waste in the 99 roll-off boxes is municipal solid waste disposed of at the landfill on the day of the accident, along with at most a very small portion, if any, of the remaining accident debris. Notwithstanding my exercise of authority to require Penske to remove the commingled waste, the waste remains in roll-off containers at TDSL's facility due to TDSL's refusal to allow Penske access to the material and the parties' ongoing legal dispute as to how the waste should be handled. Accordingly, because this matter is best resolved in court, I do not plan to take further action on Penske's Notice of Violation pending the resolution of this matter in court proceedings.

In closing, I assure you that TCEQ takes very seriously the agency's responsibility for the administration of Texas' RCRA Program as has been demonstrated in this matter and all RCRA issues handled by this agency since program approval. Please do not hesitate to contact me on any additional questions you may have.

Sincerely,

Glenn Shankle, Executive Director
Texas Commission on Environmental Quality

cc: David Gillespie, EPA, Region 6
Gautman Srinivasan, OGC, EPA
Tom Reinhart, OSW, EPA
Cynthia Woelk, Associate Attorney General, Office of the Attorney General
Derek Seal, General Counsel, TCEQ
Dan Eden, Deputy Director, OPRR, TCEQ
John Steib, Deputy Director, OCE, TCEQ
Stephanie Bergeron Perdue, Acting Deputy Director, OLS, TCEQ

1 REPORTER'S RECORD

2

3 CAUSE NO. 98-0159

4

5 TEXAS DISPOSAL SYSTEMS)(IN THE 22ND JUDICIAL

6 LANDFILL, INC.)(

7 VS.)(DISTRICT COURT OF

8 PENSKE TRUCK LEASING CO.)(

9 L.P., PENSKE LOGISTICS,)(

10 INC. AND ZENITH ELECTRONICS)(

11 CORPORATION)(HAYS COUNTY, TEXAS

12

13

14 - - - - - - - - - - - - - - - - - - -

15

16 SCHEDULING HEARING

17 FEBRUARY 27, 2006

18

19 - - - - - - - - - - - - - - - - - - -

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21

22 BE IT REMEMBERED that on the 27th day of February, A.D.

23 2006, the above entitled and numbered cause came on for hearing

24 in said Court, Honorable Howard Towslee, Judge Presiding, and

25 the following proceedings were had, to-wit:

DUPLICATE

1 APPEARANCES

2

3 FOR THE PLAINTIFF:

4

5 KIRK P. WATSON
6 HUGHES LUCE, LLP
7 111 Congress Avenue, Suite 900
8 Austin, Texas 78701

9

10 GREGORY P. SAPIRE
11 HUGHES LUCE, LLP
12 111 Congress Avenue, Suite 900
13 Austin, Texas 78701

14

15 KERRY E. RUSSELL
16 RUSSELL, MOORMAN & RODRIGUEZ, LLP
17 Texas Heritage Plaza
18 102 West Morrow Street, Suite 103
19 Georgetown, Texas 78626

20

21

22

23

24

25

1 FOR DEFENDANT PENSKE:

2

3 DOUGLAS Y. CHRISTIAN

4 BALLARD SPAHR ANDREWS & INGERSOLL, LLP

5 1735 Market Street, 51st Floor

6 Philadelphia, Pennsylvania 19103-7599

7

8 WILLIAM P. JOHNSON

9 BAKER BOTTS, LLP

10 1500 San Jacinto Center

11 98 San Jacinto Boulevard

12 Austin, Texas 78701-4287

13

14

15 FOR DEFENDANT ZENITH:

16

17 PHILIP L. COMELLA

18 SEYFARTH SHAW, LLP

19 55 East Monroe Street, Suite 4200

20 Chicago, Illinois 60603-5803

21

22 DAVID WADDELL

23 SEYFARTH SHAW, LLP

24 700 Louisiana Street, Suite 3700

25 Houston, Texas 77002-2797

1 THE COURT: Why don't we begin on the record with
2 announcements, who you are, who you represent, and then we'll
3 talk about the status of the case and try to make a plan for
4 disposing of it. We'll start with the Plaintiff.
5 MR. WATSON: Thank you, Your Honor, my name is
6 Kirk Watson, and together with my law partner Greg Sapire, we're
7 two of the Counsel that represent TDSL, the Plaintiff in this
8 matter.
9 MR. RUSSELL: I'm Kerry Russell, Your Honor, I'm
10 also an attorney for TDSL. I've been in for some period of
11 time, not as long as some of the folks here but longer than Mr.
12 Watson.
13 THE COURT: Okay. Thank you. Are you from
14 Austin?
15 MR. WATSON: Yes, Judge, I am.
16 THE COURT: Were you the mayor?
17 MR. WATSON: I was mayor for a short period of
18 time, yes, sir.
19 THE COURT: I don't know you, but I recognize the
20 name.
21 That takes care of Plaintiff's side; right?
22 MR. WATSON: Yes, it does.
23 THE COURT: Now we got two sets of Defendants in
24 this side of the case.
25 MR. CHRISTIAN: Yes, sir, that's correct. My

1 name a Doug Christian, I'm with Ballard Spahr, I'm from
2 Philadelphia, I'm one of the lawyers representing the Penske
3 companies.
4 THE COURT: Well, I've never met a Philadelphia
5 lawyer before. Welcome to Texas.
6 MR. CHRISTIAN: Thank you, sir.
7 THE COURT: And who did you say your co-counsel
8 is?
9 MR. CHRISTIAN: Bill Johnson, Baker Botts,
10 co-counsel for the two Penskes Defendants.
11 THE COURT: How about Zenith?
12 MR. COMELLA: Phil Comella from Chicago, Seyfarth
13 Shaw, representing Zenith, my client, and we have David Waddell
14 from Houston office here as well.
15 THE COURT: Welcome to Texas.
16 MR. COMELLA: Thank you.
17 THE COURT: Now, my understanding this is sort of
18 a status hearing to get the case back on track, try to get it --
19 as far as I'm concerned, we're all sort of family here, you
20 don't have to stand up if you don't want to. Whatever you're
21 pleased to do.
22 But we'd like to try to make some progress this
23 afternoon, see where we are and where we want to go. Where each
24 of you would like to go and how soon you would like to get
25 there.

1 I did have time this morning to read through a
2 little bit of the file and the history of some of it. Just
3 briefly, what I know about the case, there was a car wreck,
4 truck wreck, whatever, big truck involved maybe seven or eight
5 years ago, 1998 or '97, probably on Interstate 35, and some
6 television picture tubes, cathodes rays, whatever, broke. And I
7 understand they are considered hazardous, the lead contained in
8 them. Some of those were deposited in your landfill, your
9 client's landfill, and you didn't like that so you filed a
10 lawsuit.
11 I also understand that there's some litigation or
12 something going on in Austin that may affect this case. And I
13 don't know exactly what that is at this point in time, whether
14 we need to wait until they finish that process or not. I need
15 to know those things and where we are. I also read a little bit
16 about the trial, was it Judge Steel?
17 MR. WATSON: Yes, Your Honor.
18 MR. CHRISTIAN: Yes, it was Judge Steel.
19 THE COURT: That tried the case in 2004, which is
20 almost two years ago now in April, and there was a mistrial
21 because of some publicity in the Austin American-Statesman some
22 of the jurors may have read, and, therefore, I think out of an
23 abundance of caution he granted a mistrial.
24 And I don't know how he bailed out of the case,
25 but he must have.

1 MR. COMELLA: He became a wise man.

2 THE COURT: All right. And it eventually got to

3 me and went through some other judges. One of the questions I

4 had is are you stuck with me, has the objection time already run

5 on that, and that's it, you're stuck with me?

6 MR. WATSON: All of us probably would phrase that

7 a little differently, say we're happy to have you, Judge.

8 THE COURT: Well, maybe I could get just a brief

9 statement if I made any misstatements, correct me, and also just

10 from each one of you where you would like to go with this case

11 and how quickly can we get there, and sort of what's on your

12 mind, and what you would like to accomplish today. And I'll try

13 to keep up with you.

14 MR. WATSON: Judge, in terms of basic facts,

15 there's not much I would add to that, other than to say, point

16 out a couple points of accuracy, one is that when there was a

17 breaking of those cathode ray tubes, the CRTs, you had a

18 situation where you have toxic debris, which is a toxic

19 characteristic hazardous waste, which under law is only supposed

20 to be disposed of in specific type of landfills.

21 There, in candor, is probably some dispute about

22 all that happened that day, but without getting into all that,

23 to jump instead to your questions, this dispute arises out of

24 the fact that these toxic characteristic hazardous wastes ended

25 up in my client's landfill, which is not permitted to take on

1 that kind of waste.

2 THE COURT: From my reading of the case, it

3 appears to me that the other side has agreed that it should not

4 have been deposited in your --

5 MR. WATSON: Well, certainly -- I think they

6 might dispute that to some degree, but certainly once my client

7 said we're not -- once my client found out it was toxic

8 characteristic hazardous waste and said we're not going to

9 accept that, they then manifested it properly and transported it

10 and handled it the way it's supposed to be under the law.

11 What happened, just to cut to where, I think, we

12 are -- and I've been in the case now since December, so I'm

13 relatively new to the case. And so I've looked at this case

14 from the standpoint of how do I best represent my client, but

15 also what representations do I make to the Court about the best

16 way to address the case.

17 And the proposal I would make to the Court is

18 that you are also accurate -- before I make the proposal, you

19 are also accurate, I believe, in saying that there's a matter

20 going on in Travis County that could have a significant impact

21 upon this case. And here's the basis of that. In Travis

22 County -- and, again, I'll go into more detail if you would like

23 at some point -- but what occurred is the Texas Commission on

24 Environmental Quality began an investigation of this event that

25 occurred in 1997 shortly after the event. Unfortunately, it was

1 not a completed investigation before the time of trial.
2 I believe that that was one of the -- that
3 competition, if you will, between those cases to some degree was
4 a complicating factor in the trial of that case. And, frankly,
5 I don't think we ought to relive that history because I think it
6 will create additional problems if we try to retry this case
7 right now.
8 What happened was subsequent to the mini trial in
9 this case, the TCEQ completed it's investigation, and even --
10 and made certain findings, including a Notice of Violation with
11 regard to the Penske entities. Now, the Penske entities did not
12 challenge that with TCEQ. Again, I'll go into more detail if
13 you would like, but ultimately there were seven different
14 lawsuits that ended up in Travis County District Court, some of
15 them filed by the Penske Defendants based on actions of the
16 Texas Commission on Environmental Quality, some filed by TDSL
17 based upon actions. And, again, we can go into more detail
18 whenever you would like.
19 But the bottom line is some of those issues that
20 come out of that case -- that case up there, that now by the way
21 was consolidated back in December of 2005, all seven of the
22 cases have been by an agreement consolidated together in Travis
23 County. In that case, which I believe is the appropriate and
24 perhaps has if not exclusive jurisdiction, primary jurisdiction
25 on certain of those issues, including issues such as who was the

1 generator of the waste.

2 Now that's again a term of art in the regulatory

3 industry. Generator being in this case, we believe, Penske.

4 And that's what had been found in the notice of violation. But

5 the generator -- in the trial -- first trial, Judge, there's a

6 lot of evidence had to go in to trying to prove who was the

7 generator and all that sort of thing.

8 Also, there's a big issue in that case that has

9 been raised by Penske. And this is the issue of once you have

10 this toxic characteristic hazardous waste mixed with other

11 municipal solid waste and diluted, can it be treated as

12 something other than hazardous waste. Our position is that

13 under CERCLA and RCRA and all those different acronyms you can't

14 do that. That is an issue to be decided.

15 If in fact, Judge, it is decided in favor of

16 Penske and against TDSL, it really goes to damages in this case.

17 The point being that you --

18 THE COURT: Who is going to decide that issue,

19 the agency or --

20 MR. WATSON: Travis County. The agency -- here's

21 what's happened here, Judge -- Travis County District Court.

22 What's happened on that issue specifically is that when the

23 Executive Director of TCEQ issued the Notice of Violation, it

24 said, Penske, you got to move this stuff. Penske offered then

25 to remove it, but to remove it as not hazardous waste but as

1 special waste. When -- the Executive Director indicated that
2 would be okay, my client -- and, again, I wasn't involved at
3 that point -- but my client filed a motion to overturn that
4 action. That went in front of the entire commission, TCEQ, and
5 they granted the motion to overturn and said, no, you can't do
6 it that way.
7 Subsequent to that the Executive Director issued
8 another order that, in essence, said you have to manifest it as
9 hazardous waste until such time as you test it to see if it's
10 still hazardous under this mixture rule. Again there was a
11 motion to overturn that.
12 The -- by the way, I'll come back to it. The
13 commission didn't rule, and so by operation of law the motion to
14 overturn was denied. A lot of these actions have now made it to
15 the Travis County District Court, which I think is where it's
16 going to be decided.
17 I'll indicate one other thing, that if you treat
18 it -- if you were to treat it not as hazardous waste, but as
19 special waste, it too would have to go to a specific type of
20 disposal facility, one of which TDSL doesn't have. So even if
21 it weren't hazardous waste, it would still need to go to a
22 different facility.
23 But having said all that, you have a court where
24 the TC -- court where you have issues where TCEQ probably must
25 be involved as a party. The only place you can appeal those

1 decisions, the only place Penske could appeal the decisions it's
2 not happy with, the only place that we could appeal what we're
3 not happy with is Travis County. So the Travis County Distric
4 Court will make those decisions.
5 To cut to the chase now, with that as background,
6 I think those are very important and I think Judge Steel frankly
7 thought they were important, and that's why when he had his
8 hearing on July 8th, of 2004 he said, gentlemen, we're in a
9 whole new ball game now that TCEQ has started moving. Because
10 TCEQ just hadn't moved prior to that.
11 So here's what my proposal is, for what it's
12 worth, Judge. My proposal is that you set this case for trial
13 sometime -- and I'm suggesting mid October to early November.
14 You -- we're going to get into a discussion here, one of the
15 things is we think we're entitled as a matter of right to
16 designate some additional experts after that mistrial.
17 THE COURT: Yes, sir, I read about that.
18 MR. WATSON: And put that into the scheduling
19 order, when that has to be done, and set the case for trial in
20 October or early November with this caveat and this
21 understanding, and that is that will give this court some time
22 to see what is happening in Travis County. And I will commit
23 that we're going to push Travis County to try to -- all that was
24 consolidated and ordered expedited, and I believe is part of the
25 reason back in December, again, before -- I think if was before

1 I was involved, if it wasn't, I didn't know it was happening.
2 But get that done so that if we get to August or
3 September we keep this case moving, get the designation of
4 experts that we need to do, allow for discovery. And, by the
5 way, that's been hanging out there for about 18 months. And
6 then we could come back to the Court and the Court could decide
7 whether it needs to continue a stay or an abatement of this
8 matter. But I'm not -- I'm trying to find middle ground on
9 this, because I think probably we're entitled to an abatement,
10 and I can argue the law, and I'm prepared to do that. But
11 that's what we're looking for here today, Judge.
12 THE COURT: Let me, as we sit here, let me ask
13 this question, what is the situation on the ground out there, is
14 the area cordoned off, if you will, and it's still sitting there
15 eight years later?
16 MR. WATSON: Well, kind of sort of. What
17 happened is my client has taken the waste that they believe is
18 the toxic characteristic hazardous waste that's now been
19 commingled with other municipal solid waste, there's about 1600
20 tons of it, there are 99, what they call, roll-off boxes, so it
21 can be stored and not be in the face of the landfill, if you
22 will. And they're stored so that those roll-off boxes at some
23 point can be taken to a proper disposal facility.
24 THE COURT: And when the case does go to trial,
25 what are you expecting from the Defendants, money damages, is

1 that what you're looking for?

2 MR. CHRISTIAN: Yes.

3 MR. WATSON: We want the requirement that they

4 take the waste, but for the most part it's also money damages.

5 THE COURT: Did I also understand there was

6 mediation -- some type of a settlement attempt last summer?

7 MR. WATSON: There have been, and I'm going to

8 let Russell --

9 MR. RUSSELL: Yes, Your Honor, I was involved in

10 it. After the mistrial Judge Steel ordered us to mediation, and

11 we had a day of mediation and didn't reach any agreement there.

12 Mr. Christian or Mr. Comella can probably address -- I think

13 there may have been an earlier mediation, much earlier in this

14 trial. I'm not sure of that, but we did go to mediation and it

15 was not successful.

16 THE COURT: And is it your opinion that it still

17 would not be successful at this date?

18 MR. RUSSELL: I don't believe it would, Your

19 Honor.

20 MR. WATSON: By the way, Judge, this may be the

21 ramblings of a new lawyer to the case, I'm new enough to the

22 case that, like I say, just since December, and I have spent a

23 lot of time immersing myself in the facts and the law of this

24 case so far. I'll be deferential, but I always hate to just

25 stand up in court and say that I don't think there's any chance.

1 There are some things I've learned over the past couple weeks,
2 potential things that might have been said by and between
3 Counsel and the clients, that ought to be explored at some
4 point. So I'll just throw that out for what it's worth.
5 THE COURT: And you wouldn't be opposed to
6 mediation?
7 (Several speaking at once.)
8 MR. RUSSELL: I'll add, Your Honor, we wouldn't
9 be opposed to mediation, we'd be glad to.
10 MR. WATSON: Not unless every other lawyer in the
11 courtroom tells me that there's not a chance of it and, Watson,
12 you're new and you're not worth talking to.
13 THE COURT: Well, let's see what their position
14 is. I do anticipate that they're going to be opposed to
15 changing the scheduling order and designating experts. And I
16 believe I read somewhere where the judge said -- Judge Steel
17 maybe said when the mistrial was declared that we would stay
18 hitched to the original scheduling order. But I need to learn
19 more about that.
20 MR. WATSON: Well, and my response to that is if
21 you also read that transcript, he talked about going ahead and
22 designating new experts as a result of it. And even he makes
23 comment about the fact go ahead and designate those experts.
24 And I'm not sure we ever had a ruling where he said that you --
25 and truth of the matter is that where there's a declared

1 mistrial, that is the bets are off as far as I think the law
2 goes, and we're prepared to argue that in more detail.
3 MR. SAPIRE: We've provided you with the letter
4 and we submitted a full transcript of the -- to my knowledge,
5 only full hearing that Judge Steel conducted.
6 THE COURT: What is your name, please?
7 MR. SAPIRE: Sorry, Greg Sapire, on behalf of
8 TDSL.
9 THE COURT: I haven't read that yet. If it's in
10 here, I haven't read it.
11 MR. SAPIRE: And, like I said, we -- I don't
12 think that your impression of Judge Steel's position is
13 consistent with the whole transcript.
14 And, like I said, we've submitted it to you with
15 that letter and encourage you to look at it.
16 THE COURT: Everybody seems to be reasonable,
17 maybe we can have an agreement about a scheduling order. Let me
18 turn to the other side and see what their response is.
19 MR. CHRISTIAN: Your Honor, again, I'm Doug
20 Christian for the two Penske companies involved in the case, and
21 I would like to, as a lawyer who's been involved in this case
22 from the very beginning, welcome Opposing Counsel and Your Honor
23 to the case. It's a case that has run amuck.
24 THE COURT: It needs to be pulled out of that
25 muck, we need to resolve it.

1 MR. CHRISTIAN: It does. The parties have spent
2 millions and millions of dollars on a case that involved some
3 television tubes that went into a landfill, most if not all of
4 which came out the next day. And you would think that that is
5 the type of dispute that could be resolved.
6 But we have been involved in so many different
7 forums relating to this dispute, the legislature, the TCEQ, the
8 press, this court in this county, now apparently Travis County
9 is a place Plaintiffs want to go with this dispute.
10 THE COURT: Well, I think Travis County, my
11 understanding, you're being from Philadelphia, is that the
12 administrative agency ruled, and evidently they appealed that
13 ruling, has to be in Travis County.
14 MR. CHRISTIAN: Understood, Your Honor. I
15 understand.
16 Now there are so many aspects of this case, I
17 know it's very difficult for everyone to get their arms around
18 what's going on here. But distilled to its essence, this is a
19 tort case involving responsibility for alleged damages. It is a
20 tort case. This is not a regulatory enforcement action. That's
21 what's going on in Travis County. The TCEQ issued a Notice of
22 Violation, which is nothing more than an allegation with regard
23 to certain conduct.
24 Penske has attempted to work this thing out over
25 the years, I can't tell you how many times. Penske did not

1 immediately object to that Notice of Violation, what Penske did
2 was try to work with the TCEQ and with TDSL to deal with this.
3 Long story short, after forays into the
4 legislative process, and the TCEQ, and God knows how many other
5 places, we haven't been able to work it out. This is almost the
6 eighth -- well, more than the eighth anniversary of the filing
7 of this lawsuit.
8 When TDSL filed this lawsuit in February of 1998,
9 it asked for money damages and it asked for injunctive relief.
10 The relieve requested was, hey, guys, get the stuff out of our
11 landfill. They've never pursued that injunctive relief. And,
12 in fact, they didn't pursue the case for several years, three or
13 four years, if my recollection serves me correctly.
14 But what's important is TDSL sought relief in
15 this court against the two Penske Defendants and against Zenith.
16 And we tried the case. We started to try the case back in 2004,
17 everyone was content to do so. We tried it, there was a
18 mistrial declared as a result of a newspaper article. We won't
19 get into the competing allegations with regard to who caused it.
20 But here we are almost two years after we began
21 to try this case. Not only does TDSL want new experts the Judge
22 wouldn't let them get in last time, new theories of recovery,
23 adding millions of dollars of damages to the claim, new theories
24 of recovery, they want new discovery. They want us, basically,
25 to do it all over again. All the time we spent not only on

1 discovery, but then pulling out of the 60 day's worth of
2 testimony, the experts we would read to the jury, present to the
3 jury dealing with issues related to exhibits, the objections to
4 the admissibility of exhibits. They want to start almost at
5 square one again.
6 Our position is that action in Travis County,
7 Your Honor, has nothing to do with this tort claim. Those
8 appeals, if they are even appropriate appeals, are vis-a-vis an
9 enforcement action. The issue of who the generator is under
10 environmental statutes -- I think Mr. Watson said a lot of
11 evidence went in regarding who was the generator. Well, no
12 evidence went in on that point because Judge Steel, quite
13 rightly, said that's none of our business, that is not what's
14 going on in this tort case. He kept that evidence out. A lot
15 of that evidence didn't go in.
16 Now, I don't know, Your Honor, why TDSL wants to
17 slow this thing down, but we have been very, very patient over
18 the years. We've been very patient in trying to work this out
19 with TDSL. We don't know why TDSL is taking such a scorched
20 earth approach here, but it is time, for reasons of fundamental
21 fairness, to get this case tried. And this case ought to be
22 tried on the record that existed right before the mistrial was
23 declared.
24 And that is because the parties agreed, there was
25 an agreed scheduling order. The parties agreed, Judge Steel

1 affirmed that agreement when he said, and Your Honor referred to
2 it, "That is the ruling of the Court, just to rephrase, granting
3 the motion, which was the motion for mistrial, resetting the
4 trial for September 13th, not changing any other scheduling,
5 except we're going to have a pretrial on June 21 to see what
6 we -- what you-all can agree on".
7 Now, we feel very strongly, Your Honor, that this
8 case go back to trial as quickly as possible without spending an
9 additional million dollars on discovery and new experts. It is
10 unfair to allow them to reopen the record.
11 So our position, and we agree a hundred percent
12 with Mr. Watson with regard to the trial date, if we can get an
13 October trial date, that will work for us.
14 THE COURT: Other than changing or setting new
15 trial date, would you be agreeable to any other changes in this
16 scheduling order, they want -- they want to designate more
17 people, you oppose that, is that --
18 MR. CHRISTIAN: We oppose that, although we can
19 take a few minutes and talk, if you would like.
20 THE COURT: May want to do that and look at our
21 calendars and see what dates would work, et cetera. But
22 basically you would like to try with the discovery that was
23 produced up until April of 2004?
24 MR. CHRISTIAN: Yes, Your Honor. Because with
25 regard to the tort action, nothing that has happened since that

1 trial is relevant with regard to what we're dealing with here.
2 And especially this situation in Travis County, where if you
3 look at their most recent Amended Petition, which I think they
4 filed last Thursday, they want a determination of who the
5 generator is, the point of generation, all sorts of issues under
6 the environmental statutes that are not relevant here.
7 THE COURT: And you want it to stay -- you want
8 to used the same liminis that we had in the other trial, more or
9 less?
10 MR. CHRISTIAN: Your Honor, of course the Court
11 has the power. But, yes, we don't think -- we don't think a
12 mistrial, which we had nothing to do with, that was declared as
13 a result of an article based on conversations the reporter had
14 with TDSL and it's Counsel, we don't think a mistrial should
15 operate to the benefit of the party who we think caused the
16 mistrial, or to the detriment of the innocent party.
17 So, yes, Your Honor, I don't think these rulings
18 should be revisited.
19 MR. WATSON: Judge, If I may interrupt, just real
20 quickly. I want to make sure it's very clear, because I know
21 that he read from part of that transcript, but just so it's
22 completely clear, the Court also said in that hearing at page 11
23 of the transcript I've got, line 13 -- beginning of line 13, he
24 said, "Okay, boom, I'm going to open up and allow an additional
25 scheduling order. I will limit it to the new proceedings. And

1 we'll probably have a fight over that once everybody sends out
2 all their notices, et cetera. As far as what's going on at TCEQ
3 and how that affects it, it opens it up, it changes things, and
4 it will probably allow the Plaintiffs to get some experts in".
5 And that ends at line 19.
6 So I think there is also a fundamental -- the
7 truth of the matter is you're new in the case, I'm new in the
8 case, but you have the discretion to do these things. I think
9 Judge Steel was thinking it ought to happen that way, too.
10 THE COURT: And I have not read the transcript of
11 the hearing you referred to.
12 Yes, sir, would you like to put in your two cents
13 worth?
14 MR. COMELLA: Your Honor, it's my pleasure to be
15 here this morning, or this afternoon, and I've improved my
16 temperature by about 50 degrees, so I'll stay as long as I can.
17 I've been involved with this case since October
18 10th, 1997, the day after the accident. And from the beginning,
19 Your Honor, echo what Mr. Christian said, this is a tort case.
20 There's no difference in this case and any other civil tort case
21 filed in this courtroom. It does concern waste, and does
22 concern the disposal of waste. But it ultimately comes down to
23 was there a duty, do the Defendants owe a duty to TDSL to stop
24 them in some way from disposing of this waste.
25 It turns out -- and I'm not sure if these are in

1 the facts you reviewed, it turns out that Zenith had no idea who
2 TDSL was, much less had a contract with them or was in
3 communication with them.
4 So this poses a real problem in a tort case to
5 build a duty where there's no relationship, no knowledge of the
6 party. So what we really have going on here since the trial two
7 years ago is TDSL trying to import all these environmental
8 regulatory principles into what is a tort case.
9 Judge Steel made it very clear on the record
10 numerous times, we filed a brief in opposition to the motion to
11 stay, which quotes some of Judge Steel's rulings. But the case
12 law -- and Judge Steel was very clear that it's irrelevant what
13 the environmental statues say because environmental statutes are
14 strict liability. And the only Texas case on this point says
15 you cannot use strict liability statutes to set a resident
16 standard of care, you can't do it.
17 There is a way to file, for a private party to
18 file an environmental case, it's calls the RCRA citizen's suit,
19 you could file a citizen's suit under Research Conservation and
20 Recovery Act and bring a party's principals, you have to know
21 who's the generator, what kind of waste is it. But the problem
22 with those kinds of suits for these claims is that you don't get
23 money damages, you get attorney's fees. But all you basically
24 get is injunctive relief, there's no money damages. And it's
25 very clear from the case law that if you want to import

1 regulatory principles, use that statute.

2 So, really, have two spheres of law going on

3 here, we have the civil courtroom, which is where we are, tort

4 principle, and we have the regulatory stuff, administrative

5 rules and regulations going on in Austin with the TCEQ. Two

6 separate spheres.

7 Zenith is not a party to the Travis Court

8 actions. Therefore, even if they were rel -- even if those

9 rulings were relevant, we could not be barred by collateral

10 estoppel or res judicata, because we're not a party to those.

11 On basic due process you've got to be part of the litigation,

12 part of the action, to have a negative ruling apply to you.

13 So this whole frolicking detour, if I may call it

14 that, off to Travis County doesn't have any affect on this case

15 for two reasons, number one, regulatory principles aren't

16 relevant, and, number two, they can't be applied against Zenith,

17 so we have to retry all the same issues in this courtroom.

18 I would have to say -- I want to say as well that

19 if you look at the briefs, the TCEQ proceedings were not

20 judicial, they were not contested, there was not evidence, there

21 was not the right of cross-examination. So, again, any ruling

22 that the Travis County court gives is not going to be applied as

23 res judicata, and the law is pretty clear on it.

24 So our position is it's time for TDSL to fish or

25 cut bait. They filed this action eight years ago, we have

1 incurred enormous expense and time being dragged through this
2 where we -- we load trucks at Melrose Park, Illinois, on
3 something like October 6th, we put them on the truck, and that
4 was it. And somebody else, a third party not in this courtroom
5 brought the tubes to TDSL.
6 TDSL has accepted waste acceptance procedures.
7 You think that maybe they would have checked the waste coming
8 in. Leaving that aside for a moment. So here we are really a
9 remote party, a stranger to the facts, a stranger to TDSL. We
10 really think that TDSL needs either to get this case to trial or
11 simply dismiss us from the case.
12 I really want to say one more thing about the
13 recitation of facts you were given -- I'm not sure what you've
14 read.
15 THE COURT: I've read the letter that was written
16 to Judge Strauss by Plaintiff's Counsel --
17 MR. WATSON: Mr. Donaldson.
18 THE COURT: -- about last fall sometimes.
19 MR. COMELLA: And I will say that somebody has --
20 THE COURT: Here, I have it here if you want to
21 look at it.
22 MR. COMELLA: As we know, there's at least three
23 sides to every story --
24 THE COURT: I know.
25 MR. COMELLA: That's one side of the story. Even

1 the fact I'm going to say, well, it's hazardous waste, well,
2 that's disputed. The only data on these tubes shows it's not a
3 hazard, was not a hazardous waste.
4 So the point I want to make there is that if you
5 would like to have a -- the other side to the story, we'd be
6 happy to provide our side of the story.
7 But, in summary, I just want to say that I think
8 this case should be tried as soon as possible on the same
9 record. We think the Travis County diversion is simply that,
10 it's a waste of time. It has no effect on us. And furthermore
11 I don't think the Travis County court is going to give advisory
12 opinions on all these issues. And we really think it's time for
13 TDSL to figure out they ought to pull this lawsuit, so --
14 THE COURT: Would you be agreeable to a, say, an
15 October, November trial date?
16 MR. COMELLA: Yes, yes, that would be fine.
17 THE COURT: And you would also oppose any
18 additional discovery on Plaintiff's behalf; is that right?
19 MR. COMELLA: Yes. We were there, Your Honor,
20 and it's a controversial point. And with respect to the new
21 Counsel, it was our sense that -- that the mistrial was really a
22 way to improve their litigation posture.
23 Now that's a controversial statement, but I do
24 not think, and David does not think, that they should be
25 rewarded. And to backfill their case with more experts and more

1 theories because of a mistrial that really began with a
2 conversation between this side of the room and a reporter --
3 THE COURT: That's Penski's position, too.
4 MR. COMELLA: Exactly.
5 THE COURT: Let me come back over here and let
6 you respond. May I give you the impressions as we go along?
7 MR. WATSON: Please.
8 THE COURT: It appears to me we've got a court
9 case here, and if it was ready for trial in April of 2004, and
10 it was tried up to a mistrial, it should be ready to go to trial
11 right now with the same discovery, et cetera. I can't see
12 why -- the facts haven't changed, and the same truck wreck out
13 there, and the landfill you said remains basically the same
14 since right after the accident occurred. I can't imagine why we
15 would have to open this up to more discovery, more experts, or
16 anything. The case is eight years old, we need to get rid of
17 it.
18 MR. WATSON: I don't question a minute that we
19 ought to get rid of it. Here's the difficulty, Judge, first of
20 all, as you're completely aware, when the Travis County District
21 Courts take on a case that is an appeal of any action from an
22 administrative agency such as this, it's not a just advisory
23 opinion. It is, in fact, an opinion that has res judicata and
24 collateral estoppel.
25 And here's what Judge Steel was thinking -- and I

1 think that's why there's disagreement between the two of us, Mr.
2 Christian and myself, he read to you from a transcript of April
3 26th, 2004. In June -- on June 8th of 2004, Judge -- I'm so
4 sorry, July 8th, 2004, the parties came in front of Judge Steel.
5 And they started off by pointing out that one of the differences
6 between the time we went to trial in 2004, this case went to
7 trial, and the time it was mistried, and July 8th, 2004, and
8 certainly today, is that TCEQ, which really hadn't been doing
9 anything on this matter, had now acted.
10 And what occurred was Mr. Donaldson pointed out
11 to Judge Steel that in response to TDSL's request for
12 enforcement, that it issued a Notice of Violation. And as a
13 result it ordered Penske in that notice and determined that the
14 material that went into the landfill was hazardous, and that
15 Penske had violated at least five different provisions of the
16 Texas regulations.
17 And here's what Judge Steel said in response, "It
18 appears to me, and that's basically what I heard" -- and I think
19 he's referring to what he heard out in the public -- "it appears
20 to me that we're playing in a whole new ball game, gentlemen. I
21 remember two comments that I made from the last trial when we
22 mistried, number one is I told you guys that your might be
23 careful what you ask for because I may grant it, regarding the
24 motion for new trial -- I mean the mistrial. And, number two is
25 we spent a majority of our time dealing with the fact that TCEQ

1 had not made any movement in this, feds, state, strict
2 liability, I mean everything from your pleadings down to
3 probably the last ruling I made in this case had to do with who
4 is the generator and we're not going to let the generator in.
5 And the responsibility for moving, which is the majority" -- was
6 also -- "which is a majority of these damages", he said. I
7 won't read all of that.
8 But the point being that the difference today is
9 that now TCEQ -- and I'll say it this way, Judge, it may very
10 well have been that my client should have been asking for an
11 abatement back then and say abate this case until the
12 jurisdiction with primary, or with exclusive perhaps, but
13 certainly primary jurisdiction makes certain determinations
14 about this case. Where that leads now is that since they have
15 moved and it's now Penske -- Penske filed suit in Travis County
16 District Court asking for final ruling.
17 And, by the way, it doesn't matter whether it was
18 a contested case hearing or not at the agency level because
19 we're now in a judicial proceeding in Travis County. The point
20 being that that's a big difference. You just heard, for
21 example, a comment that it wasn't designated as hazardous waste.
22 Well, instead of you having to have us try to put on all the
23 evidence related to hazardous waste in this court, there's a
24 jurisdiction that has at least primary jurisdiction on that
25 issue, and that's the Travis County District Court as it comes

1 out of TCEQ, the state agency.

2 So, Judge, when you suggest that there's not much

3 difference, there's a world of difference, and for judicial

4 economy I would think you want to have that determined.

5 THE COURT: We don't know when that will end down

6 there in Travis -- or in Austin, if you will, it might go

7 through the appellate court.

8 MR. WATSON: Very well could.

9 THE COURT: It could be two or three years from

10 now.

11 MR. WATSON: Yes, Judge. And my response to that

12 is twofold, number one is, I would give anything, looking back

13 in 20/20 hindsight, which I get the gift of doing right now, if

14 TCEQ had moved more rapidly and had been able to come up with

15 determinations, and frankly had moved with greater clarity on

16 some of these issues.

17 But those are the kinds of hands that you and I

18 and all these folks have been dealt. The truth of the matter is

19 that if it is appropriate to abate this matter, if it's

20 appropriate to abate because you've got a court that's going to

21 make those determinations -- and TCEQ can't really be a part of

22 this case. If it's appropriate for that to be done, I'm sorry

23 that it may take some time, but that may be just what the law

24 is. The second thing I would say about it, Judge, is that I

25 will always be arguing that you should abate it until you have

1 final determinations.

2 But that's one of the reasons I say you ought

3 to -- if you're going to put in a new scheduling order, we ought

4 to come back and have to argue about that at some later point in

5 time, but --

6 THE COURT: Or agree to it. Or come in with an

7 agreement.

8 MR. WATSON: Certainly that would have to be the

9 case. But that, listening to this argument, I do worry about

10 whether or not -- I was an optimist earlier in the hearing, I'm

11 less an optimist now about whether we can agree to those

12 specific kinds of details.

13 Judge, I think it's too bad that we're at this

14 point. I'm not sure what the prejudice is, other than it

15 carries it out for a longer period of time. But I'll tell you

16 this, Judge, if the Travis County District Court says that they

17 can dispose of this waste in some way other than the way we've

18 been saying, it changes the whole dynamic, in their favor,

19 frankly.

20 THE COURT: Well, the Defendants have agreed more

21 or less to an October, November trial date. Maybe you can agree

22 upon some modification, small modification, if you will, of the

23 scheduling order as to who may be allowed to designate another

24 expert and for what reason, et cetera. Maybe there's some

25 common ground you can stand on.

1 And there was one witness over here, I think the
2 Plaintiff said, a fact witness, some lady I believe you were
3 able to locate and you'd like to identify now as a fact witness,
4 et cetera. Maybe they can agree upon some, seems like a minor
5 point, they may be able to agree to concede some of those points
6 and agree to an October, November trial date. Maybe we're all
7 on the same ground as far as when to dispose of the case.
8 MR. WATSON: For clarity at this time, Judge --
9 (Two speaking at once.)
10 MR. COMELLA: -- we know that one of the reasons
11 for statutory limitations and one of the reasons to bring trials
12 to court quickly is because memories fade, employees leave,
13 companies change. Here's our problem, I represent Zenith
14 Electronics, Zenith Electronics right now doesn't really exist
15 except as a name brand. I don't have any employees, the only
16 employee I have is a former employee who's retired. And the
17 more this is delayed, the worse it gets for us to defend this
18 case.
19 THE COURT: That's the reason we should dispose
20 of this case quicker than we have been. The Supreme Court has
21 given us guidelines about how quickly we're supposed to get
22 these cases off the docket.
23 MR. WATSON: And, Judge, all I suggest is, and I
24 want to be very clear on what it is that I -- my proposal was.
25 I think the Court ought to set the case, I think the Court ought

1 to put in place a new scheduling order. I do believe we're
2 entitled under the law, and I believe under what Judge Steel
3 said subsequent to the hearing that you were read from by Mr.
4 Christian, I believe he was saying he was opening it up to that,
5 and I think we're entitled to that. But I also truly believe,
6 Judge, that it's in the best interest of the Court, and the way
7 the law is that Travis County, even though it's been a long,
8 drawn out process, has the right and should be allowed to do
9 that. If we agree to -- I'm willing to say set for October.
10 I'm going to come back if they ever ruled, and I'm going to ask
11 you to abate this case.
12 THE COURT: And I'm going to resist all of that,
13 because it's going to be my goal to get rid of this case --
14 MR. WATSON: I understand that.
15 THE COURT: -- as quickly as I can.
16 MR. WATSON: I just want to make clear that when
17 I show back up -- having said that I made a proposal, when I
18 show back up you here, you think I'm baiting and switching you,
19 because I'm willing to go ahead and set that and move forward as
20 best we can. But I truly believe that that's the law and I'm
21 going to encourage that.
22 MR. CHRISTIAN: Your Honor, may I, very briefly?
23 THE COURT: Yes, sir, sure.
24 MR. CHRISTIAN: Two or three years in Travis
25 County --

1 THE COURT: Well, that would include an appeal,
2 we don't know that.
3 MR. CHRISTIAN: Of course, discovery, motion,
4 practice, trial, appeal, the whole nine yards. Your Honor, this
5 is what TDSL said, this is what TDSL told the Court on October
6 12th, 2004, after anything Judge Steel said, after one or more
7 of the TCEQ petitions had been filed --
8 THE COURT: Before you read that, may I ask a
9 question about --
10 MR. CHRISTIAN: Yes, sir.
11 THE COURT: What happened to the September trial
12 date of 2004 right before that?
13 MR. CHRISTIAN: Nothing, Your Honor.
14 MR. COMELLA: Judge Steel did not have the time
15 to devote.
16 MR. CHRISTIAN: And then Judge Steel stepped away
17 from the case.
18 THE COURT: Okay. Now you were going to read
19 their comments from an October hearing, Plaintiff's comments?
20 MR. CHRISTIAN: Actually from an October brief.
21 This is when they were pushing the case because they wanted a
22 new judge. They didn't get too many rulings in their favor at
23 trial, they wanted a new judge, and this is the argument they
24 made to get a new judge. And it was successful. "This case has
25 been pending almost seven years, I'll just cut to the chase

1 here. This case must be one of the oldest civil cases on this
2 Court's docket. The case should be tried and disposed of".
3 Now with all due respect to TDSL's Counsel, I
4 understand they have a strategy. And I understand they think
5 for some reason they're going to get a better shake in Travis
6 County. But they filed this action in this county. They tried
7 this action in April of 2004. Now they come into this courtroom
8 and suggestion -- not suggest, say that it should be stayed for
9 another three years.
10 The Travis County enforcement proceedings,
11 they -- we're not saying they ought to stop, they can just go on
12 their merry way.
13 THE COURT: We don't have the power to stop them
14 anyway.
15 MR. CHRISTIAN: We don't. But this court has the
16 power to get this case tried.
17 THE COURT: And that's going to be my goal, if
18 you will try, to try to do it more or less in an agreeable way.
19 I think all of you agreed upon a target date for trial. We
20 could look at our calendars and pick out a date for that. If we
21 do try it in October/November, how long, with the case in the
22 posture that it is right now, without additional discovery and
23 et cetera, how long do you expect a trial would take?
24 MR. WATSON: Judge, it's my understanding last
25 time both sides announced six weeks. Again, that's part of the

1 reason I think having some rulings out of Travis County could
2 change that.
3 THE COURT: I'm probably not going to wait on
4 Travis County.
5 MR. WATSON: I heard you. I just want to make
6 sure I don't leave anything on the table. I would think we
7 probably ought to set a month.
8 THE COURT: Well, with that in mind, probably
9 need to look at October setting, because November we're looking
10 at holidays, et cetera. If we could start early October, we
11 might be able to finish it before Thanksgiving.
12 MR. CHRISTIAN: That will be fine with us, Your
13 Honor.
14 MR. COMELLA: Yes.
15 THE COURT: You agree with the length of the
16 trial?
17 MR. CHRISTIAN: I think it gets back to trial on
18 the record we went to trial on before, then, yes, of course a
19 month. If we get into all this additional stuff, then it's
20 certainly going to be longer.
21 THE COURT: Would you be willing to talk to Mr.
22 Watson today before you leave about what you could agree to as
23 far as opening up additional discovery, if anything, and also
24 look at your calendars to see what dates would be agreeable with
25 you?

1 MR. CHRISTIAN: The answer is yes to both.
2 THE COURT: You would to both?
3 MR. CHRISTIAN: Yes.
4 THE COURT: And also maybe even talk about
5 mediation. It sounded to me like there was just a little spark
6 of hope that maybe go back in mediation before then?
7 MR. CHRISTIAN: Your Honor, we are always willing
8 to discuss settlement. Whether we need to do it in the context
9 of mediation, I'm not sure that's the best bet. But we are
10 always willing to talk.
11 THE COURT: Whatever you agree to as far as I'm
12 concerned is better than nothing. And I certainly wouldn't want
13 to force you to go to mediation if you have already tried it and
14 it seems hopeless. If anyone says it's going to be helpful,
15 I --
16 MR. COMELLA: Tried twice.
17 THE COURT: Pardon me?
18 MR. COMELLA: It's been mediated twice, 2003 and
19 2004.
20 THE COURT: But there was some comments that said
21 it might not hurt to do it again.
22 MR. RUSSELL: Your Honor, my comment about when
23 you asked me did I think mediation would be successful, I
24 directed that towards forced mediation. I do believe there are
25 certainly grounds for discussions now that new Counsel's on

1 board and other things happened that it's -- it would be
2 fruitful to have some discussions, at least informally.
3 MR. CHRISTIAN: Sure.
4 THE COURT: May we take a break, then, at this
5 point right now? Don't go away. And visit with each other
6 about your calendars and also what, if anything, you can agree
7 upon as far as discovery in concerned on both sides. And come
8 back in here in a few minutes and let me know where you are, and
9 if I have to make some rulings.
10 I may want to take time now to read this
11 transcript, I believe you said I've got it.
12 MR. WATSON: It's attached to the letter we gave
13 you, Judge.
14 THE COURT: RIght here?
15 MR. WATSON: Yes, sir.
16 THE COURT: And you have a copy of what they've
17 given me?
18 MR. CHRISTIAN: We just got it today, just a
19 minute before the hearing started.
20 THE COURT: Well, let me read it while you folks
21 are talking. And if you let me know when you're ready to get
22 back on the record, we'll come back in here.
23 MR. WATSON: Thank you, Your Honor.
24 (A break was taken.)
25 THE COURT: We've had a little break, you've

1 talked, and off the record you've told me you have some type of
2 agreement to announce; is that correct?
3 MR. CHRISTIAN: Your Honor, that is correct.
4 Doug Christian for Penske Defendants. We have negotiated a
5 compromise on the issues relating to the scheduling order. We
6 will present for the Court's signature a proposed order if the
7 Court would like. But the --
8 THE COURT: I think we need a written order
9 approved by all three parties.
10 MR. CHRISTIAN: Generally though, I'll state for
11 the record, the important points of that order are as follows:
12 trial date October 2nd.
13 THE COURT: Let me check. I'm wide open, I just
14 want to be sure of that date.
15 Yes, that's great. Anticipated length of four
16 weeks, more or less.
17 MR. CHRISTIAN: Yes, sir.
18 TDSL will be permitted to designate up to three,
19 including three, additional expert witnesses, or with regard to
20 expert witnesses who were going to be permitted to testify at
21 trial back in April if they wish to expand the nature of that
22 testimony that will count among the three. With one exception,
23 Your Honor, which is if a -- if a damages witness for TDSL
24 wishes to, using the same model and not based on factual
25 developments in the interim, but based solely on the passage of

1 time, wishes to amend the amount of damages, that will be --
2 that will not count against one of TDSL's three witnesses.
3 Penske and Zenith --
4 THE COURT: Before you get off that subject and
5 go to another one, do you have a date when the Plaintiff will be
6 required to designate their experts?
7 MR. CHRISTIAN: Yes, sir, March 30th.
8 THE COURT: Okay, thank you.
9 MR. CHRISTIAN: And Penske and Zenith together
10 have a total of up to three additional expert witnesses.
11 THE COURT: Total?
12 MR. CHRISTIAN: Yes, sir, total. So three on
13 that side of the courtroom, three on this side of the courtroom.
14 THE COURT: Do you have a date on your side when
15 you have to designate?
16 MR. CHRISTIAN: May 15th, Your Honor.
17 THE COURT: Okay.
18 MR. CHRISTIAN: The deadline to depose all new
19 experts, June 15th.
20 THE COURT: Okay.
21 MR. CHRISTIAN: Plaintiffs will make their
22 experts available on or after April 30th. Defendants --
23 THE COURT: Okay. Wait a second.
24 Okay, I'm with you.
25 MR. CHRISTIAN: Defendants on or after June

1 15th -- I'm sorry, Your Honor --

2 THE COURT: That the right date?

3 MR. CHRISTIAN: Your Honor, if I could have a

4 minute, please.

5 MR. SAPIRE: Can we go off the record for just a

6 moment?

7 (Off-the-record discussion ensued.)

8 THE COURT: We're back on the record.

9 MR. CHRISTIAN: We're back on the record.

10 Plaintiff designates experts by March 30th and

11 makes them available by April 30th.

12 Defendant designates by May 15th, makes them

13 available for deposition to be completed by June 15th.

14 MR. WATSON: Yes.

15 MR. CHRISTIAN: And with regard to any challenge

16 to the admissibility of any proposed expert testimony, we're

17 talking July 1st as a deadline for filing the motions. And

18 then, of course, it would be most helpful to know as soon as

19 possible what the Court's ruling is going to be as far in

20 advance of trial as possible.

21 THE COURT: Okay. We may want to select a date

22 in July, then, for a pretrial hearing, motions hearing.

23 MR. CHRISTIAN: Yes, sir.

24 THE COURT: We can work a --

25 MR. WATSON: I didn't bring my July calendar.

1 THE COURT: We can work around that.

2 MR. SAPIRE: Just so everybody knows, we've got a

3 July 10th trial setting right now that may take up to two weeks.

4 But we'll see how that goes.

5 MR. CHRISTIAN: So, Your Honor, that would be the

6 agreed to scheduling order.

7 THE COURT: May I make an inquiry before we nail

8 it down, and that is did you have a -- or did you think about

9 pleadings, when that might be cut off?

10 MR. CHRISTIAN: Yes, sir, all of -- and this is

11 an important point of this obviously -- everything else from the

12 existing schedule order applies. So the only thing we're

13 changing at this point are experts.

14 THE COURT: Let me see if it's a Rule 11

15 agreement, if everybody has agreed to it.

16 MR. WATSON: Yes, Your Honor.

17 THE COURT: Plaintiffs are on board with this;

18 right?

19 MR. RUSSELL: Yes, Your Honor.

20 THE COURT: How about the other Defendant?

21 MR. COMELLA: Yes, Your Honor.

22 MR. WATSON: And the only thing I want to make

23 sure we're clear on is on the aspect of attorney's fees,

24 attorney fee experts. And that was not calculated as part of

25 the three?

1 MR. RUSSELL: That's correct, if they update.

2 MR. WATSON: Well, they have been designated. It

3 would be the same kind of thing in terms of the passage of time?

4 MR. CHRISTIAN: Well, we don't believe the

5 attorney's fees are in the case.

6 MR. WATSON: And you're going to object to it in

7 that regard --

8 MR. CHRISTIAN: We're going to object to it.

9 (Three speaking at once.)

10 MR. WATSON: We're not saying you waive, and

11 neither are we waiving any objection to say that these people

12 aren't experts or are not relevant in the case in one way or

13 another, it's just that they can be updated along the lines of

14 the damage experts.

15 MR. SAPIRE: Let me consult with --

16 MR. CHRISTIAN: So Your Honor is clear, we --

17 THE COURT: Hold that thought so they can visit,

18 as well.

19 Go ahead.

20 MR. SAPIRE: They have heard this, we're not

21 telling you anything they haven't heard today.

22 Prior Counsel was one of the attorney's fees

23 designated -- attorney's fees designated in this case. For

24 obvious reasons, it makes sense that someone else be the

25 attorney's fee expert on behalf of TDSL. So we're, without

1 getting into whether there will be an attorney's fee claim
2 submitted to the jury or the Court, or anything else, we're only
3 saying we reserve the right to maybe juggle attorney's fees
4 experts, independent of the ruling.
5 THE COURT: Counsel, is that agreeable?
6 MR. CHRISTIAN: Yes, sir. If they had designated
7 an attorney's fees witness to testify at the last trial, then,
8 of course, they can amend that because of the passage of time,
9 they can amend the amount.
10 THE COURT: Not only that, but they have another
11 rider in the saddle and they want him to probably be their
12 expert instead of the prior Counsel is what I understand.
13 MR. SAPIRE: That's correct, we've designated Tom
14 Watkins as an attorney's fees expert, was previously done 18
15 months ago, and I'm saying we may want Mr. Watkins rather than
16 Mr. Donaldson to be that expert. And I'm saying we're not in a
17 position today, not having spoken to those folks yet about
18 those, to commit. But it's going to be Watkins instead of
19 Donaldson.
20 MR. CHRISTIAN: All right. Why don't we simply
21 agree that this agreement today does not rule that out. We
22 preserve all of our arguments we have with regard to that.
23 THE COURT: That takes car of that issue. I
24 really appreciate the work you did on this scheduling in order
25 to -- there may be some other things we'd like to talk about.

1 When I went back there I read through the transcript and had a
2 little bit better understanding, I think, I'm learning a little
3 bit more all the time.
4 But there also is a motion to stay proceedings
5 that Plaintiffs have filed, and I thought this is probably not
6 the time for me to hear it. This is just a status hearing, and
7 maybe want to get a date for us to come back and present that
8 issue.
9 MR. WATSON: That is precisely what I was saying
10 at the beginning, Judge, and that is I'm going to come back at
11 you as many times as you will allow me before getting upset.
12 THE COURT: I won't get upset.
13 MR. WATSON: Good, I'm going to come back a lot
14 of times.
15 THE COURT: I get paid for coming. But I doubt
16 these two, though.
17 MR. WATSON: They're already upset, I can't solve
18 that problem.
19 But here's my point, Judge, the truth of the
20 matter is I believe that a stay or an abatement is appropriate,
21 pending all that, and I will want to argue that in more detail
22 than what we did today.
23 THE COURT: And I need to rule on it for you so
24 you can do whatever you need to depending on what I rule. But
25 this is, I don't believe, not the day for me to do that.

1 MR. CHRISTIAN: And, Your Honor, that's fine.
2 But can we come back as soon as possible to argue that, because
3 that's a very important issue.
4 THE COURT: I'll do it whenever you want to, as
5 soon as you want to.
6 MR. CHRISTIAN: Are you, Kirk, going to be filing
7 an amended motion, or a new motion?
8 MR. WATSON: I hadn't thought about it, can do
9 that if it will be helpful to you.
10 MR. CHRISTIAN: Doesn't matter to me, I just want
11 to know whether we argue on the current papers or whether you --
12 THE COURT: Would you be willing to just submit
13 it to me for a ruling without oral argument? That is, if you
14 have any argument, you can reduce it to writing and send it to
15 me.
16 MR. WATSON: Whatever you prefer, I love to hear
17 myself talk, so I brought bias in that regard, but I'll be happy
18 to do whatever you want to do in that regard or whatever they
19 will agree to.
20 MR. COMELLA: It's already been briefed, Your
21 Honor.
22 THE COURT: Pardon me?
23 MR. COMELLA: It's already been briefed, the
24 motion to stay has already been briefed. And in fact we gave
25 you a highlight of what the arguments are already about an hour

1 ago.

2 MR. RUSSELL: It hasn't been fully briefed, Your

3 Honor, because we specifically did not reply to their responses.

4 And Judge Strauss, when he took us out, he said you're probably

5 going to want to reply and said we'll wait on that.

6 THE COURT: Well, would you be willing to submit

7 to me without oral argument after you have finally briefed it?

8 MR. SAPIRE: Your Honor, may I make a suggestion?

9 I just have a feeling, also being new to this case and having

10 worked through more of the file, with all due respect, than Your

11 Honor has, that you may find after reading the briefs, wonderful

12 as they are, that you still have questions. I know you're

13 mindful of their travel expenses and having to be here. Maybe

14 we could have a telephone hearing about that.

15 Well, I'm just saying I think the Court would

16 find it useful to be able to ask questions of Counsel.

17 MR. WATSON: I do too, Judge. I'd be happy to

18 brief it, but I think you're going to want to ask us questions.

19 THE COURT: Would you be willing to come back?

20 MR. CHRISTIAN: Of course, Your Honor, it's an

21 important issue.

22 We will, of course, come back, but we'd like it

23 to be as quickly as possible.

24 THE COURT: They would like time to file a reply

25 brief, I understand.

1 MR. RUSSELL: Yes, Your Honor.
2 THE COURT: How long will that take?
3 MR. WATSON: We can do it in 10 days.
4 MR. RUSSELL: Took the words out of my mouth.
5 MR. CHRISTIAN: I don't want to inflate any more
6 paper here, but I anticipate their reply brief is going to be
7 based in part on some pleading that was filed in the Travis
8 County matter last week, and that's something we need to be
9 heard on, so maybe one more round of briefs on that part.
10 THE COURT: So 30 days from now we have a
11 hearing?
12 MR. CHRISTIAN: That would be just fine, Your
13 Honor.
14 THE COURT: And that would give you time to reply
15 if you want to?
16 MR. CHRISTIAN: Yes, sir.
17 THE COURT: Do you have your calendars for
18 sometime around April the 1st?
19 MR. WATSON: I didn't bring my calendar for that.
20 In fact, my calendar is on one of those little cell phones, and
21 I purposely leave those in the car when I walk into a courtroom.
22 But you set it, Judge, and I'll make it happen.
23 MR. CHRISTIAN: Could we make it possibly the end
24 of March, Your Honor?
25 THE COURT: Yes, sir.

1 MR. CHRISTIAN: I've got a trial beginning the
2 first three weeks.
3 THE COURT: Do you work on Fridays?
4 MR. CHRISTIAN: Yes, sir.
5 MR. WATSON: By court order.
6 THE COURT: Friday, March the 24th?
7 MR. CHRISTIAN: That's fine with us, Your Honor.
8 THE COURT: Or March 31st?
9 MR. CHRISTIAN: 24th would be preferable for us,
10 if that works for the Court.
11 MR. WATSON: I'm happy either way.
12 THE COURT: That's a Friday.
13 What's the earliest we can do it that day?
14 MR. CHRISTIAN: We can come in the night before,
15 we can get started as early as the Court wishes.
16 THE COURT: Want to do it at ten o'clock, or
17 1:30, whatever you prefer.
18 MR. SAPIRE: Earlier is better.
19 MR. CHRISTIAN: Ten o'clock on the 24th; is that
20 fine?
21 MR. WATSON: I'll make it happen.
22 THE COURT: Okay, Friday the 24th at 10:00 A.M.
23 I need to give you, before you leave, some
24 information about how to fax me copies, if you would, so I can
25 look it over before I get here.

1 If you will be mailing it to me, if you want to,
2 it's PO Box in Caldwell 648. PO Box 648, Caldwell is 77836.
3 I have a fax machine at the courthouse there that
4 I still use, it's 979-567-2382.
5 Do you need to call me, do you want that phone
6 number? I don't mind if you call. We're not supposed to talk
7 one-on-one, and probably if you need to call you need to go
8 through the coordinator or someone here in this office.
9 MR. WATSON: Judge, can I repeat back the fax
10 number, 979-567-2382?
11 THE COURT: Yes, sir.
12 MR. WATSON: And the zip was 77836?
13 MR. CHRISTIAN: Your Honor, if we need to Fed Ex
14 something, I'm not sure they can deal with PO boxes.
15 THE COURT: I'll give you the street address.
16 it's 206 North Moore.
17 MR. CHRISTIAN: Thank you.
18 THE COURT: There's also in the file a pending
19 motion to substitute Counsel, at least that's --
20 MR. WATSON: I think that's agreed; right?
21 MR. CHRISTIAN: We are happy to welcome this
22 gentlemen to the case, Your Honor. One caveat though, I
23 understand Mr. Watson is running for the legislature, and we all
24 hope he's elected.
25 (Laughter.)

1 MR. CHRISTIAN: That didn't come out right.
2 MR. WATSON: Judge, I'll be hitting you up for a
3 campaign contribution as soon as we leave the courtroom.
4 (Laughter.)
5 THE COURT: I don't think that would be
6 appropriate.
7 MR. CHRISTIAN: Your Honor, what we don't,
8 obviously, want to happen is that there be a lengthy legislative
9 stay, or whatever it's called, as a result of Mr. Watson being
10 elected.
11 THE COURT: He hasn't been elected yet.
12 MR. CHRISTIAN: No, I'm just considering all the
13 possibilities, Your Honor.
14 MR. WATSON: I sure like his optimism, Judge.
15 MR. CHRISTIAN: So as long as we're not going to
16 be facing that, or course, we have no problem.
17 THE COURT: I don't think I have any control over
18 that. It's automatic, as I understand, if he is elected, it
19 will go in next year whenever after he's sworn in. But we'll
20 deal with that when we get there.
21 MR. CHRISTIAN: Yes, sir.
22 THE COURT: I'll try to get the trial behind us
23 before then.
24 Are there any other issues that we need to talk
25 about today?

1 MR. WATSON: No, Your Honor.

2 MR. CHRISTIAN: Not that I'm aware of.

3 THE COURT: The hearing on the 24th, Linda just

4 asked me, hearing on motion to stay at this point, there may be

5 some other motions filed, I'll be happy to look at them.

6 Probably can dispose of that before lunchtime if we start at ten

7 o'clock, don't you think?

8 MR. CHRISTIAN: I'm sure, Your Honor.

9 THE COURT: Probably if you try to put a block of

10 time in for us.

11 Okay, we'll see you in, what, about a month.

12 MR. CHRISTIAN: Thank you, Your Honor.

13 MR. WATSON: Judge, thank you very much.

14 MR. SAPIRE: May we be excused?

15 THE COURT: Yes, sir.

16

17 (Court was adjourned at 4:13 P.M.)

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THE STATE OF TEXAS :
COUNTY OF HAYS :

I, DOROTHY OPPENHEIMER-BRYS, acting as Deputy Official Court Reporter in and for the 22nd Judicial District Court of Hays County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all proceedings had in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $ 328.30 and was paid/will be paid by Plaintiffs.

WITNESS MY OFFICIAL HAND this the 6th day of March, 2006.

DOROTHY OPPENHEIMER-BRYS, Texas CSR 129
Expiration Date: 12/31/06
Oppenheimer Reporting Services
9405 Crownspoint Circle
Austin, Texas 78748
(512) 282-1388

No. 98-0159

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	)	IN THE DISTRICT COURT OF
Plaintiff	)	
vs.	)	HAYS COUNTY, TEXAS
PENSKE TRUCK LEASING CO. L.P., PENSKE LOGISTICS, INC., and ZENITH ELECTRONICS CORP.,	)	
Defendants	)	207th JUDICIAL DISTRICT

PLAINTIFF'S MOTION TO STAY

TO THE HONORABLE GUS J. STRAUSS, JUDGE OF SAID COURT:

Texas Disposal Systems Landfill, Inc. ("TDSL"), Plaintiff in this action, hereby moves this Court for a stay of the above-mentioned proceeding for a period of one hundred eighty (180) days to allow resolution of a legal issue fundamental to this proceeding.[1] That fundamental legal issue is whether or not D008 toxic characteristic hazardous waste can be diluted in lieu of treatment and then be disposed of as non-hazardous waste. That issue is currently being litigated in Travis County, Texas, on appeal from various actions of the Texas Commission on Environmental Quality ("TCEQ" or "Commission").[2] TDSL has also filed a federal petition with the United States Environmental

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1 TDSL originally made an oral request for an abatement of this proceeding, but is now filing its request in the form of a written *Motion to Stay* as directed by the Court, and agreed to by all parties, at the scheduling conference on October 12, 2005.

2 *See* Plaintiff's Original Petition, *Texas Disposal Systems Landfill, Inc. vs. Texas Comm'n on Envtl. Quality*, Cause No. GN402245 (July 19, 2004); Plaintiff's Original Petition, *Texas Disposal Systems Landfill, Inc. and Texas Campaign for the Env't vs. Texas Comm'n on Envtl. Quality*, Cause No. 403551 (Oct. 25, 2004); Plaintiff's Original Petition, *Texas Disposal Systems Landfill, Inc. and Texas Campaign for the Env't vs. Texas Comm'n on Envtl. Quality*, Cause No. GN404231 (Dec. 29, 2004); Plaintiff's Original Petition, *Penske Truck Leasing Co., L.P. vs. Texas Comm'n on Envtl. Quality*, Cause No. GN403433 (Oct. 15, 2004); Plaintiff's Original Petition, *Penske Truck Leasing Co., L.P. vs. Texas Comm'n on Envtl. Quality*, Cause No. GN403519 (Oct. 22, 2004); Plaintiff's Original Petition, *Penske Truck Leasing Co., L.P. vs. Texas Comm'n on Envtl. Quality*, Cause No. GN403900 (Nov. 30, 2004); Plaintiff's Original Petition, *Penske Truck Leasing Co., L.P. vs. Texas Comm'n on Envtl. Quality*, Cause No. GN404119 (Dec. 16, 2004).

Protection Agency ("USEPA") regarding this legal question because the USEPA has authority over the TCEQ hazardous waste program.[3] TDSL believes that a reasonable basis exists for resolution of this issue in one or both of these forums within 180 days.

Allowing this issue to be decided by a Travis County District Court will substantially shorten the time needed for pretrial and trial in this Court by eliminating arguments over the legal effect of undisputed facts. Such arguments took up significant time in the previous trial of this matter and were never resolved before the mistrial was ordered and remain unresolved today. Plaintiff, Defendants, and the State of Texas joined in consolidation motions in Travis County in an effort to expedite the Travis County appellate decision by consolidating the seven separate appeals into a single appeal.[4] The resolution of this fundamental legal issue by the Travis County District Court should be determinative and the parties should not be able to mount a collateral attack in this Court.[5] As Judge Gary Steel recognized during the first trial in this case, Travis County is the proper forum for resolution of this fundamental legal issue arising under Texas environmental

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3 *See 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* (Nov. 14, 2005), attached hereto as Exhibit 1. Also included with Exhibit 1 is a clean copy of Exhibit 2 to the Petition for the court's convenience.

4 *See* Motion to Stay, *Texas Disposal Systems Landfill, Inc. vs. Texas Comm'n on Envtl. Quality*, Cause No. GN402245 (Oct. 7, 2005); Motion to Stay, *Texas Disposal Systems Landfill, Inc. and Texas Campaign for the Env't vs. Texas Comm'n on Envtl. Quality*, Cause No. 403551 (Oct. 7, 2005); Motion to Stay, *Texas Disposal Systems Landfill, Inc. and Texas Campaign for the Env't vs. Texas Comm'n on Envtl. Quality*, Cause No. GN404231 (Oct. 7, 2005); Motion to Stay, *Penske Truck Leasing Co., L.P. vs. Texas Comm'n on Envtl. Quality*, Cause No. GN403433 (Oct. 7, 2005); Motion to Stay, *Penske Truck Leasing Co., L.P. vs. Texas Comm'n on Envtl. Quality*, Cause No. GN403900 (Oct. 7, 2005); Motion to Stay, *Penske Truck Leasing Co., L.P. vs. Texas Comm'n on Envtl. Quality*, Cause No. GN403519 (Oct. 7, 2005); Motion to Stay, *Penske Truck Leasing Co., L.P. vs. Texas Comm'n on Envtl. Quality*, Cause No. GN404119 (Oct. 7, 2005).

5 *See Acker v. City of Huntsville*, 787 S.W. 2d 79 (Tex-App. Hous. [14th Dist.] Feb. 1, 1990) at FN 1: "A third action between the same parties was also pending in a Travis County district court. The Walker County district court abated action until either the federal or Travis County court resolved the issue."

statutes.[6]

An additional basis for the requested stay is to allow TDSL sufficient time to engage alternate lead trial counsel for this proceeding. If this Court does not believe that a Motion to Stay for 180 days is warranted or productive in this case, TDSL respectfully requests that, in the alternative, this Court issue a sixty (60) day stay to allow new lead trial counsel to be selected and to allow that counsel adequate time for review of the extensive files and documentation in this case.

I. Argument

A. Discussion of Motion for 180 Day Stay

Although factual disputes remain between the parties, the core material facts are not contested. However, the parties completely disagree as to the legal significance of these undisputed facts. TDSL believes that Texas environmental statutes and regulations provide the standard of care applicable in this case that when breached prove negligence. The legal interpretation of Texas environmental law relative to a key aspect of this litigation is currently pending in Travis County District Court, sitting in an appellate capacity, in the various appeals from certain actions taken by TCEQ in this matter.

There are three basic categories of negligent actions at issue in this case. One issue arises in the context of the Defendants' failure to properly handle the D008 toxic characteristic hazardous lead waste generated at the accident scene, the second issue arises in the context of the Defendants' failure to properly remove the commingled D008 waste from the TDSL landfill, and the third issue involves the statutory and common law standard of care associated with moving materials, such as

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6 In an October12, 2005, letter from the TCEQ Executive Director, Mr. Glenn Shankle, to Ms. Pam Giblin, attorney for Penske, Mr. Shankle also expressed his view that a judicial resolution of this issue is necessary. *See* Letter from Mr. Glenn W. Shankle, Executive Director, TCEQ, to Ms. Pamela Giblin, Attorney for Penske Truck Leasing (Oct. 12, 2005).

the television parts involved in this litigation, around the country as part of a multi-site assembly process. While there are factual disputes in the evidentiary context, the basic facts are not in serious dispute. The real dispute is over the standards of care and the interpretation of laws establishing these standards that ultimately will control the jury's deliberations in this proceeding.

In the first category, TCEQ has issued a Notice of Violation ("NOV") against Penske Truck Leasing Co. and Penske Logistics, Inc. ("Penske"), finding that (1) "Penske caused, suffered, allowed, or permitted waste to be disposed of at an unauthorized facility" in violation of various provisions of Chapter 30 of the Texas Administrative Code, and (2) Penske "fail[ed] to determine if a generated waste was a hazardous waste."[7] This determination by TCEQ also included a subsidiary finding that Penske was a generator of the D008 waste at issue in this case.[8]

In the second category – Defendants' refusal to properly remove and dispose of the commingled D008 waste – the TCEQ Commissioners and Executive Director have issued a variety of rulings addressing this issue, resulting in the filing of seven lawsuits in Travis County District Court (four by Penske, three by TDSL) challenging various aspects of those rulings. As previously noted, the parties have jointly requested that the seven lawsuits be consolidated into one action to allow expedited review and resolution. Resolution of this issue by the Travis County District Court will significantly clarify the contested issues in the instant case and, as a result, will streamline the pretrial and trial proceedings.

In an effort to expedite resolution of this fundamental legal issue, TDSL has filed the previously noted petition with the USEPA challenging the TCEQ's Executive Director's apparent

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7 *See* Letter from Mr. Glenn W. Shankle, Acting Executive Director, TCEQ, to Mr. Brian Hard, President, Penske Truck Leasing (May 13, 2004), Summary of Investigations Findings at 1, attached hereto as Exhibit 2.

8 *Id.*

authorization allowing Defendants to dispose of the diluted D008 toxic characteristic hazardous waste as non-hazardous waste. TDSL alleges in its federal petition that federal law prohibits such disposal and, therefore, TCEQ is obligated to comply with federal hazardous waste law under the delegation agreement with the USEPA. The position of the USEPA relative to this petition should help expedite the Travis County appeal.

Based on the Travis County District Court decision, partial summary judgment on several issues can be expected before this Court moves forward with pre-trial and trial issues. However, if this Court maintains the current schedule, the discovery period will end and a trial on the merits will occur before the Travis County District Court has a chance to receive briefs, hear oral argument, and issue a decision. Additionally, awaiting a final decision by the Travis County District Court will not substantially prejudice any party to this proceeding. As the case was initially filed in February1998, an additional 180 day stay will not harm any party.

For these reasons, TDSL is seeking a temporary stay in this proceeding. If a stay is granted, TDSL believes that a 180 day time period is a reasonable period for a decision at the Travis County District Court level. It is both logical, efficient, and in the interest of judicial economy to allow the legal issues to be decided in the Travis County District Court prior to commencing further discovery and proceeding to trial in this Court.

B. Discussion of Request for Sixty Day Continuance to Substitute Lead Counsel

TDSL is currently seeking alternate lead trial counsel. Normally, TDSL would request a sixty day (60) continuance to substitute lead counsel. However, if the Court grants this Motion to Stay all proceedings for 180 days, TDSL will concurrently substitute lead trial counsel within that time frame. If, however, the Court chooses not to grant the 180 day stay, then TDSL respectfully requests, in the alternative, a 60 day continuance to allow for substitute lead counsel to prepare for discovery and pretrial hearings.

At the present time, TDSL is interviewing potential lead trial counsel and will make a decision on a substitute lead trial counsel as soon as possible. Mr. Jim Blackburn has been added in this pleading as additional trial counsel; however, Mr. Blackburn will not be designated as lead trial counsel. TDSL's new lead trial counsel will need to review the voluminous pleadings, discovery, and depositions in this case. To this end, a 60 day continuance would be adequate and should not unreasonably inconvenience any of the parties, given the time that has already passed between the original mistrial and the current status of these proceedings. Additionally, TDSL requests that a scheduling order be established that moves back the current scheduled date of trial at least 60 days and establishes deadlines based upon such trial setting.

II. PRAYER

TDSL respectfully requests that this Court, in the exercise of its discretionary powers, stay the current proceedings for one hundred eighty days to allow resolution of the Travis County District Court appeal. Such stay will promote judicial economy and simplify the issues for the jury. In the alternative, TDSL requests that a sixty day continuance be granted to select new lead trial counsel

and to allow new counsel adequate time to review the factual and legal documents that have been compiled to date in this case.

Respectfully submitted,
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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served by facsimile transmission and/or U.S. First Class mail on this 15th day of November, 2005, to the following service list:

Honorable Gus J. Strauss
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P.O. Box 145
Columbus, Texas 78934
Fax Number: (979) 732-2591

Hays County District Court
Cecilia Adair, District Clerk
Hays County, 123 Justice Center
110 East Martin Luther King, Jr. Drive
San Marcos, Texas 78666
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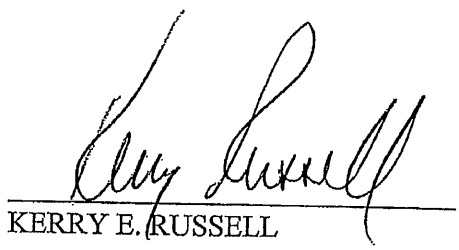
Attorneys for Zenith Electronics Corp.



KERRY E. RUSSELL

No. 98-0159

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	)	IN THE DISTRICT COURT OF
Plaintiff	)	
vs.	)	HAYS COUNTY, TEXAS
PENSKE TRUCK LEASING CO. L.P., PENSKE LOGISTICS, INC., and ZENITH ELECTRONICS CORP.,	)	
Defendants	)	207th JUDICIAL DISTRICT

PLAINTIFF'S MOTION TO STAY

EXHIBIT 1

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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 & Rodriquez, 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 filed 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 rules[1] (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

EXHBIT 1

BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

TCEQ DOCKET NO 2004-0984-IHW-E

REPORT OF MARIANNE LAMONT HORINKO

SEPTEMBER 8, 2004

1. IDENTIFICATION

My name is Marianne Lamont Horinko, 4710 Benjamin Cross Court, Chantilly, Virginia, 20151, telephone 202-997-3318.

2. CREDENTIALS

From 2001 to 2004, I served as Assistant Administrator of the Office of Solid Waste and Emergency Response (OSWER) at the U.S. Environmental Protection Agency (EPA), including service as Acting Administrator of EPA from July through November, 2003. OSWER is the office responsible for administration of the federal Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) programs. From 1992 to 2001, I served as President of Clay Associates, Inc. (and Executive Vice President and General Counsel of its predecessor organization, Don Clay Associates, Inc.), a national environmental consulting firm specializing in hazardous waste policy. From 1990 to 1992 I served as Attorney Advisor to Don Clay, the Assistant Administrator for OSWER, responsible for RCRA and CERCLA policy. From 1986 to 1990 I practiced law at Morgan, Lewis & Bockius, specializing in RCRA and CERCLA. From 1983 to 1985 I was a staff scientist at ENVIRON Corporation, specializing in risk assessment and environmental regulation. A copy of my resume is attached as Exhibit A.

3. SUBJECT MATTER

This report provides my expert opinion as to the regulatory status of commingled hazardous waste, generated as a result of the traffic accident on I-35 involving damage to

approximately 1,248 color television cathode ray tubes (CRTs) from a Penske Truck Leasing Co., L.P. truck on October 9, 1997 in Hays County, Texas, and municipal solid waste at the Texas Disposal Systems Landfill (TDSL).

4. GENERAL SUBSTANCE OF MENTAL IMPRESSIONS AND OPINIONS AND BRIEF SUMMARY OF BASIS FOR THEM

A. FRAMEWORK FOR REGULATION OF HAZARDOUS WASTE UNDER RCRA

Since 1980, EPA has developed a comprehensive regulatory framework under Subtitle C of RCRA for identifying, transporting, treating, storing, and disposing of hazardous waste. The regulations (set forth at 40 C.F.R. Part 261-299) center around two broad objectives: to prevent releases of hazardous wastes and constituents through a comprehensive and conservative set of management requirements (commonly referred to as "cradle-to-grave" management), and to minimize the generation and maximize the legitimate reuse, recycling, and treatment of hazardous waste and constituents.

The RCRA regulations generally apply to any "solid waste." EPA defines "solid waste" as garbage, refuse, sludge, or other discarded material (including solids, semi-solids, liquids, and contaminated gaseous materials). If a material is a "solid waste," the generator must then determine if it is a "hazardous waste." *It is the responsibility of the generator either to test the waste or use its knowledge of the waste to make a determination about its properties, either before or at the time of generation.* EPA generally defines hazardous waste as either "listed"

waste, which is a specific waste stream designation based upon the specific hazardous properties of that waste stream, or "characteristic" waste, which is a generic waste stream that exhibits a characteristic of hazardous waste. There are four categories of characteristic waste: ignitable, corrosive, reactive, and toxic. For toxic wastes, EPA has published a schedule of concentration levels for leachability testing of specific toxic chemicals, above which wastes are deemed to be hazardous.

The RCRA statute further mandates that hazardous wastes be treated to minimize threats to human health and the environment prior to land disposal. EPA has developed a set of regulations, the Land Disposal Restrictions (LDR), that apply to each listed and characteristic hazardous waste to ensure that they are treated properly prior to land disposal. These regulations are needed to fulfill the intent of the law that hazardous wastes be treated so as to "substantially reduce the toxicity of the waste or migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized." RCRA Section 3004(m)(1). *In other words, it is not permissible to simply dilute a waste in order to reduce the toxicity below the characteristic leachate level; the waste must be treated to comply with the law.*

B. THE SPILLED CRTS FROM THE PENSKE TRUCK WERE HAZARDOUS WASTES UNDER RCRA

In the instant matter, the CRTs being shipped by Penske ceased being useful products and became "discarded" (and thus, solid wastes under RCRA) when the Penske truck accident

occurred at approximately 12:51 p.m. on October 9, 1997 (This situation is analogous to the train derailment which occurred in California in the early 1990s involving a spill of metam sodium, a toxic pesticide; in that situation, EPA testified that the pesticide product became discarded and thus, subject to RCRA when the train left the tracks.) Under its contractual arrangement with the shipper, Zenith Electronics Corporation (Zenith), Penske was on official notice that any discarded CRTs would be hazardous waste because of their high lead content. Zenith routinely managed all of their other discarded CRTs as D008 hazardous waste. Furthermore, contractual arrangements between Zenith and Penske specified that any discarded CRTs would be managed as D008 waste. Thus, both Zenith and Penske had knowledge that the materials would be hazardous if discarded, and at the time the CRTs spilled from the truck and were no longer usable as intended or for other purposes, they became discarded under RCRA. (Indeed, EPA itself specified that discarded commercial CRTs are hazardous D008 waste in a rule proposing to exempt recycling of CRTs under certain conditions to safeguard their handling from the hazardous waste management requirements. 67 Fed. Reg. 40508).

Zenith's assertion that the CRTs are essentially harmless is mistaken. In fact, EPA is on the record as having great concern about the growing amount of CRT waste - that is why the Agency proposed the CRT recycling rule, to keep the discarded CRTs out of landfills. EPA also convened a stakeholder group, the National Environmental Product Stewardship Initiative, to develop consensus on how to stop disposal of discarded CRTs. Last year California enacted legislation to mandate CRT recycling, and a number of states are considering landfill bans on CRTs.

Both Zenith, as the owner of the CRTs, or Penske, as the operator of the truck carrying the CRTs, could be considered the "generator" for purposes of RCRA. As generator of a solid waste, Penske had the obligation to determine whether the material was "hazardous" under RCRA upon occurrence of the accident and then ensure its proper treatment and disposal. Thus, Penske should have either relied upon its knowledge to report the materials as hazardous, or tested the spill materials to determine actual hazard, prior to allowing the spilled materials to be sent to a municipal landfill in error

Penske was also obliged to provide proper notification to public authorities under CERCLA that a release of a hazardous substance above its reporting threshold had occurred Public safety officials responding to the traffic accident relied upon the Penske driver's misrepresentation that the CRT waste (i.e., shattered glass materials containing leachable lead) was not hazardous to send the materials to the TDSL facility in error. Penske's assertion that the emergency responders and receiving facility were responsible for the hazardous waste designation runs counter to the RCRA rules, which rely upon generator testing or knowledge.

At the time of the truck accident, the discarded CRTs should have been managed as D008 hazardous waste. After the passage of several hours and upon realizing its error, Penske appears to have taken some proper steps to correct its error and to ensure responsible and legal management of the waste CRTs (other than those that had been placed into the landfill face because of the truck driver's misrepresentation). Penske headquarters, prior to discovering the error, caused seven dump truck loads to be taken to TDSL and unloaded at the landfill face.

Thereafter, after Penske's notification to TDSL that the discarded CRT waste was hazardous, two dump trucks originally directed to TDSL from the accident scene were returned to the scene. Penske mobilized a licensed hazardous waste handler, Code 3, to containerize these two dump truck loads and the remaining discarded CRT waste in rolloff boxes, separate out the CRT waste, and manage it as hazardous waste. However, Penske is irresponsible in not managing the mixture of municipal solid waste and hazardous waste as D008 hazardous waste. Once the hazardous waste characteristic attaches at the point of generation under EPA's rules (i.e , the accident scene in this instance), that waste code carries through until the materials are properly treated to remove the hazardous waste characteristic and meet the LDR requirements. As discussed below, simply diluting the hazardous waste to reduce the levels of toxic constituents below the characteristic is impermissible.

The September 2, 2004 letter from Charles J. Sheehan, EPA Regional Counsel, Region 6 (Dallas) to Lydia Gonzalez Gromatzky, TCEQ supports this reading of the regulations. Sheehan correctly notes that a waste which does not meet the characteristic levels at the point of generation does not require disposal in a RCRA Subtitle C hazardous waste landfill. Sheehan further emphasizes that improper dilution, such as mixing with municipal solid waste, may not be used to achieve these levels and avoid adequate treatment under RCRA, and a regulating agency may take such enforcement action as is necessary to ensure that proper treatment of such waste occurs.

C. MIXING THE SPILLED HAZARDOUS WASTE WITH MUNICIPAL SOLID WASTE DOES NOT DEFEAT THE MATERIALS' HAZARDOUS WASTE DESIGNATION UNDER RCRA

The RCRA statute expressly mandates that hazardous waste be treated to minimize threats prior to land disposal. This statutory requirement applies to both listed and characteristic wastes. In promulgating the regulatory treatment levels for each RCRA waste stream, EPA divided the task into manageable packages or "thirds." The treatment standards for characteristic wastes were included in the so-called "third-thirds" rulemaking (note that the designation of wastes into each "third" was something of a misnomer, given that the last "third"actually contained much more than a third of the RCRA waste streams).

In promulgating the "third-thirds" rule, which contained the LDR standards for characteristic wastes, EPA faced the dilemma of whether to set treatment standards for these waste streams that might be below the characteristic concentration levels. In other words, could EPA mandate treatment to levels below which the waste was clearly hazardous? EPA found that soundest reading of the RCRA statute would indeed require such treatment, noting the "statutory goals and policies of seeking to reduce the uncertainties inherent in the land disposal of hazardous waste by substituting a system whereby hazardous wastes are pretreated in such a way that minimizes threats to human health and the environment." 54 Fed. Reg. 48490.

In reaching this policy result, EPA recognized that the characteristic of toxicity is defined by levels higher than the health-based levels that have been the basis for delisting many

hazardous wastes. In other words, the toxicity characteristic concentration levels are those at which the wastes clearly present a substantial hazard, and that lower levels also may pose a hazard In addition, characteristic wastes may also contain other hazardous constituents, and only by mandating treatment beyond simply removing the characteristic will allow EPA to reach these other hazardous chemicals. EPA indicated that this broad reading of its statutory authority was the only way to reduce the characteristic waste's toxicity and mobility in a way that further minimizes the threat to human health and the environment. Indeed, EPA noted that this reading was the only way to implement the Congressional admonition against dilution in lieu of treatment.

More critically, EPA also addressed the important issue of whether dilution could be used to defeat the hazardous waste characteristic - not just meet the LDR standards. EPA specifically stated: "It is not permissible to dilute a waste to render it non-hazardous in lieu of proper treatment under section 3004(m)" of RCRA. 54 Fed. Reg. 48495. In reaching this conclusion - that characteristic toxic wastes cannot be mixed with non-hazardous wastes in order to render them non-hazardous - EPA noted that its authority to mandate LDR treatment standards below the characteristic level would be largely meaningless if a person could dilute the waste to remove the characteristic rather than treating it. The legislative history of the statute clearly indicates Congress' intention that dilution not be used as a substitute for treatment, noting that "a prohibition of this type of dilution is particularly important where regulations are based on concentrations of hazardous constituents." Id. In the final "third-thirds" rule, EPA found that "in many cases dilution simply increases the volume of the waste without reducing or

immobilizing the mass of hazardous constituents," and that "characteristic wastes may also contain significant concentrations of other hazardous substances." 55 Fed. Reg. 22653. Thus, the Agency "adheres to the position that the act of impermissibly diluting a prohibited waste so that it no longer exhibits a characteristic (or is rendered delistable) is illegal." 55 Fed. Reg. 22666. The dilution prohibition clearly applies to removing the characteristic, not just complying with the RCRA land disposal restrictions.

Penske's assertion that EPA conclusively asserted that the currently containerized mixture of characteristic toxic waste and non-hazardous waste that was impermissibly diluted is automatically non-hazardous under the "third-thirds" rule is also wrong. Indeed, such a policy result would be contrary to the RCRA statute and also detrimental to the environment. Allowing Penske to classify all of the material as non-hazardous and dispose of the material without treatment violates the RCRA statutory mandate that hazardous waste be treated to minimize threats to human health and the environment. Any other result would remove the incentive for generators to treat their wastes responsibly, as well as allow them to reap an unfair economic benefit by evading the costs of proper waste management and disposal. Penske was responsible for the generation of hazardous waste and for potentially allowing hazardous waste to be disposed in a manner that may have caused risk to human health had TDSL not immediately isolated and stored the waste for proper treatment and disposal. Penske's preferred disposal option, to place the waste in a nonhazardous waste landfill, does nothing to reduce the toxicity or volume of waste material - it simply moves the problem to another hazardous waste landfill. Irresponsible behavior should not be rewarded by selecting, and the Texas Commission on

liability. If Penske is allowed to remove this material and improperly dispose of it, resulting in future cleanup under Superfund, TDSL and the generators of the associated MSW may be potentially liable for the entire costs of the cleanup. Furthermore, such liability may attach regardless of whether the site where the waste was disposed ends up on the National Priorities List. Under the Superfund law, not only the Federal government, but also the state, a local government, or even private parties can sue to recover the costs of cleanup. Furthermore, the RCRA statute also includes a citizen suit provision, under which TDSL could be liable for cleanup resulting from any "imminent and substantial endangerment" caused by the improperly-managed waste. As a result, assurances from the state that it will not pursue TDSL for any cleanup costs do not insulate TDSL from any other prospects of future liability for improper management of the Penske waste.

E. PENSKE SHOULD ASSUME RESPONSIBILITY FOR ITS MIXTURE OF HAZARDOUS AND SOLID WASTE BY REMOVING THE MATERIALS FROM THE TDSL PREMISES TO AN AUTHORIZED HAZARDOUS WASTE DISPOSAL FACILITY AND DETERMINING WHAT TYPE OF TREATMENT IS APPROPRIATE PRIOR TO LAND DISPOSAL IN ORDER TO MEET THE RCRA REQUIREMENT TO MINIMIZE THREATS

The TCEQ, as the state agency authorized to administer the RCRA statute in this case, should require that Penske utilize the same approach to the materials at issue here as the other discarded hazardous wastes generated at the truck accident scene. That is, Penske should hire a licensed hazardous waste contractor to remove the discarded material mixed with other waste to an authorized hazardous waste facility, manifested as D008 hazardous waste. The licensed

contractor should then assist Penske and regulatory authorities in determining the appropriate treatment protocols and disposal options that will comply with the RCRA requirement that wastes be treated to minimize threats, reduce the toxicity and volume of material, and ensure proper disposal.

While I believe the law mandates treatment of the co-mingled materials as a hazardous waste, even if the Commission assumes for the sake of argument that there exists some flexibility under the law, they should still adhere to this course of action for a number of compelling policy reasons. Most important, of course, is protect the public health, ensure treatment to minimize threats consistent with RCRA, and disincentivize impermissible dilution. The Commission should also send a strong message that cavalier attitudes toward improper waste management and irresponsible corporate stewardship such as Zenith's and Penske's won't be tolerated in the state of Texas. Finally, the Commission should take steps to ensure that emergency responders and responsible actors helping out after an accident are insulated from liability for their actions. Thus, the proper course of action is to manifest the waste to a licensed RCRA hazardous waste handler and determine through proper testing and analysis whether treatment will immobilize the lead.

5. LIST OF DOCUMENTS, REPORTS, AND DATA COMPILATIONS THAT HAVE BEEN RELIED UPON IN PREPARATION OF THIS REPORT

A list of documents, reports, and data compilations that have been relied upon in preparation of this report is attached as Exhibit B. Should additional material or facts come to

light, I reserve the right to amend my opinion

Respectfully submitted,

Marianne Lamont Horinko

EXHIBIT A:

Marianne Lamont Horinko

Marianne L. Horinko is a Visiting Scholar at the Environmental Law Institute, a non-profit organization devoted to the study of U.S and international environmental law. She is an internationally-recognized author and speaker on the topics of environmental cleanup policy, hazardous waste regulation, waste reduction and recycling, emergency response and homeland security, and "brownfields" revitalization.

Ms. Horinko was named Assistant Administrator for the Office of Solid Waste and Emergency Response at the U.S. Environmental Protection Agency by President George W. Bush in June 2001, a position she held until June 2004. She served as Acting EPA Administrator from July through November, 2003 during the interim between Administrators Christine Todd Whitman and Michael O. Leavitt.

During her tenure as Assistant Administrator, Ms. Horinko refocused the goals of her office around five major priorities: Homeland Security/Emergency Response; One Clean-up Program; Land Revitalization; Energy Recovery, Recycling & Waste Minimization; a Retail Environmental Initiative (the Resource Conservation Challenge) and Workforce Development.

Following the events of September 11, Ms. Horinko learned that she had both war time and peace time responsibilities, and spent her first few months at EPA in the unprecedented and unexpected

role of assisting in environmental cleanup activities at Ground Zero in lower Manhattan, the Pentagon in Washington DC, and the U.S. Capitol due to anthrax contamination. In 2003, as National Program manager, she oversaw EPA's response to the Columbia Space Shuttle Disaster As a result of these experiences, she has led the way in crafting the groundbreaking National Approach to Response

She brought new approaches to environmental protection using partnerships, flexibility and innovation to create environmental improvement. The Brownfields program, signed into law by President Bush in 2002, is a model for many of her efforts, as it is the embodiment of these new approaches to environmental protection. Under her leadership, the budget for the Brownfields program more than doubled.

During the first Bush Administration, Ms. Horinko was Attorney Advisor to Don Clay, EPA's Assistant Administrator for Solid Waste and Emergency Response. In that capacity she was responsible for RCRA regulatory issues and Superfund reauthorization. Subsequently, she served as President of Clay Associates, Inc., a national environmental policy consulting firm, where she launched the RCRA Policy Forum, a membership organization comprised of federal and state governments, environmental groups, Hill staff, and industries interested in furthering constructive dialogue to improve the nation's waste programs.

Ms. Horinko is an alumna of the University of Maryland, College Park (B.S. in analytical chemistry, 1982) and Georgetown University Law School (J.D., 1986). From 1986 to 1990, Ms. Horinko was an attorney at Morgan, Lewis & Bockius, involved in the areas of pesticides and hazardous waste

counseling, Clean Water Act and Superfund litigation, and environmental audits in connection with business transactions She was responsible for both the Superfund Settlements Project and the Information Network for Superfund Settlements, a policy group of over 120 companies, law firms, and other organizations aimed at cooperative efforts to streamline cleanups

She is married and has two children.

Bio Dated 8/17/04

EXHIBIT B - List of materials reviewed or relied upon in developing report

1 U.S. Environmental Protection Agency, "Land Disposal Restrictions for Third Third Scheduled Wastes," Final Rule, 55 Fed. Reg. 22520.

2 U.S. Environmental Protection Agency, "Land Disposal Restrictions for Third Third Scheduled Wastes," Proposal Rule, 54 Fed. Reg. 48372.

3. May 25, 2004 Letter to Bob Gregory, TDSL from Glenn Shankle, TCEQ re: Zenith Cathorde Ray Tubes (CRT); Truck accident of October 9, 1997 and subsequent handling of CRT waste accident debris at the accident scene and at the TDSL landfill; TCEQ Permit No. 2123; Travis County.

4. TCEQ Docket No. 2004-0984-IHW-E, Penske Truck Leasing Co., L.P.'s Response to Texas Disposal Systems Landfill, Inc.'s Motions to Overturn, August 2, 2004.

5. June 30, 2004 Letter to John Steib, TCEQ from Gary Newton, TDSL re: June 18, 2004 letter to Marc Althen of Penske Truck Leasing Co. on Hazardous CRT Waste and Penske's Request for Authorization for Disposal of a Special Waste.

6 October 10, 1997, Fax from Charles J. Smith, Jr., Penske Truck Leasing, to Jim Gregory, Texas Dispoal Systems Landfill, noting Penske as generator of spilled materials.

7. November 5, 1997 Letter from Chris Smith, TCEQ to Mark Althen, Penske Truck Leasing, re: Penske Truck Leasing Spill Located at South IH-35 near Buda, Hays County, Texas.

8. December 2, 1997 Letter to Chris Smith, TCEQ from Marc Althen, Penske Truck Leasing re: Penske Logistics Spill IH-35 Near Buda, Harp County, Texas.

9. January 15, 2004 Letter to Bob Gregory, TDSL from Wade Wheatley, TCEQ re:

Commingled Cathode Ray Tube Regulated Hazardous Waste, Texas Disposal Systems Landfill, Inc., TCEQ Permit No. MSW-2123, Travis County, Texas.

10. May 12, 2004 Letter to Glenn Shankle, TCEQ from Kerry Russell, Russell, Moorman, and Rodriguez, L.L.P. re: May 6, 2004 TDSL Meeting.

11. May 13, 2004 Letter to Brian Hard, Penske Truck Leasing from Glenn Shankle, TCEQ re: Notice of Violation for the Sill Investigation at IH-35 South, near Exit 221, Buda, Hays County, Texas.

12. May 13, 2004 Letter to Bob Gregory, TDSL from Glenn W. Shankle, TCEQ re: Zenith Cathode Ray Tubes (CRT); Accident of October 9, 1997.

13. May 14, 2004, Opinion of Keith Hopson, Attorney-at-Law.

14. September 2, 2004 Letter to Lydia Gonzalez Gromatsky, TCEQ from Charles J. Sheehan, Regional Counsel, EPA Region 6.

15. June 1, 2004 Letter to John Steib, TCEQ from Marc Althen, Penske Truck Leasing re: Proposed Removal Plan, Notice of Violation dated May 13, 2004, Spill Investigation at IH-35 South, near Exit 221, Buda, Hays County, Texas.

16. June 4, 2004, Report of Robert M. Zoch, Jr., P.E.

17. June 16, 2004, Letter to Lydia Gonzalez-Gromatsky, TCEQ from Gary Newton, TDSL re: Response to May 20, 2004 letter regarding Cathode Ray Tube Regulated Hazardous Waste, TCEQ Permit No. MSW-2123, Travis County Texas.

18. June 18, 2004 Letter to Marc E. Althen, Penske Truck Leasing from John F. Steib, Jr., TCEQ.

19. June 21, 2004 Request for Authorization for Disposal of a Special Waste from Waste

Management, Inc to TCEQ

20. Penske/Zenith Hazardous Waste Handling General Timeline

21. TCEQ Docket No 2004-0984-IHW-E, In the Matter of the Authorization of Disposal of Waste as Special Waste Issued by the Executive Director, Executive Director's Response to Texas Disposal Systems Landfill, Inc.'s Motion to Overturn.

22. TCEQ Docket No. 2004-0984-IHW-E, In the Matter of the Authorization of Disposal of Waste as Special Waste Issued by the Executive Director, Zenith Electronics Corporations's Response to Motion to Overturn.

23. July 28, 2004 Letter to Bob Gregory, TDSL from John Steib, TCEQ.

24. July 28, 2004 Letter to Gary T. Newton, TDSL from Michael A. Duff, Penske Truck Leasing.

25. July 27, 2004 Letter to Mike Duff, Penske Logistics from Gary Newton, TDSL re: Response to your July 23, 2004 letter.

26. July 23, 2004 Letter to Gary Newton, TDSL from Michael A. Duff, Penske Truck Leasing.

27. July 8, 2004 Letter to Bob Gregory, TDSL from John F. Steib, Jr., TCEQ.

28. 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., Texas Disposal Systems Landfill, Inc.'s Motion to Overturn the Executive Director's June 30, 2004 Decision.

EXHBIT 2

PENSKE
Truck Leasing

MARC E. ALTHEN
VICE PRESIDENT
ENVIRONMENTAL SERVICES

December 2, 1997

Mr. Chris Smith
Waste Program Manager
Texas Natural Resources Conservation Commission
Region 11
1921 Cedar Bend, Suite 150
Austin, TX 78758-5336

DEC 3 1997

Re: Penske Logistics Spill IH-35
Near Buda, Harp County, Texas

Dear Mr. Smith:

This letter shall serve as Penske Logistics' written response to your November 5, 1997 letter.

On October 9, 1997, a Penske Logistics tractor-trailer had an accident in Buda, TX near exit 221 on IH-35 South, Hays County, at approximately 1:00 p.m. In response to the accident, Mr. Brian Acker of the Texas Public Safety Commission, dispatched Automotive Wrecker Service to the accident scene. During Automotive Wrecking Service's attempt to upright the trailer portion of the vehicle, the side of the trailer apparently gave way and some of the contents of the trailer, namely television picture tubes, spilled onto the roadway and the side of the road.

Mr. Acker requested Automotive Wrecking Service pick up and dispose of the boxes and the television picture tubes. M&M Trucking Co. was hired by Automotive Wrecking Services to load and transport the boxes to a local municipal landfill owned by Texas Disposal System.

At approximately 4:50 p.m., the Penske Spill Coordinator was advised of the incident by its branch office.

At approximately 5:05 p.m., the Penske Spill Coordinator contacted TX NRCC's Austin Regional Office and reported the incident to Mr. Art Norman. During this call, Mr. Norman was advised that the trailer contained approximately 1,200 picture tubes which contained lead and phosphorous and, if broken, would be a hazardous waste.

PENSKE TRUCK LEASING CO. / ROUTE 10 GREEN HILLS / P.O. BOX 563 / READING, PA 19603-0563
TELEPHONE 610-775-6268 / FAX 610-775-6442

At approximately 5:35 p.m. Penske's Spill Coordinator contacted Mr. Acker and Texas Disposal System's Vice President, Mr. Jim Gregory, and advised them that the waste was hazardous and could not be disposed of in a non-hazardous landfill. During the call, it was decided that the landfill would stockpile the material until proper disposal arrangements could be made. However, Mr. Gregory informed Penske's representative that the landfill had already disposed of two loads of the tubes.

During the same time frame, Jodi Gonzales of Hays County Emergency Management, provided Penske with the names of two potential emergency response companies. Penske immediately contacted one of these companies, Code 3, and hired them to conduct the cleanup.

Code 3 arrived on the scene at approximately 8:00 p.m. and completed the cleanup at 2:30 a.m. on October 10, 1997. The remaining spilled materials (broken cathode ray tubes, fiberboard cartons, and wrapping) were placed into several roll-on/off containers and transported to the Texas Disposal System to await proper disposal.

On October 10, 1997 Edward Villallando of the Hays County Texas Department of Transportation confirmed that the waste had been properly cleaned up and that no further action was required.

As of today, Penske is attempting to properly dispose of the remaining stockpiled waste at a permitted hazardous waste disposal site.

If you have any questions, please contact me at the letterhead address.

Sincerely,

Marc E. Althen

MEA:csk
L1112597.mea

cc: R. T. Traub

Exhibit 2

Clean Copy

PENSKE
Truck Leasing

MARC E. ALTHEN
VICE PRESIDENT
ENVIRONMENTAL SERVICES

December 2, 1997

Mr. Chris Smith
Waste Program Manager
Texas Natural Resources Conservation Commission
Region 11
1921 Cedar Bend, Suite 150
Austin, TX 78758-5336

RECEIVED
DEC 8 1997
TNRCC-Field Operations
Austin Region 11

Re: Penske Logistics Spill IH-35
Near Buda, Harp County, Texas

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Mr. Chris Smith
Texas Natural Resources Conservation Commission
December 2, 1997
Page 2

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As of today, Penske is attempting to properly dispose of the remaining stockpiled waste at a permitted hazardous waste disposal site.

If you have any questions, please contact me at the letterhead address.

Sincerely,

Marc E. Althen

MEA:csk
L:1112597.mea

cc: R. T. Traub

EXHBIT 3

EXHIBIT 3

Summary of the Facts Associated with the Generation of Hazardous Waste by Penske and Zenith.

On October 9, 1997, a highway accident involving a truck owned by Penske Truck Leasing Co., L.P. and operated by Penske Logistics, Inc. ("Penske") resulted in the generation of a waste comprised of over 1000 damaged or broken cathode ray tubes ("CRTs"). (Exhibit 2) These CRTs were owned by Zenith Electronics Corporation ("Zenith"). The CRTs were being transported between Zenith's manufacturing plants pursuant to a contract between Zenith and Penske Logistics. This contract included an agreement that Penske would indemnify Zenith. To perform the contract, Penske leased the truck from Penske Truck Leasing, which also provided logistical and accident handling services to Penske Logistics.

Because of the nature of the broken and discarded CRTs, and its substantial lead content, the resulting waste (the "CRT Waste") was and remains a toxic characteristic hazardous waste, a "D008" waste. At the accident scene, however, the Penske Logistics driver initially misrepresented the CRT waste as a non-hazardous waste. Penske did not inform accident response personnel that the broken CRTs needed to be managed as hazardous waste until more than 6 truck loads of the CRT waste had been sent to TDSL's facility.

Yet, before the accident in October 1997, other loads of Zenith CRTs had been broken or damaged while being transported, and Zenith has arranged to dispose of the waste from those accidents as D008 hazardous waste in authorized hazardous waste landfills. Moreover, the transportation agreement between Zenith Electronics and Penske Logistics, entered into months before the accident, recognized the hazardous nature of the CRTs if they were broken or discarded. The agreement placed the burden on Penske to assure proper disposal.

Nevertheless, instead of taking the CRT Waste to a facility authorized to accept hazardous wastes, Penske initially designated the CRT Waste as non-hazardous waste and allowed the CRT Waste to be taken to the municipal solid waste landfill operated in Travis County by TDSL. Upon later notification by Penske that the CRT Waste was in actuality a hazardous waste, TDSL refused to accept additional loads of CRT Waste and isolated the hazardous CRT waste that had been commingled in the working face with municipal solid wastes and soils.

When Penske and Zenith corrected the original erroneous classification of the CRT Waste, it classified the waste as D008 hazardous waste. Penske and Zenith took that action after some of the CRT Waste was delivered to TDSL's facilities and placed in its landfill. The remainder of the CRT Waste was then apparently managed by Penske and Zenith properly as a hazardous waste and shipped to a facility authorized to accept hazardous waste.

The CRT Waste that was accepted by TDSL prior to proper classification of the waste is currently at TDSL's facilities in a mixture; i.e. the hazardous CRT waste, mixed with municipal solid waste and clay cover soil. It is still awaiting proper removal and management by Penske and/or Zenith. In the meantime, TDSL was authorized by TCEQ to containerize this mixture and leave at the TDSL facility.

TDSL has repeatedly requested that TCEQ require Penske or Zenith to remove the CRT waste and properly manage it as a hazardous waste. TCEQ has refused to do so in a way that complies with federal law for the management of hazardous waste. For example, Penske requested and

TCEQ approved the use of a manifest for the waste that would have allowed Penske to claim that it was not the generator of the hazardous waste.

TCEQ's most recent actions can be summarized as follows:

On May 13, 2004, the Executive Director of TCEQ issued an enforcement letter notifying Penske that Penske had violated Texas law by failing to determine that the waste it generated and sent to TDSL's facility was a hazardous waste. (Exhibit 6)

Thus, TCEQ had found that Penske was the generator of the hazardous (D008) waste. The attached October 12, 2005 letter, however, indicates that TCEQ does not intend to pursue enforcement of this violation.

On June 18, 2004, the Executive Director of TCEQ issued a letter to Penske authorizing disposal of the hazardous D008 waste along with the municipal waste with which it had been commingled as non-hazardous waste. (Exhibit 7)

On June 30, 2004, the Executive Director of TCEQ issued a follow-up letter regarding methods for disposal of the commingled waste. (Exhibit 8)

On September 16, 2004, the Commissioners of TCEQ reversed the actions of the Executive Director, granting TDSL's Motion to Overturn the decision and appearing to interpret state law consistent with federal law. (Exhibit 9)

On September 24, 2004, the Executive Director of TCEQ issued a new letter that provided several options to Penske for management of the hazardous waste that remains at TDSL's facilities. One option would allow the commingled waste to be managed as a hazardous "until such time as it is conclusively determined that no D008 waste at the level that is characteristically hazardous remains." (Exhibit 4) Based on further documents, it is clear that the Executive Director actually intended to return to his original position so that Penske and Zenith could manage the commingled waste, i.e. the mixture of the original CRT waste, the municipal solid waste and soil, as a non-hazardous waste if samples from the mixture were analyzed and the mixture did not test as a hazardous waste. No separation of the CRT waste in the mixture would first be required.

On December 1, 2004, the Commission took no action on TDSL's Motion to Overturn the improper alternative in the September 24, 2004 decision of the Executive Director and, thus, allowed that decision of the Executive Director to remain in effect.

On October 12, 2005, the Executive Director issued a letter that made it clear that TCEQ would not pursue its May 13, 2004 enforcement action. (Exhibit 5) In essence, the Executive Director of TCEQ has taken the official position that Penske does not have to comply with the clear language of state and federal rules for the proper treatment or disposal of the mixture of the CRT hazardous waste with the soils and municipal solid waste from TDSL's landfill.

EXHBIT 4

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 24, 2004

Mr. Marc E. Althen
Senior Vice President
Penske Truck Leasing
P.O. Box 563
Reading, Pennsylvania 19603-0563

Dear Mr. Althen:

On May 13, 2004, the Texas Commission on Environmental Quality (TCEQ) issued Penske Truck Leasing (Penske) a Notice of Violation (NOV) in connection with the spill investigation at IH-35 South near Exit 221 in Buda, Hays County. This NOV required Penske to take certain corrective actions. On June 18, 2004, on my behalf, John Steib, Deputy Director for the Office of Compliance and Enforcement, approved your proposed plan for removal and disposal of the waste located at the Texas Disposal Systems Landfill (TDSL) as special waste. TDSL filed a Motion to Overturn my decision in this matter. On September 15, 2004, the Commission issued an order overturning my decision and remanding this matter.

I now exercise my authority to act in this matter, and by this letter, I am requiring the following actions of Penske. No later than October 27, 2004, Penske must remove all of the waste currently stored in the 99 roll-off containers at the TDSL facility. This waste must be manifested as hazardous waste and disposed of at a permitted hazardous waste facility. Alternatively, Penske may pursue the actions discussed at the September 16th hearing relating to the assessment and any necessary extraction of the waste in the roll-off containers. If Penske pursues this approach, all activities associated with the assessment, characterization and extraction of the contents of the roll-off containers must be conducted at a separate authorized facility in a manner that ensures protection of human health and the environment. Specifically, Penske must ensure compliance with all RCRA requirements, including land disposal restrictions for any D008 waste triggering those requirements. In any case, the roll-off containers must be removed from the TDSL facility by October 27, 2004, and the waste manifested as hazardous waste until such time as it is conclusively determined that no D008 waste at the level that is characteristically hazardous remains.

Upon completion of this activity, but no later than 90 days from the date of this letter, please submit all documentation necessary to demonstrate that the waste was properly disposed of in accordance with all applicable rules and regulations. Please submit this information to:

Ms. Anna Rodriguez, Special Assistant
Office of Compliance and Enforcement
Texas Commission on Environmental Quality
P.O. Box 13087, MC 163
Austin, Texas 78711-3087

If you have any questions, please feel free to contact Mr. John F. Steib, Jr., Deputy Director, Office of Compliance and Enforcement at (512) 239-5718.

Sincerely,

Glenn Shankle, Executive Director
Texas Commission on Environmental Quality

cc: Ms. Pam Giblin, Baker Botts, LLP
Mr. John F. Steib, Jr., Deputy Director, TCEQ Office of Compliance and Enforcement
Mr. Robert Gregory, Texas Disposal Systems

EXHBIT 5

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 12, 2005

Ms. Pamela M. Giblin
Baker Botts, LLP
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, Texas 78701-4287

Dear Ms. Giblin:

I am responding to your recent letter regarding the May 13, 2004 notice of violation (NOV) issued by the Texas Commission on Environmental Quality to Penske Truck Leasing Co., L.P. (Penske) in connection with the spill investigation at IH-35 South near Exit 221 in Buda, Hays County. You believe that Penske has done everything in its power to address this NOV and state that Penske now intends to proceed with obtaining a trial date in the pending Hays County litigation to allow a court to ultimately decide the disputed issues in this matter.

I agree that Penske has made appropriate attempts to address the NOV. Further, notwithstanding the briefings filed, meetings convened and hearings held before this agency, a number of relevant issues remain in dispute and are unresolved. In my view, these matters are best resolved in court. Given these circumstances, I do not plan to take further action on the NOV pending the resolution of this matter in court proceedings.

Sincerely,

Glenn Shankle
Executive Director

EXHBIT 6

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

RECEIVED
AUG 16 2004

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 13, 2004

CERTIFIED MAIL # 7002 0860 0000 9040 7278
RETURN RECEIPT REQUESTED

Mr. Brian Hard, President
Penske Truck Leasing
P.O. Box 563
Route 10-Green Hills
Reading, PA 19603-0563

Re: Notice of Violation for the Spill Investigation at IH-35 South, near Exit 221, Buda, Hays County, Texas

Dear Mr. Hard:

On October 9, 1997, the Texas Commission on Environmental Quality (TCEQ) responded to a tractor-trailer accident at the above-referenced location. The TCEQ has continued the investigation of the incident to assure environmental compliance with applicable requirements of the Texas Water Code, the Texas Administrative Code and the Code of Federal Regulations. The information obtained in the investigation indicates that violations have occurred regarding the management of the waste material generated during the incident. Enclosed is a summary which lists the investigation findings. Please submit to this office by July 13, 2004, a written description of corrective actions taken and the required documentation demonstrating that the cathode ray tube contaminated solid waste at the Texas Disposal Systems Landfill has been removed and properly disposed of at an authorized facility.

In the enclosed listing we have cited applicable requirements, including TCEQ rules. If you would like to obtain a copy of the applicable TCEQ rules, you may contact any of the sources listed in the enclosed brochure entitled "Obtaining TCEQ Rules." Copies of applicable federal regulations may be obtained from either of the following offices:

U.S. Government Printing Office
Texas Crude Building
801 Travis Street
Houston, Texas 77002
713/228-1187 (phone)

U.S. Government Printing Office
Room 1C-50
Federal Building
1100 Commerce Street
Dallas, Texas 75242
214/767-0076 (phone)

EXHIBIT
tabbies
ED-1

The TCEQ appreciates your assistance in this matter. We anticipate that you will resolve this matter as required in order to protect the State's environment.

If you or members of your staff have any questions, please feel free to contact me at (512) 239-3900.

Sincerely,

Glenn W. Shankle, Acting Executive Director
Texas Commission on Environmental Quality

GS/bem

cc: Mr. Michael A. Duff, Penske Truck Leasing, Reading, PA
Mr. Douglas Y. Christian, Reed Smith, 2500 One Liberty Place, 1650 Market Street, Philadelphia, PA 19103-7301
TCEQ Austin Regional Office

Enclosure: Summary of Investigation Findings

SUMMARY OF INVESTIGATION FINDINGS
Penske Truck Leasing Co., L.P., Penske Logistics, Inc.
Spill Investigation Located at IH-35 South, Near Exit 221, Buda, Hays County, Texas
Incident Date: October 9, 1997

NOTICE OF VIOLATIONS

1. 30 Tex. Admin. Code §330.4(b) / 30 Tex. Admin. Code §335.2(a) / 30 Tex. Admin. Code §335.2(b) and Tex. Admin. Code §335.43(a)

30 Tex. Admin. Code §330.4(b)
In accordance with the requirements of subsection (a) of this section, no generator, transporter, owner or operator of a facility, or any other person may cause, suffer, allow, or permit wastes to be stored, processed, or disposed of at an unauthorized facility or in violation of a permit.

30 Tex. Admin. Code §335.2(a)
No person may cause, suffer, allow, or permit any activity of storage, processing, or disposal of any industrial solid waste or municipal hazardous waste unless such activity is authorized by a permit, amended permit, or other authorization...

30 Tex. Admin. Code §335.2(b)
In accordance with the requirements of subsection (a) of this section, no generator, transporter, owner or operator of a facility, or any other person may cause, suffer, allow, or permit its wastes to be stored, processed, or disposed of at an unauthorized facility or in violation of a permit.

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.

Alleged Violation
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.

Recommended Corrective Action
To resolve this alleged violation, the approximately 1,600 tons (99 plastic-lined and covered rolloff transport containers) of commingled cathode ray tube contaminated solid waste that resulted from Penske's actions must be removed from the Texas Disposal Systems Landfill (TDS) and disposed of at an authorized facility. Penske has until July 13, 2004 to remove and properly dispose of this waste and provide a written description of corrective action taken and the required documentation demonstrating that compliance has been achieved for the outstanding alleged violation

2. 30 Tex. Admin. Code §335.62

30 Tex. Admin. Code §335.62
Hazardous Waste Determination and Waste Classification. A person who generates a solid waste must determine if that 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.

Alleged Violation
Failure to determine if a generated waste was a hazardous waste.

Recommendation Corrective Action
There is no corrective actions for this alleged violation.

EXHBIT 7

file copy

251

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 18, 2004

Mr. Marc E. Althen
Senior Vice President
Penske Truck Leasing
P. O. Box 563
Reading, Pennsylvania 19603-0563

Dear Mr. Althen:

We have received your recent letter describing your proposed plan for removal and disposal of waste located at the Texas Disposal Systems Landfill (TDSL). This waste was generated as result of emergency response cleanup activities related to an accident involving a Penske Truck Leasing (Penske) truck carrying Zenith picture tubes. Penske submitted the plan in response to a Notice of Violation issued by the Texas Commission on Environmental Quality (TCEQ) dated May 13, 2004.

According to your letter, Penske proposes the following actions:

- Transfer the contents of the 99 roll-offs to 30-yard end dump transportation vehicles over a two-day period in June 2004.
- Transfer and dispose of the waste as Municipal Solid Waste in the Class I cell at the BFI Tessman Road Landfill.
- Submit written documentation of completion of removal and disposal activities to TCEQ by July 13, 2004.

Please note that, based on our discussions, we understand that you are proposing to dispose of the waste as a special waste. We have reviewed your plan and approve your approach of transferring the waste from the TDSL facility and disposing of it as special waste. We also understand that you will ensure that the wastes are disposed of at a facility authorized to accept special wastes. Before the waste can be disposed of as a special waste, you must receive approval from the TCEQ. To receive authorization for disposal, please complete TCEQ Form 0152 (Request for Authorization for Disposal of a Special Waste) and submit it to the MSW Permits Section, Waste Permits Division, TCEQ, P.O. Box 13087, MC 124, Austin, Texas 78711-3087. You may also fax the completed form to (512) 239-6000.

EXHIBIT
ED-3

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Please also note that regarding the transfer of roll-off contents, we do have concerns about the potential for odors and particulates generated as a result of transfer of the materials from the roll-offs to the 30 yard end dump transportation vehicles. Removal of the roll-offs in their current state would address this concern. An alternative approach would entail Penske achieving consent from TDSL for the unloading and transfer of the waste on its site and we would expect that appropriate measures to mitigate odors and particulates would be undertaken.

We look forward to receiving your completion report by July 13, 2004 as required in the May 13, 2004 Notice of Violation. Please feel free to contact me at (512) 239-5100 if you have any questions.

Sincerely,

John F. Steib, Jr., Deputy
Office of Compliance & Enforcement
Texas Commission on Environmental Quality

EXHBIT 8

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 30, 2004

Mr. Marc E. Althen
Penske Truck Leasing Co., L.P.
Route 10 Green Hills
P.O. Box 563
Reading, PA 19603-0563

Re: Notice of Violation
Proposed Removal Plan dated May 13, 2004

Dear Mr. Althen:

This letter is in response to your letter of June 28, 2004 requesting acknowledgment of the approval given by the Texas Commission on Environmental Quality (TCEQ) in a letter dated June 18, 2004, signed by Mr. John Steib, Deputy Director, for disposal of the above waste material as a special waste and to concur that the landfills listed in your letter meet the requirements of that letter. The landfills listed below have Class 1 industrial non-hazardous waste cells and are authorized to accept municipal solid waste (MSW) special waste.

1. Covel Gardens Landfill, San Antonio TX - MSW permit 2093
2. Atascocita Landfill, Humble, TX - MSW permit 1307
3. Itasca Landfill, Itasca TX - MSW permit 241
4. U.S. Ecology Landfill, Robstown TX - Industrial Hazardous Waste permit 50052
5. Newton County Landfill, Mauriceville TX - MSW permit 2242
6. Safety Kleen Landfill, Altair TX - MSW permit 203
7. CSC Disposal and Landfill, Avalon TX - MSW permit 1209

The Brazos County Landfill in College Station, Texas, MSW permit 1444C is not listed because it does not have a cell to accept Class 1 industrial non-hazardous waste.

EXHIBIT
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ED-5

Mr. Marc E. Althen
Page 2
June 30, 2004

Although the above cited landfills meet the criteria of the June 18, 2004 TCEQ letter the landfills are not required to accept the waste. Please be reminded that each landfill may require additional information before acceptance.

For any questions concerning this authorization, you may call (512) 239-2334. Mailing address: Municipal Solid Waste, MC-124, P.O. Box 13087, Austin, TX 78711-3087.

Sincerely,

Wade M. Wheatley, P.E., Director
Waste Permits Division

WMW/ETB

EXHBIT 9

Kathleen Hartnett White, *Chairman*
R B "Ralph" Marquez, *Commissioner*
Larry R Soward, *Commissioner*

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RECEIVED
SEP 2 0 2004
BY:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 16, 2004

TO: Persons on the attached mailing list

RE: Penske Truck Leasing Co., L.P.
TCEQ Docket No 2004-0984-IHW-E
An Interim Order Concerning Motions to Overturn

Attached is a copy of an order issued by the Commission regarding the above-referenced matter

Should you have any questions, please contact Cynthia Zapata of the Texas Commission on Environmental Quality's Office of the Chief Clerk (MC 105) at (512) 239-4517.

Sincerely,

LaDonna Castañuela
Chief Clerk

LDC/cz

Enclosure

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE STATE OF TEXAS
COUNTY OF TRAVIS
I hereby certify that this is a true and correct copy of a Texas Commission on Environmental Quality document, which is filed in the permanent records of the Commission. Given under my hand and the seal of office on SEP 17 2004

LaDonna Castanuela, Chief Clerk
Texas Commission on Environmental Quality

AN INTERIM ORDER concerning Motions to Overturn regarding the Executive Director's June 18, 2004 and June 30, 2004 letters allowing Penske Truck Leasing Co., L.P. to dispose of commingled picture tube waste as municipal solid waste special waste; TCEQ Docket No. 2004-0984-IHW-E

On September 16, 2004, the Texas Commission on Environmental Quality (Commission) evaluated during its public meeting the Motions to Overturn filed by Texas Disposal Systems Landfill, Inc concerning the Executive Director's June 18, 2004 and June 30, 2004 letters allowing Penske Truck Leasing Co., L.P. to dispose of commingled picture tube waste as municipal solid waste special waste The Commission also considered responses/briefs to the motions and replies/briefs to those responses

After considering the written filings, oral argument, and responses to questions during the public meeting, the Commission determined that the Motions to Overturn should be granted and that the matter should be remanded to the Executive Director.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

1. The Motions to Overturn filed by Texas Disposal Systems Landfill, Inc. are GRANTED; and

2. This matter is hereby REMANDED to the Executive Director.

Issue date: SEP 16 2004

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Kathleen Hartnett White

Kathleen Hartnett White, Chairman

Mailing List
Penske Truck Leasing, L.P.
TCEQ Docket No. 2004-0984-IHW-E

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Georgetown, Texas 78626
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National Solid Waste Management Association
4301 Connecticut Avenue, NW
Washington, DC 20008
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John Steib
TCEQ Office of Compliance & Enforcement MC 172
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Austin, Texas 78711-3087
512/239-5100 FAX 512/239-0532

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Docket Clerk
TCEQ Office of Chief Clerk MC 105
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Austin, Texas 78711-3087
512/239-3300 FAX 512/239-3311

Jody Henneke
TCEQ Office of Public Assistance MC 108
P.O. Box 13087
Austin, Texas 78711-3087
512/239-4000 FAX 512/239-4007

No. 98-0159

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	)	IN THE DISTRICT COURT OF
Plaintiff	)	
vs.	)	HAYS COUNTY, TEXAS
PENSKE TRUCK LEASING CO. L.P., PENSKE LOGISTICS, INC., and ZENITH ELECTRONICS CORP.,	)	
Defendants	)	207th JUDICIAL DISTRICT

PLAINTIFF'S MOTION TO STAY

EXHIBIT 2

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 13, 2004

CERTIFIED MAIL # 7002 0860 0000 9040 7278
RETURN RECEIPT REQUESTED

Mr. Brian Hard, President
Penske Truck Leasing
P.O. Box 563
Route 10-Green Hills
Reading, PA 19603-0563

Re: Notice of Violation for the Spill Investigation at IH-35 South, near Exit 221, Buda, Hays County, Texas

Dear Mr. Hard:

On October 9, 1997, the Texas Commission on Environmental Quality (TCEQ) responded to a tractor-trailer accident at the above-referenced location. The TCEQ has continued the investigation of the incident to assure environmental compliance with applicable requirements of the Texas Water Code, the Texas Administrative Code and the Code of Federal Regulations. The information obtained in the investigation indicates that violations have occurred regarding the management of the waste material generated during the incident. Enclosed is a summary which lists the investigation findings. Please submit to this office by July 13, 2004, a written description of corrective actions taken and the required documentation demonstrating that the cathode ray tube contaminated solid waste at the Texas Disposal Systems Landfill has been removed and properly disposed of at an authorized facility.

In the enclosed listing we have cited applicable requirements, including TCEQ rules. If you would like to obtain a copy of the applicable TCEQ rules, you may contact any of the sources listed in the enclosed brochure entitled "Obtaining TCEQ Rules." Copies of applicable federal regulations may be obtained from either of the following offices:

U.S. Government Printing Office
Texas Crude Building
801 Travis Street
Houston, Texas 77002
713/228-1187 (phone)

U.S. Government Printing Office
Room 1C-50
Federal Building
1100 Commerce Street
Dallas, Texas 75242
214/767-0076 (phone)

The TCEQ appreciates your assistance in this matter. We anticipate that you will resolve this matter as required in order to protect the State's environment.

If you or members of your staff have any questions, please feel free to contact me at (512) 239-3900.

Sincerely,

Glenn W. Shankle, Acting Executive Director
Texas Commission on Environmental Quality

GS/bem

cc: Mr. Michael A. Duff, Penske Truck Leasing, Reading, PA
Mr. Douglas Y. Christian, Reed Smith, 2500 One Liberty Place, 1650 Market Street, Philadelphia, PA 19103-7301
TCEQ Austin Regional Office

Enclosure: Summary of Investigation Findings

SUMMARY OF INVESTIGATION FINDINGS
Penske Truck Leasing Co., L.P., Penske Logistics, Inc.
Spill Investigation Located at IH-35 South, Near Exit 221, Buda, Hays County, Texas
Incident Date: October 9, 1997

NOTICE OF VIOLATIONS

1. 30 Tex. Admin. Code §330.4(b) / 30 Tex. Admin. Code §335.2(a) / 30 Tex. Admin. Code §335.2(b) and Tex. Admin. Code §335.43(a)

30 Tex. Admin. Code §330.4(b)
In accordance with the requirements of subsection (a) of this section, no generator, transporter, owner or operator of a facility, or any other person may cause, suffer, allow, or permit wastes to be stored, processed, or disposed of at an unauthorized facility or in violation of a permit.

30 Tex. Admin. Code §335.2(a)
No person may cause, suffer, allow, or permit any activity of storage, processing, or disposal of any industrial solid waste or municipal hazardous waste unless such activity is authorized by a permit, amended permit, or other authorization...

30 Tex. Admin. Code §335.2(b)
In accordance with the requirements of subsection (a) of this section, no generator, transporter, owner or operator of a facility, or any other person may cause, suffer, allow, or permit its wastes to be stored, processed, or disposed of at an unauthorized facility or in violation of a permit.

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.

Alleged Violation
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.

Recommended Corrective Action
To resolve this alleged violation, the approximately 1,600 tons (99 plastic-lined and covered rolloff transport containers) of commingled cathode ray tube contaminated solid waste that resulted from Penske's actions must be removed from the Texas Disposal Systems Landfill (TDS) and disposed of at an authorized facility. Penske has until July 13, 2004 to remove and properly dispose of this waste and provide a written description of corrective action taken and the required documentation demonstrating that compliance has been achieved for the outstanding alleged violation.

2. 30 Tex. Admin. Code §335.62

30 Tex. Admin. Code §335.62
Hazardous Waste Determination and Waste Classification. A person who generates a solid waste must determine if that 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.

Alleged Violation
Failure to determine if a generated waste was a hazardous waste.

Recommendation Corrective Action
There is no corrective actions for this alleged violation.

No. 98-0159

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	)	IN THE DISTRICT COURT OF
Plaintiff	)	
vs.	)	HAYS COUNTY, TEXAS
PENSKE TRUCK LEASING CO. L.P., PENSKE LOGISTICS, INC., and ZENITH ELECTRONICS CORP.,	)	
Defendants	)	207th JUDICIAL DISTRICT

On _____ *[date]*, the Court considered Plaintiff's Motion to Stay.

After considering the Motion and arguments of the parties, the Court is of the opinion that the Motion should be granted because the expected decision by the Travis County District Court will substantially shorten the time needed to adjudicate this cause of action in this Court.

It is ORDERED that Cause No. 98-0159 , styled Texas Disposal Systems Landfill, Inc., Plaintiff vs. Penske Truck Leasing Co., L.P., Penske Logistics, Inc., and Zenith Electronics Corp., Defendant, filed in the District Court of Hays County, Texas be stayed for 180 days. All actions in the above mentioned cause are to be abated for 180 days, or May 8, 2006. All deadlines, prehearing matters hearing dates, and post hearing dates are continued by 180 days and will be calculated from May 8, 2006.

Signed _____ *[date]*.

_____
Honorable Gus S. Strauss
Presiding Judge

RECEIVED
MAR 14 2006

CAUSE NO. 98-0159

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.	§	IN THE DISTRICT COURT OF
	§	
v.	§	HAYS COUNTY, TEXAS
	§	
PENSKE TRUCK LEASING CO., L.P., PENSKE LOGISTICS, INC., AND ZENITH ELECTRONICS CORP.	§	
	§	207TH JUDICIAL DISTRICT

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF MOTION TO STAY

Plaintiff Texas Disposal Systems Landfill, Inc. ("TDSL") files this Reply in Further Support of its Motion for Stay.[1] Because it is now clear that this entire case turns on statutory and regulatory issues that cannot — and, by Defendants' own admissions, should not — be determined in this civil lawsuit for money damages, the interests of justice and judicial economy demand staying this action until these essential statutory and regulatory issues are properly resolved in the parallel Travis County proceedings involving TDSL, the Penske Defendants, and the Texas Commission on Environmental Quality ("TCEQ").[2] Although Defendants' briefs in opposition to TDSL's Motion to Stay unfairly attack TDSL's motives, Defendants offer no valid justification for rushing this case back to trial before the key statutory and regulatory issues on which it turns have been decided.

[1] TDSL's Motion to Stay was filed November 15, 2005, and is set for hearing at 10:00 a.m. on March 24, 2006. At the status conference on February 24, 2006, TDSL provided the Court a letter summarizing the factual background of this case and TDSL's arguments in support of its Motion to Stay. TDSL incorporates that letter herein by reference. For the Court's convenience, a true and correct copy of that letter is attached hereto as Exhibit A without the enclosures to which it refers.

[2] The term "Penske Defendants" refers to Defendants Penske Truck Leasing Co., L.P. and Penske Logistics, Inc. (collectively, "Penske"). As explained in Section 3 below, Defendant Zenith Electronics Corp. ("Zenith") also is effectively bound by the Travis County proceedings by virtue of its extensive involvement in the TCEQ actions and inactions on which they are based, and the fact that Zenith's interests in the TCEQ and Travis County proceedings are coextensive with Penske's.

1. This Case Cannot Be Tried Fairly Without Resolving Fundamental Statutory and Regulatory Issues at Stake in the Travis County Proceedings.

The essence of TDSL's claims in this case is that it suffered substantial burdens and millions of dollars in expenses in dealing with the accident debris deposited in its landfill as a proximate result of an October 9, 1997 motor vehicle accident near Buda, Texas, involving a Penske truck carrying Zenith television-tube (*i.e.*, CRT) cargo that constituted "hazardous waste" when broken. The only reason that TDSL incurred those substantial burdens and multi-million dollar expenses is because it believed — and continues to believe — that, under state and federal law, the accident debris that ended up in its landfill is D008 toxic characteristic hazardous waste, and Defendants have a clear legal obligation to properly treat and dispose of it. Indeed, TDSL has steadfastly resisted taking action on its own and treating and disposing of the hazardous CRT waste at a hazardous-waste treatment facility solely because of TDSL's valid concern that doing so could expose it to potentially unlimited financial liability under federal environmental laws as a "generator" of "hazardous waste."[3] The transcript from the trial of this cause indicates that Judge Gary Steel eventually came to understand the essence of TDSL's claims and how they related to the statutory and regulatory issues that could not be resolved at trial:

> And just . . . so all the attorneys will hear the comment I made on . . . 'generator,' what I basically said . . . was . . . what we have is [TDSL General Counsel Gary] Newton stand[ing] up here . . . and tell[ing] us that the reason TDSL did not want to take some stuff out of their landfill is because they were afraid they were going to be anointed with 'generator' and be responsible for that if something happened. . . . I mean, there's some evidence and some argument it would have been – the proper thing to do is take it out, and the reason they didn't, because they didn't want to be a 'generator' and be responsible for that for the rest of time under the Superfund legislation.[4]

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[3] Under federal environmental regulations, a "generator" is as "any person, by site, whose act or process produces hazardous waste . . . or whose act first causes a hazardous waste to become subject to regulation." *See* 40 C.F.R. § 260.10. Federal regulations define "hazardous waste" in 40 C.F.R. § 261.3.

[4] *See* Exhibit B, Trial Tr. of 04/21/2004, 1300:5-1301:6.

Indeed, Judge Steel called this issue the "elephant" in the room.[5] And dealing with it at trial appeared to vex the Court, leading to highly nuanced evidentiary rulings. For example, Judge Steel ruled at one point that TDSL could "not . . . put the environmental regulations on the board or pass them out," but could "ask [its] witness if he believes, under the environmental laws as he understood it, that Penske was the individual under the environmental laws that should be responsible for this cleanup."[6]

Importantly, this "elephant" in the room (*i.e.*, the legal status of the hazardous CRT waste) is the primary source of TDSL's damages. The vast majority of the damages that TDSL has suffered depend on whether the hazardous CRT waste from the October 9, 1997 accident that was, by Defendants' own belated designation, D008 toxic characteristic hazardous waste remains "hazardous waste" in its current commingled state. Why? Because if it is determined that the D008 CRT waste commingled with municipal solid waste and landfill cover soils that today remains on TDSL's property in 99 roll-off containers is not and never was "hazardous waste," then two inevitable conclusions follow: (1) Defendants were not required to treat and dispose of the D008 CRT waste as "hazardous waste" under state or federal law, and (2) the substantial burdens and expenses that TDSL undertook to deal with the D008 CRT waste commingled with municipal solid waste and landfill cover soils were unnecessary and not the fault of Defendants.

Defendants appear to agree that this case revolves around fundamental statutory and regulatory issues, but have insisted that such questions cannot under any circumstances be resolved in this lawsuit. For example, Defendants repeatedly made the following arguments through the pretrial hearings and the trial:

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[5] *See* Exhibit B, Trial Tr. of 04/21/2004, 1302:4 ("That was the elephant that I was talking about.").

[6] *See* Exhibit C, Trial Tr. of 04/20/2004, 954:5-12.

- "They [TDSL] have to prove that this . . . mass [of material] is, in fact, today hazardous material -- hazardous waste."[7]

- "[W]e believe it's their burden . . . to prove that it's a . . . hazardous waste. . . . Because otherwise we're going to be in the midst of speculation and guessing at trial over: 'What is this material?' We're going to be engaging in hypotheticals: 'Well, if it's a hazardous waste' or 'It might be a hazardous waste' instead of answering the question: Is it or is it not?"[8]

- "To us . . . If they don't detect any lead, even if it's mixed with soil, that strongly suggests that the mixture . . . that they want us to treat as hazardous waste is not hazardous waste."[9]

- "One of the questions we have asked in this case is: 'Look, the TNRCC [now the TCEQ] said you can leave that in there. No harm, no foul.'"[10]

Regrettably, this Court cannot answer these essential statutory and regulatory questions, even though each and every claim and defense depends on them. For that reason, Judge Steel concluded: "Take it to Austin. Take it to the TCEQ."[11] And when the TCEQ finally took action after the mistrial, Judge Steel told the parties in July 2004:

> It appears to me that we're playing in a whole new ball game, gentlemen. . . . [W]e spent a majority of our time dealing with the fact that TCEQ had not made any movement in this: fed, state, strict liability. I mean, everything from your pleadings down to probably the last ruling that I made in the case had to do with 'Who is the generator?' and 'We're not going to let the generator in' and the responsibility for moving [the commingled waste], which is the majority of these damages. . . . It almost starts with your pleadings, Counsel. I have gone back and looked at those. And if we have got TCEQ moving, it looks like to me it's now totally a different lawsuit, from the pleadings, down to every ruling . . . .[12]

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[7] *See* Exhibit D, Tr. of 01/06/2004 Hrng., 29:13-15 (quoting D. Christian, counsel for Penske).

[8] *See* Exhibit D, Tr. of 01/06/2004 Hrng., 30:10-19 (quoting P. Comella, counsel for Zenith) (emphases added).

[9] *See* Exhibit D, Tr. of 01/06/2004 Hrng., 29:21-25 (quoting P. Comella, counsel for Zenith).

[10] *See* Exhibit D, Tr. of 01/06/2004 Hrng., 42:23-25 (quoting D. Christian, counsel for Penske).

[11] *See* Exhibit B, Trial Tr. of 04/21/2004, 1309:24.

[12] *See* Exhibit E, Tr. of 07/08/2004 Hrng., 6:16 - 8:13.

2. The Fundamental Statutory and Regulatory Issues at the Heart of This Case Can and Will be Efficiently Resolved in the Travis County Proceedings.

The proceedings in Travis County involving the parties' administrative appeals and TDSL's claims for declaratory relief will provide the much-needed answers to the fundamental statutory and regulatory questions underlying this case. In the Travis County proceedings, the court will determine (among other things) the following:

1. whether the hazardous CRT waste in its commingled state remains D008 toxic characteristic hazardous waste;

2. if so, whether one or more Defendants are considered the "generator" of that D008 toxic characteristic hazardous waste under state and federal law;

3. whether, as the "generator" of that D008 toxic characteristic hazardous waste, one or more Defendants were required to treat and dispose of it in an authorized hazardous-waste facility; and,

4. whether TDSL has or had any responsibility to treat and dispose of the D008 toxic characteristic hazardous waste once it was deposited into the working face of its landfill and commingled with non-hazardous municipal solid waste.

2.1 Undisputed facts.

Although there certainly are some factual disputes between the parties, there is a core of operative, material facts that are not contested. In fact, the issues being litigated in Travis County rest almost entirely on facts that the parties do not materially dispute. Resolution of these issues — most of which now have been addressed by the TCEQ — does not require extensive factfinding, making the issues especially appropriate for determination in the Travis County forum, where other hotly contested fact issues present in this Hays County lawsuit (*e.g.*, damages) do not present an added burden.

The undisputed material facts include the following:

- The highway accident on October 9, 1997 that started the chain of events leading to this lawsuit occurred when a Penske truck carrying Zenith CRTs overturned on IH-35

while avoiding a head-on collision with another car. The truck was driven by a Penske employee.

- The Zenith CRTs were being transported pursuant to a contract between Zenith and Penske. This contract included an agreement that Penske would indemnify Zenith. To perform the contract, Penske Logistics leased the truck from Penske Truck Leasing, which also provided logistical and accident handling services to Penske Logistics.

- At the accident scene, the Penske Logistics driver, Harry McCain, did not inform accident response personnel that broken CRTs were to be treated as hazardous waste. Mr. McCain testified that he was not aware of this fact. Before the accident here at issue, other loads of Zenith CRTs had been broken or damaged while being transported. In every instance, Zenith had arranged to dispose of the waste from those accidents as D008 toxic characteristic hazardous waste in authorized hazardous waste landfills.

- The Transportation Agreement between Zenith and Penske Logistics, entered into months before the accident, recognized the hazardous nature of the CRTs if they were broken or discarded, and placed the burden on Penske to ensure proper disposal.

- Broken CRTs and other accident waste were transported from the accident scene to TDSL's landfill until a Penske representative informed TDSL that the broken CRTs were classified as D008 toxic characteristic hazardous waste due to the level of lead. After this notification, no more broken CRTs were deposited into the TDSL landfill working face, and the accident scene was remediated by a special hazardous waste management team.

- TDSL's landfill is not permitted to accept and dispose of D008 toxic characteristic hazardous lead waste in the volume that was delivered from the accident here at issue (*i.e.*, in an amount exceeding 2,200 lbs., the upper limit to the exception for small-quantity generators of such waste).

- Accident waste that was stored at TDSL's landfill in roll-off boxes was handled and disposed of by Penske as D008 toxic characteristic hazardous waste in a hazardous waste landfill in 1998. Penske Truck Leasing identified the generator of the D008 hazardous CRT waste from the accident as Penske Logistics, Inc. However, Defendants refused to deal with the D008 toxic characteristic hazardous CRT waste commingled with municipal solid waste and landfill cover soil compacted below the landfill's working face.

- Penske representatives told the TNRCC (the predecessor state environmental agency to the TCEQ) that the accident waste was hazardous, and later provided TDSL and the TNRCC with documentation confirming that the D008 toxic characteristic hazardous CRT waste from the accident was, in fact, hazardous.

These undisputed material facts make the issues at stake in the Travis County proceedings amenable to summary judgment without the need for developing an extensive factual record. Indeed, much of the factual record developed in this lawsuit likely could be used in the Travis County proceedings.

2.2. The TCEQ's actions.

Between May and December of 2004, the TCEQ — acting variously through its three Commissioners and the Executive Director — issued a number of rulings with regard to the parties' actions and their legal effect. These rulings include a May 13, 2004 Notice of Violation, in which the agency found that the Penske Defendants had violated various provisions of Chapter 30 of the Texas Administrative Code (Environmental Quality). Specifically, the TCEQ found that "Penske caused, suffered, allowed, or permitted waste to be disposed of at an unauthorized facility" in violation of various provisions of Chapter 30 of the Texas Administrative Code, and Penske "fail[ed] to determine if a generated waste was a hazardous waste."[13] This determination by the TCEQ also included the subsidiary finding that Penske was a generator of the D008 waste at issue in this case.[14] TDSL was not cited for any violation of any law, regulation, or its permit.[15]

2.3. The Travis County proceedings.

The validity and effect of the May 13, 2004 Notice of Violation is one of the essential statutory and regulatory issues being resolved in Travis County. Obviously, confirmation of the TCEQ Notice of Violation in a judgment reciting the following would resolve most, and perhaps all, of the liability issues in this suit: (1) the CRT debris constituted D008 toxic characteristic

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[13] A true and correct copy of the TCEQ's May 13, 2004 Notice of Violation against Penske was attached as Exhibit 3 to TDSL's Motion to Stay.

[14] *Id.*

[15] *Id.*

hazardous waste, (2) Penske was a "generator" of that hazardous waste, (3) Penske allowed such waste to be disposed of at an unauthorized facility, and (4) TDSL did not violate any law, regulation or its permit Likewise at stake in the Travis County proceedings is a claim for (among others) the following declaratory relief:

- waste that has been classified as hazardous waste because of its toxic characteristics must be manifested and managed as hazardous waste from the point of generation to the point of ultimate disposal in accordance with Texas and federal law;
- the hazardous CRT waste was and remains D008 toxic characteristic hazardous waste because of its volume (*i.e.*, an amount greater than 2,200 lbs.) and its lead content;
- the point of generation of the D008 toxic characteristic hazardous CRT waste was the October 9, 1997 accident scene;
- once the D008 toxic characteristic hazardous CRT waste was classified as "hazardous waste," its classification cannot be changed by commingling such waste with non-hazardous municipal solid waste;
- Texas and/or federal land disposal requirements applied to the D008 toxic characteristic CRT waste at the point of generation; and
- the D008 toxic characteristic hazardous CRT waste commingled with municipal solid waste and landfill cover soils must be manifested, transported, treated and disposed of at an authorized facility in accordance with all applicable land disposal regulations.[16]

This claim for declaratory relief and the appeals concerning the TCEQ's actions and inactions cannot be resolved in this Hays County lawsuit because the TCEQ is not a party and cannot be joined as a party. As a result, considerable time and efforts were devoted during pretrial and in the first trial to arguments over the legal effect of essentially undisputed facts. Allowing these matters to be resolved in the Travis County proceedings would greatly reduce the time and burden required to try the instant case. It would also avoid the possibility of contradictory (and,

[16] A true and correct copy of Plaintiff's Amended Original Petition in the Travis County proceedings is attached hereto as Exhibit F.

therefore, manifestly unjust) results from two separate cases in the same judicial appellate district involving the same facts and parties.[17]

3. The Travis County Proceedings Will Be Preclusive Against Penske and Zenith.

Texas law recognizes that when an issue has been decided in one proceeding, a party to that proceeding (or someone in privity with that party) cannot seek a contrary ruling in a different forum. This doctrine is known as collateral estoppel or issue preclusion. Important policies that are furthered by the doctrine of collateral estoppel include the need to maintain stability of court decisions and promotion of judicial economy. *See, e.g.*, *Benson v. Wanda Pet. Co.*, 468 S.W.2d 361, 363 (Tex. 1971). "Issue preclusion, or collateral estoppel, prevents relitigation of particular issues already resolved in a prior suit." *Barr v. RTC*, 837 S.W.2d 627, 628 (Tex. 1992). Collateral estoppel applies when an issue is actually decided in one action, is essential to the judgment or resolution of that action, and is the same as an issue present in the suit in which collateral estoppel is invoked. *Texas Dept. of Public Safety v. Petta*, 44 S.W.3d 575, 579 (Tex. 2001). "The doctrine is designed to promote judicial efficiency and to prevent inconsistent judgments by preventing any relitigation of an ultimate issue of fact. Collateral estoppel does not require mutuality. It applies when the party against whom it is asserted had a full and fair opportunity to litigate the issue in the prior suit." *Id.* (footnotes omitted). In addition, collateral estoppel can be applied against a party in privity with one who had a full and fair opportunity to litigate the issue. A determination of privity requires examination of the parties' shared interests; "[p]rivity exists if the parties share an identity of interests in the basic

[17] In the event that this case is re-tried before the Travis County proceedings are resolved, TDSL has filed a Request to Take Judicial Notice concerning 21 separate Texas environmental statutes and regulations. A true and correct copy of Plaintiff's Request to Take Judicial Notice is attached hereto as Exhibit G. The breadth of these statutes and regulations offers some indication of the deep extent to which they affect the underlying litigation.

legal right that is the subject of litigation." *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996).

Orders of an administrative body, such as the TCEQ, can have preclusive effect when the agency resolved disputed issues that the parties have had an adequate opportunity to litigate or contest. *SWEPI, L.P. v. Camden Resources, Inc.*, 139 S.W.3d 332, 338-39 (Tex. App. — San Antonio 2004, pet. denied). Once an agency has decided an issue, "that issue is conclusive in a subsequent action between the same parties." *Id.* at 339.

As shown above, several issues fundamental to the claims and defenses at issue in this lawsuit have been addressed by the TCEQ, and all of the others are the subject of TDSL's claim for declaratory relief (*e.g.*, Defendants' contention that the hazardous CRT waste is not "hazardous waste"). Both Penske and Zenith participated extensively in the TCEQ proceedings, filing numerous submissions that included legal argument and presentation of fact, and appearing at multiple hearings to argue their position. The filings show two key facts: (1) that the issues at stake in the Travis County proceedings were hotly contested before, and decided by, the TCEQ; and (2) that Penske and Zenith took precisely the same positions and presented the same arguments on the same issues. These facts lead to the inescapable conclusion that Penske and Zenith will be barred from collaterally attacking the results of the Travis County proceedings. All Defendants in this action had the opportunity to litigate these issues before the TCEQ and actually litigated them. Also, regardless of the agency actions, the Penske Defendants will fully litigate the issues in Travis County District Court — a court with the jurisdiction to decide the matters involving the TCEQ's findings and actions — because they and the TCEQ are parties to that suit. And even though Zenith is not technically a party in Travis County, it is barred from

mounting a collateral attack due to its presence before the TCEQ and its alignment of interests with Penske (including, significantly, the indemnity agreement between Zenith and Penske).

4. This Court Has Discretion to Stay this Lawsuit Pending the Results of the Travis County Proceedings, and Such a Stay Serves the Interests of Both Justice and Judicial Economy.

A trial court has wide discretion to stay a case, including a stay to allow other lawsuits to proceed. *See, e.g.*, *Space Master Int'l, Inc. v. Porta-Kamp Mfg. Co.*, 794 S.W.2d 944, 946 (Tex. App. – Houston [1st Dist.] 1990, no writ); *Nowell v. Nowell*, 408 S.W.2d 550, 553 (Tex. Civ. App. – Dallas 1966, writ dism'd), *cert. denied*, 389 U.S. 847 (1967). A trial court, when presented with a motion to stay, will consider the matters presented by the motion and enter such order as the court, in its discretion, deems advisable. *Owens-Corning Fiberglas Corp. v. Caldwell*, 822 S.W.2d 143, 147 (Tex. App. – Houston [1st Dist.] 1991, orig. proceeding); *Evans v. Evans*, 186 S.W.2d 277, 279 (Tex. Civ. App. – San Antonio 1945, no writ). This Court should exercise its discretion, in furtherance of the important interest of judicial economy and to maintain consistency and stability in judicial and agency determinations, to stay this matter pending the outcome of the Travis County proceedings. As demonstrated above, key issues of environmental law will be decided in that action, and the results necessarily will have a significant impact on hotly contested questions in this case.

5. The Results of the Travis County Proceedings Are Clearly Relevant and Will Be Admissible in this Suit under Texas Law.

Penske and Zenith mistakenly argue that the results of the Travis County proceedings would be irrelevant, unduly prejudicial, and therefore inadmissible in this Hays County suit. But since at least 1973, it has been the blackletter law of this state that "an unexcused violation of a legislative enactment or an administrative regulation . . . may be relevant evidence bearing on the issue of negligent conduct." *See Southern Pacific Co. v. Castro*, 493 S.W.2d 491 (Tex. 1973)

(adopting RESTATEMENT (SECOND) OF TORTS § 288B). In the 33 years following *Castro*, Texas courts frequently have held that laws and regulations are admissible as evidence of the standard of conduct necessary to avoid liability for negligence. *See, e.g., Costilla v. Crown Equip. Corp.*, 148 S.W.3d 736, 739-40 (Tex. App. – Dallas 2004, no pet.) (affirming admission of OSHA regulations as relevant to standard of care and not unduly prejudicial). In opposition to more than three decades of consistent Texas jurisprudence on this issue, Defendants rely solely upon a single federal district court opinion for the proposition that the TCEQ's findings that one or both of them violated various state and federal environmental laws and regulations is inadmissible as evidence of the standard of care in this suit. *See Western Greenhouses v. U.S.*, 878 F. Supp. 918 (N.D. Tex. 1995). It is telling that Defendants do not identify any other authority construing Texas law to support so sweeping a proposition. More important, the *Western Greenhouses* decision does not support the argument for which Defendants cite it. The Court in *Western Greenhouses* did not hold that an unexcused violation of an environmental statute or regulation is inadmissible as evidence of the standard of care. It held only that such unexcused statutory violations cannot "define[] a standard of conduct suitable for the application of negligence *per se*." 878 F. Supp. at 930 (emphasis added). By contrast, the overwhelming weight of authority in Texas and elsewhere holds, consistent with Section 288B of the Restatement (Second) of Torts, that statutes and regulations are evidence relevant to the standard of care. *See, e.g., Costilla*, 148 S.W.3d at 739-40.

6. Conclusion and Prayer.

Allowing the statutory and regulatory issues fundamental to this case to be decided in the only forum capable of resolving them (*i.e.*, Travis County) will substantially shorten the time needed for pretrial and trial in this Court by eliminating arguments over the legal effect of

undisputed facts. The matters being litigated in Travis County are key to the instant case; this is made clear by the parties' repeated discussion of (and disagreement over) those issues prior to, and during, the first trial in this case. The resolution of these issues will be preclusive and the parties will not be able to mount a collateral attack against them in this Court. As Judge Gary Steel recognized during the first trial in this case, this Court is not the proper forum for resolution of these issues. Sadly, this case is old. Part of its age is a result of the many years in which the TCEQ did not act. However, it now has. As Judge Steel said, that creates a "whole new ball game." Accordingly, Plaintiff Texas Disposal Systems Landfill, Inc. respectfully urges the Court, in its discretion, to stay the instant action pending the resolution of the issues discussed herein in the pending Travis County proceedings, and grant Plaintiff all other relief, at law or in equity, to which it may show itself justly entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

by GPS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon all counsel of record in the manner indicated below on this 9th day of March, 2005.

Douglas Y. Christian Ballard Spahr Andrews & Ingersoll, LLP 1735 Market Street, 47th Floor Philadelphia, PA 19103-7599	____ via Certified Mail, RRR ✓ via U.S. Mail (First Class) ____ via Federal Express ✓ via Facsimile ✓ via E-mail ____ via Messenger
William P. Johnson Baker Botts, L.L.P. 1500 San Jacinto Center 98 San Jacinto Blvd. Austin, TX 78701-4039	____ via Certified Mail, RRR ✓ via U.S. Mail (First Class) ____ via Federal Express ✓ via Facsimile ✓ via E-mail ____ via Messenger
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Gregory P. Sapire

CAUSE NO. 98-0159

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.	§	IN THE DISTRICT COURT OF
	§	
v.	§	HAYS COUNTY, TEXAS
	§	
PENSKE TRUCK LEASING CO., L.P., PENSKE LOGISTICS, INC., AND ZENITH ELECTRONICS CORP.	§	207TH JUDICIAL DISTRICT

ORDER

On the _____ day of March, 2006, the Court considered the Motion to Stay filed by Plaintiff Texas Disposal System Landfill, Inc. ("TDSL"). After consideration of TDSL's Motion to Stay, the response of Defendants Penske Truck Leasing Co., L.P., Penske Logistics, Inc., and Zenith Electronics Corp. (collectively, "Defendants"), the Court is of the opinion that such Motion should in all things be GRANTED.

It is therefore ORDERED that the above-captioned cause be stayed for 180 days.

It is FURTHER ORDERED that all actions in the above-captioned cause are stayed until the _____ day of _____, 2006, and all deadlines, discovery and pretrial matters are continued by 180 days.

It is FURTHER ORDERED that each party shall submit a written report to the Court on or before the _____ day of _____, 2006 concerning the status of Cause No. GN402245 pending in the 200th Judicial District Court of Travis County, Texas, and appear for a hearing on the _____ day of _____, 2006 at _____ a.m./p.m. at which the Court will determine whether to resume these proceedings or continue this stay.

SIGNED this _____ day of _____, 20_____.

_____
PRESIDING JUDGE

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February 27, 2006

BY HAND DELIVERY

Hon. Harold R. (Bob) Towslee
P. O. Box 648
Caldwell, Texas 77836

Re: Cause No. 98-0159; *Texas Disposal Systems Landfill, Inc. v. Penske Truck Leasing Co., L.P., Penske Logistics, Inc., and Zenith Electronics Corp.*; In the 207th Judicial District Court of Hays County, Texas

Dear Judge Towslee:

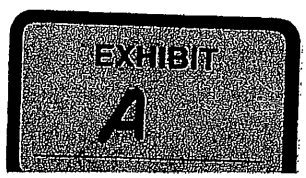
We are writing on behalf of Plaintiff Texas Disposal Systems Landfill, Inc. ("TDSL") to welcome you as the judge in this case and elaborate on the thoughts we shared with you at today's hearing about the most fair and efficient way to bring it to a verdict and judgment.

This case was filed February 23, 1998, and was stayed for about a year while Defendant Zenith was in bankruptcy. A jury trial started in April 2004, and was expected to last at least six weeks. The case unfortunately ended in a mistrial at Defendants' request after nearly three weeks of testimony. I entered the case as lead counsel for TDSL in December 2005. The evidentiary, procedural, and substantive issues now involved in this suit are some of the most complicated I've seen in my 25-year career. Indeed, we think you will agree that the case is, frankly, "broken."

Enclosed is a list of the motions that are currently pending before the Court. Among them are TDSL's Motion for Stay and TDSL's Unopposed Motion to Substitute Counsel. TDSL has not filed a reply to Defendants' responses to the Motion for Stay, but will do so promptly if necessary after today's hearing.

The damaged state of this case appears to result primarily from a series of pre-trial rulings on the parties' motions in limine that Hon. Gary Steel was forced to make without the benefit of a clear decision by the appropriate regulatory and judicial authorities of the parties' rights and duties under various state and federal environmental statutes. Below, we reiterate what we think is the fastest and most efficient way to determine with certainty the parties' statutory and regulatory rights and duties, repair this badly damaged case, and return it to trial.

Despite the complexities of this case, the events on which it is based seem 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.[1] The truckload of Zenith CRTs were on their way from a Zenith plant near Chicago to a Zenith *maquiladora* in Mexico for assembly into 19-inch TV sets. Penske was transporting the CRTs under a Transportation Agreement with Zenith that properly characterized the broken CRTs as hazardous waste due to the significant quantities of lead used to make color CRTs (an average of four pounds in each unit).[2] Thus, under the Transportation Agreement, Penske knew or should have known that if its Zenith CRT cargo were damaged, the resulting material should be disposed of as EPA Waste Code D008 toxic characteristic hazardous waste under the federal Resource Conservation and Recovery Act ("RCRA").[3]

Unfortunately, after the accident, Penske's driver initially misinformed the on-scene emergency responders that the damaged CRTs were not "hazardous" — even though Penske and Zenith not only were aware of the accident shortly after it happened, but also knew that the CRT debris needed to be handled as D008 hazardous CRT waste. Indeed, Zenith officials reminded their counterparts at Penske some 40 minutes after the wreck about the applicable hazardous-waste disposal requirements. Because Penske's driver failed to timely notify anyone about the hazardous status of the CRTs, thousands of pounds of the toxic debris were sent to TDSL's nearby non-hazardous waste landfill and commingled with regular municipal solid waste ("MSW"). TDSL accepted seven truckloads of the hazardous CRT waste (roughly 98 cubic yards in all) after specifically inquiring whether it was hazardous and upon receiving a written representation from the emergency response hauler, via a signed gate ticket, that the waste was not hazardous. 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 commingled D008 hazardous CRT waste. Notably, Penske properly managed the remainder of the accident debris as D008 toxic characteristic hazardous waste, and identified itself as the generator 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

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[1] If you are not familiar with the area, the city of Buda is in Hays County just south of Austin and about 60 miles north of San Antonio.

[2] The Penske/Zenith Transportation Agreement states, in relevant part: "CRTs are not Hazardous Materials unless damaged." (Emphasis added.) Thus, by negative implication, Defendants acknowledge in the Transportation Agreement their awareness that damaged CRTs are "hazardous." Indeed, the Material Safety Data Sheet for the CRTs that, under the Transportation Agreement, Zenith was required to provide Penske before shipment specifically identified damaged CRTs as D008 toxic-characteristic hazardous waste.

[3] 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).

environmental regulations.[4] Federal and state law prohibits managing this kind of toxic-characteristic hazardous waste as non-hazardous waste, even if it has been diluted after the point of generation (in this case, the accident scene) by mixing it with regular MSW such that the resulting commingled waste has a concentration of lead below the hazardous threshold. The law prohibits this because the toxic constituents (in this case, the lead) accumulate in the environment unless they are properly treated prior to land disposal. Thus, state and federal law require 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. Even when it is properly disposed of at an authorized hazardous waste facility, the generator of the D008 hazardous CRT waste retains unlimited and perpetual liability under federal environmental Superfund laws.[5]

Because accepting hazardous waste in violation of its permit and/or removing it for disposal elsewhere without taking responsibility for it would risk serious civil and possibly even criminal liability,[6] TDSL demanded that Penske and Zenith acknowledge their "generator" responsibility under RCRA, remove the commingled D008 CRT waste under a hazardous waste manifest, and ship it to an approved hazardous-waste treatment and disposal facility. When Defendants refused, TDSL filed this lawsuit asserting the following causes of action against Defendants: (1) negligent misrepresentation, (2) negligence (including negligence *per se*, negligent supervision and gross negligence), (3) trespass, (4) private nuisance, and (5) a request for injunctive and declaratory relief.

Over the course of the next seven or so years, one or both Defendants have insisted that TDSL is solely responsible for the commingled D008 CRT waste because TDSL accepted the

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[4] Enclosed for your convenience is an excerpt from 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. In it, the EPA makes clear that CRT waste of the volume involved in the Penske/Zenith accident (*i.e.*, more than 2,200 lbs.) 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 were familiar with these rules and their 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.

[5] The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 imposes joint and several liability for cleaning up contamination caused by hazardous substances on four categories of responsible parties: (1) the current owner or operator of a vessel or a facility; (2) the owner or operator of a vessel or facility at the time of disposal of any hazardous substance; (3) the generators of any hazardous substances located on the site; and (4) any transporter of hazardous substances to a site the transporter selected. *See* 42 U.S.C. § 9607(a)(1)- (4).

[6] A recent decision from 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).

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.[7] As a result, Defendants contend, they have not violated any legal duties to TDSL and TDSL has suffered no damages. Today, the commingled D008 CRT waste comprises about 1,600 tons of material and remains stored on TDSL's premises in 99 roll-off containers.[8] The efforts TDSL has undertaken to work around the commingled D008 hazardous CRT waste while it remained in its landfill and then safely contain it during the pendency of this suit have cost TDSL millions of dollars.

Determining the parties' regulatory responsibilities in the context of TDSL's claim for money damages added layer upon layer of evidentiary, procedural and substantive complexity to this case. For example, although all of TDSL's claims survived Defendants' summary judgment motions (including its negligence *per se* allegations), the transcripts of the pre-trial hearings indicate that Judge Steel eventually decided he would have to rule on an *ad hoc* basis whether or to what extent witnesses would be allowed to discuss state and federal environmental laws and regulations relevant to the claims and defenses at issue in this suit. Apparently, the absence of clear authority (*e.g.*, an agency ruling or a court decision) on the extent to which such laws and regulations apply to the parties under the facts of <u>this</u> case left Judge Steel unable to determine definitively which of these laws and regulations could be considered by the jury. As a result, the trial transcripts show that weeks of testimony were devoted to establishing the most basic facts – *e.g.*, that Defendants were the owners and generators of the D008 hazardous CRT waste, that the applicable environmental regulations required Defendants to properly manifest, treat and dispose of the hazardous waste generated at the accident scene, or (as Defendants believe) that TDSL was at fault for having accepted their CRT waste without knowing it was classified as "hazardous."

These essentially regulatory issues therefore remain fundamental questions in this suit. They are fundamental because the Texas Solid Waste Disposal Act imposes an explicit duty on hazardous-waste generators like Penske and/or Zenith to store, process and dispose of such waste "<u>only</u> at permitted hazardous industrial solid waste facilities."[9] The purpose of this duty is to "safeguard the physical property of the people" in connection with the disposal of hazardous waste.[10] The manner in and extent to which Defendants owe this duty to TDSL will depend on how these regulatory issues are resolved.

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[7] Both of these defenses hinge on regulatory determinations not yet made by the TCEQ or EPA.

[8] The TCEQ authorized this type of secure storage in early 2004 pending final treatment and disposal of the D008 hazardous CRT waste.

[9] *See* TEX. HEALTH & SAFETY CODE § 361.002 (emphasis added).

[10] *Id.*

Unfortunately, although the TCEQ started an investigation the month after the accident (*i.e.*, in November 1997), the agency did not show any sign of resolving these fundamental regulatory issues until after the April 2004 mistrial. In May 2004, it issued, for the first time, a Notice of Violation against Penske in which the TCEQ stated (among other things) 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 Defendants' urging, the TCEQ Executive Director accepted a proposal from Penske to dispose of the commingled D008 hazardous CRT waste as non-hazardous "special waste," rather than as hazardous waste. TDSL appealed this decision of the Executive Director. On September 16, 2004, the TCEQ determined in *dicta* supporting its Order to overturn the Executive Director's authorization that (1) Penske was the "generator" of the D008 hazardous CRT waste; (2) the commingled CRT waste had to be disposed of as D008 toxic-characteristic hazardous waste; and (3) proper disposal could be accomplished either by disposing of the entire mass of commingled waste as D008 hazardous waste, or by physically segregating the D008 hazardous CRT waste from the non-hazardous MSW. 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 2004 ruling, however, the Executive Director issued another letter that authorized Penske to remove the commingled D008 hazardous CRT waste as "hazardous waste," but giving Penske the option of removing the materials and testing them to determine whether they continued to exhibit a hazardous characteristic for lead. TDSL objected to the Executive Director's order because the D008 hazardous CRT waste had been diluted with MSW and cover soils and, therefore, could not legally be recharacterized as non-hazardous waste years after the D008 hazardous CRT waste was generated at the accident scene. TDSL was particularly concerned because Penske reported that it intended to dispose of the commingled D008 hazardous CRT waste as non-hazardous waste if selected samples from the mass of now-diluted D008 hazardous CRT waste did not test hazardous for lead. The Executive Director's authorization violates both state and federal law prohibiting dilution of toxic-characteristic hazardous waste in lieu of treatment, and TDSL refused to be a party to such a violation of law. TDSL appealed the Executive Director's latest authorization to the TCEQ (*i.e.*, to the three Commissioners). The Commissioners were split over how to address this apparently unique situation, which resulted in TDSL's appeal being overruled by operation of law.

Since then, both TDSL and Penske have filed in Travis County District Court a total of seven separate administrative appeals of the TCEQ's actions or failures to act. TDSL seeks in its three suits an appellate ruling that the TCEQ's Executive Director must follow state and federal law and require the commingled D008 hazardous CRT waste to be removed from TDSL's landfill under a hazardous waste manifest to an authorized hazardous waste facility for treatment and disposal as D008 hazardous waste. In its four suits, Penske seeks TCEQ

authorization to dispose of the commingled D008 hazardous CRT waste as non-hazardous waste without any treatment for the thousands of pounds of toxic lead remaining in the commingled waste. In December 2005, these seven suits were consolidated under Cause No. GN402245. Defendants insist that none of the actions or findings by the TCEQ or its Executive Director are admissible in any way in the Hays County lawsuit because they are not final determinations of liability by the TCEQ, and because the environmental laws and regulations at issue in this suit cannot form any part of the basis for the duty or standard of care Defendants owed TDSL. The relevant authorities make clear, however, that laws and regulations can and frequently do establish the standard of conduct necessary to avoid liability for negligence. *See, e.g., Costilla v. Crown Equip. Corp.*, 148 S.W.3d 736, 739-40 (Tex. App. - Dallas 2004, no pet.) (affirming admission of OSHA regulations as relevant to standard of care and not unduly prejudicial). Indeed, Section 288B of the Restatement (Second) of Torts, which the Texas Supreme Court adopted more than 30 years ago, states that an "unexcused violation of a legislative enactment or an administrative regulation . . . may be relevant evidence bearing on the issue of negligent conduct." *See Southern Pacific Co. v. Castro*, 493 S.W.2d 491, 497 (Tex. 1973) (adopting RESTATEMENT (SECOND) OF TORTS § 288B).

In an effort to resolve these fundamental regulatory issues on which this case is based once and for all among the proper parties, TDSL amended its pleadings in the Travis County suit against the TCEQ on February 23, 2006, to seek a declaratory judgment in conjunction with its administrative appeals. A copy of Plaintiffs' First Amended Original Petition in the Travis County lawsuit is enclosed for your reference. The declaratory relief TDSL seeks is similar to the declaratory relief it seeks in this suit. Such relief must be sought exclusively in the Travis County suit, however, because under TEX. CIV. PRAC. & REM. CODE § 37.009, "all persons who have or claim any interest that would be affected by the declaration must be made parties." The declaratory relief that TDSL seeks involves the statutes and regulations for which the TCEQ has sole enforcement authority. Thus, TDSL probably cannot obtain full declaratory relief in this Hays County suit where the TCEQ is not a party.

Upon conclusion of the consolidated appeals and declaratory relief action in Travis County, this suit could proceed quickly to trial in Hays County. Indeed, many issues that were argued and left undecided for jury presentation in the first trial probably could be resolved by summary disposition in the new trial. For example, there will be no need to submit any issue of contributory negligence to the jury. Nor would there be any need for the jury to determine which party generated the D008 hazardous CRT waste, or the legal obligations imposed on the generator of that hazardous waste under Texas law.

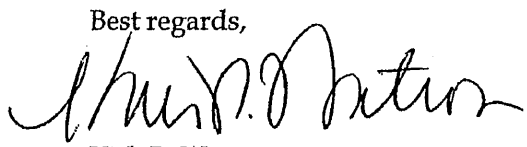
We are therefore firmly convinced that the best way to fix this "broken" case is to avoid another premature jury trial involving issues best and most efficiently resolved in the Travis County litigation. Based on the transcript from the July 2004 post-trial hearing that he held, Judge Steel appears to agree. Indeed, he specifically remarked regarding the Notice of Violation against Penske:

> It appears to me that we're playing in a whole new ball game, gentlemen. . . . [W]e spent a majority of our time dealing with the fact that TCEQ had not made any movement in this: fed, state, strict liability. I mean, everything from your pleadings down to probably the last ruling that I made in the case had to do with 'Who is the generator?' and 'We're not going to let the generator in' and the responsibility for moving [the commingled waste], which is the majority of these damages. . . . It almost starts with your pleadings, Counsel. I have gone back and looked at those. And if we have got TCEQ moving, it looks like to me it's now totally a different lawsuit, from the pleadings, down to every ruling . . . .[11]

We believe Judge Steel's instinct was correct. The fundamental regulatory issues that underlie this case should be resolved in a proceeding involving the agency charged with enforcing those regulations. If the parties return to trial without first resolving those issues, this case will remain "broken" and it will resume in the same hopelessly damaged condition it suffered from nearly two years ago.

We hope you find this letter helpful in introducing you to this matter. If we can provide you any additional information, please let us know. Again, welcome to the case.

Best regards,



Kirk P. Watson

KPW/gps
encl.

cc: Douglas Y. Christian
William P. Johnson
Philip J. Comella
David Waddell
Kerry E. Russell
James B. Blackburn, Jr.
Richard Lowerre
Gregory P. Sapire

---

[11] A complete transcript of this hearing is enclosed for your reference.

08:11 1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS) IN THE DISTRICT COURT
LANDFILL, INC.,)
3 Plaintiff,)
)
4 VS.)
) HAYS COUNTY, TEXAS
5 PENSKE TRUCK LEASING CO.,)
L.P., PENSKE LOGISTICS, INC.,)
6 ZENITH ELECTRONICS CORP.,)
)
7 Defendants.) 207TH JUDICIAL DISTRICT

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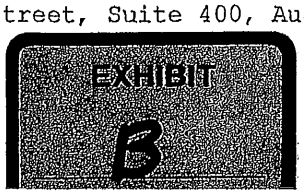

23 So they're going to come in. Maybe we do it
24 by stipulation or whatever, and look at them, redact them.
25 Let's remove all this stuff that we've been removing all

1 along and go there.
2 So that's my comment on 33, which is basically
3 you-all look at it, get together and figure out how you want
4 it to come in and in what form.
5 And just so every -- all the attorneys will
6 hear the comment I made on regulate -- not regulator --
7 generator, what I basically said -- and I would have Rick
8 read it back except Rick doesn't like to read back what I
9 say because then I argue with him that's not exactly what I
10 said. What I said was, and I called counsel up here -- and
11 Mr. Russell, you would be interested in this. I think those
12 of you that didn't approach on the other side will be
13 interested in this.
14 And what I said was -- I keep saying I don't
15 like to defend myself, but I'm going to do it again, and
16 what we have is Mr. Newton stand up here -- or sit up here
17 and tell us that the reason that TDSL did not want to take
18 some stuff out of their landfill is because they were afraid
19 they were going to be anointed with "generator" and be
20 responsible for that if something happened. And what
21 didn't -- what went unsaid was -- but what I felt fairly
22 strongly about from the beginning, regardless of whether
23 they did anything wrong or not, regardless of their
24 negligent actions.
25 I don't hear anything that says it would have

1 been negligent for them to take that out, put it into the
2 stream. I mean, there's some evidence and some argument it
3 would have been -- the proper thing to do is take it out,
4 and the reason they didn't, because they didn't want to be a
5 generator and be responsible for that for the rest of time
6 under the Superfund legislation. Getting that title does
7 not mean -- that has nothing to do with negligence, and
8 that's why I'm not buying in. And I just wanted to point
9 out that that was a classic example of why I'm not into this
10 generator and how it's misleading to the jury.
11 I just wanted you to know that that was -- and
12 it came from Plaintiff's own mouth, that it has nothing to
13 do with negligence. It's just a term that this overall
14 scheme -- and the environmental scheme and the Superfund
15 scheme, which maybe -- I'm not an expert in it. I've been
16 involved with it all of my legal career from the Federal
17 Energy Regulatory Commission, to my oil and gas background
18 and everything else. It is a scheme set up that somebody is
19 responsible if there is a problem of hazardous waste. It is

20 not set up to necessarily go after somebody that was
21 negligent.
22 And people can be tagged on that because they
23 touched it. Whether they touched it in a proper way or an
24 improper way, they can be tagged with it, and that's why I'm
25 concerned about it and that's why it's not coming in. I

1 mean, it's coming in, but I'm not going to allow anybody to
2 start highlighting it and moving it around.
3 We've gotten it in. I mean, it's going to
4 come in. That was the elephant that I was talking about,
5 and I'm looking at all of this. We will have documents that
6 just don't make any sense if we keep trying to take the word
7 out. But I don't want Plaintiff to highlight the word
8 "generator," and we haven't, and we've done a great job of
9 doing it. And it's probably harder for you not to highlight
10 it and stand up and object and everything else.
11 MR. CHRISTIAN: It sure is.
12 THE COURT: And I appreciate you-all going
13 along. I think you understand where I'm going. Whether you
14 agree with me or not is irrelevant to me at this point. I
15 think you understand what I believe is appropriate in this.
16 Now, 145A. What is 145A? We just kind of
17 decided to pass over it and come back to it.
18 MR. CHRISTIAN: Well, we're segueing right
19 into a document that deals with generator. It's got the
20 "generator" word all over it. It's a May 20, 1998 letter
21 from Marc Althen to Ben Milford of the TNRCC. I'd be
22 interested in hearing whether Mr. Milford is going to be
23 here to testify, and if he is going to be here to testify,
24 then, of course, he's the appropriate witness for that
25 document to be used with regard to.

1 But we -- it's already been established that
2 Penske treated the material in the roll-off boxes as
3 hazardous. Penske sent the material to a hazardous waste
4 facility. This is surplusage. The obvious reason for
5 getting this in is to show that Penske signed as the
6 generator of that material, and we would object to the
7 introduction of that document to the extent Mr. Donaldson is
8 seeking to introduce it on relevant -- grounds of
9 irrelevance, the prejudicial nature of it, and clearly it
10 should not be introduced with this witness.
11 THE COURT: Well, first of all, did this
12 witness see this -- this will be my ultimate question, and
13 we may have to put him up here and do it, but did he see
14 this during these decision-making processes or did he see
15 this because of the lawsuit and the exchange of documents

9 Plaintiff, and you are instructed not to consider them for
10 that purpose." That's the kind of instruction I'm looking
11 for as to a duties responsibility.
12 MR. RUSSELL: In that case, Your Honor, I'd
13 really ask that you look at our brief we filed today,
14 particularly the Hickson v. Martinez case, because it's
15 directly on point on CFR regulations and setting a duty of
16 care.
17 THE COURT: And I've read your brief once, and
18 I'll look at it again, and I guess what I'm saying is I'm
19 not really ready to give this instruction, my approval or
20 stuff. We're going to look at it, give you a chance to look
21 at it tonight, maybe even draw your own. But I read the
22 Hickson case, and let me find it again.
23 MR. RUSSELL: It's on page 7 of the Hickson
24 case. It's footnote 8 that I'm particularly talking about.
25 THE COURT: Okay. Let me find it.

1 MR. RUSSELL: That entities that are subject
2 to the CFR, you know, their standard of care is set by those
3 duties or those responsibilities under the code of federal
4 regulations, and that's what we've been saying all along.
5 It's not a strict liability issue. In this case the
6 hospitals made themselves subject to the CFR by taking the
7 Medicaid and Medicare payments. In the case of what we're
8 talking about here with a federally listed hazardous waste,
9 the manufacturer made themselves subject to these
10 regulations by deciding the manufacturer --
11 THE COURT: Let me ask you this. What
12 statutes -- what regulations do you believe establish the
13 standard of care of Penske and/or Zenith?
14 MR. RUSSELL: Their responsibility, cradle to
15 grave, to manage that D008 waste, bottom line.
16 THE COURT: As generators?
17 MR. RUSSELL: As responsible persons, and
18 I'm -- I'm hung up on the generator issue too, but Zenith,
19 under every -- every way you look at it under our
20 regulations, there has to be a responsible person for this
21 waste. Zenith was the responsible party. It was their
22 waste. I question myself whether they generated it or
23 Penske generated it when the wreck happened. And I
24 understand where you're coming from on this generator issue,
25 but there is a person that's responsible for that waste, and

1 it is that manufacturer.
2 MR. COMELLA: And let me just add -- I've said
3 this about five times -- no case that they've ever cited
4 supports what he just said.
5 THE COURT: No, and that -- I made that note.

6 I don't have any environmental law cases. Zero.
7 MR. RUSSELL: Okay. I'll put some of those
8 together for you because manufacturing processes, you know,
9 they do that.
10 MR. COMELLA: Six and a half years, never
11 argued this. I'm sorry.
12 MR. RUSSELL: You asked me what I thought was
13 the basic issue, and I'm trying to give you the basic issue,
14 because there has to be somebody responsible for it.
15 THE COURT: Ah. No, there doesn't -- no,
16 there doesn't, and I mean that with all my heart. No.
17 There are circumstances where bad things happen and nobody
18 is responsible under the law. Our government has decided in
19 dealing with hazardous waste they are going to set up a
20 government scheme so that somebody ultimately will be
21 responsible cradle to grave. It is not a common law
22 negligence issue. It is a strict liability, regardless of
23 negligence and cause.
24 Take it to Austin. Take it to the TCEQ. Take
25 it through the EPA, but down here in -- and I say "down

1 here" as in Hays County, south of Austin -- it is not our
2 responsibility to find somebody, regardless of negligence,
3 to be responsible.
4 That is my position on this. It is a
5 regulatory scheme that is different than any other because
6 our government felt responsible for saying, regardless of
7 negligence, somebody besides this government will clean up
8 these messes, and that's why it doesn't apply in a
9 negligence case, and that's where I am.
10 We'll talk about the instruction tomorrow.
11 I'm not sold on it. Jim, if you will go make one -- or make
12 two copies of this, leave me one, give both -- well, make,
13 one, two, three -- make five copies of it. Make sure I have
14 one.
15 We're in recess till 8:30 tomorrow morning. I
16 will do my best to get here on time. Hopefully I'm not
17 running the bus again.
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08:18 1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS) IN THE DISTRICT COURT
LANDFILL, INC.,)

3)
Plaintiff,)

4)
VS.)

5) HAYS COUNTY, TEXAS

PENSKE TRUCK LEASING CO.,)
6 L.P., PENSKE LOGISTICS, INC.,)
ZENITH ELECTRONICS CORP.,)

7)
Defendants.) 207TH JUDICIAL DISTRICT

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1 A P P E A R A N C E S
2
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-and-
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Mr. Kerry E. Russell
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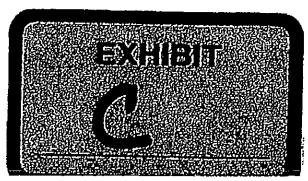

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2 for objection. Go ahead.
3 (BY MR. DONALDSON)
4 Q Let me offer you Plaintiff's Exhibit 138. And, Your
5 Honor, for the terms of the bill of exceptions, we offer in
6 the unredacted format both Plaintiff's Exhibit 137 and 138.
7 THE COURT: Do you have copies of those for me?
8 MR. DONALDSON: I don't have copies yet, but I will.
9 I do have a copy of 137. I don't have copies of 138. This
10 is a copy of 137, Your Honor. And a copy of 138 is on its
11 way.
12 (BY MR. DONALDSON)
13 Q In this November 20th, 1997 letter from Zenith, did they
14 indicate to you that they agreed with TDSL's analysis that
15 Penske was the generator of the waste?
16 A That is what they state.
17 Q And did they agree with you because they say Penske is
18 the generator because its act -- the truck accident first
19 caused the broken picture tube to become subject to
20 regulations?
21 A Those are their statements. That is what they told us.
22 Q And what was -- what effect did this -- having this
23 letter from Zenith have on your negotiations with both Zenith
24 and Penske?
25 A Well, the effect was that, you know, Zenith was pushing

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1 me to Penske. So I'm going to go to Penske, which is how
2 Zenith is angling this. I'm still going to talk to Zenith
3 and did continue to talk to them, but it was clear that
4 Zenith was telling us that it's Penske's problem.
5 Q Was it your understanding that if in fact Penske is the
6 generator of the waste, they are the one who has the
7 responsibility to declassify the waste?
8 A That was my thought; and Zenith was telling me the same
9 thing.
10 Q And that explains why you continued to be talking to
11 Penske?
12 A Penske primarily.
13 Q And why you continued to ask Penske about the
14 possibility of declassifying the waste.
15 A That's right.
16 MR. DONALDSON: That concludes our offer.
17 THE COURT: Let me make this real clear. And I want
18 to make sure we are real clear on this, and the reason,
19 Mr. Waddell, you probably wanted to stay in. I'm not going
20 to allow Exhibit 137 and 138 in as evidence in this case for
21 all the reasons I have already stated. Comment Number one.
22 Comment Number two. I am not going to allow the term
23 "generator of the waste" to be used by this witness; however,
24 comment Number 3, I don't think it's outside of my rulings
25 for this witness to tell the jury that he believed under the

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1 environmental rules that Penske was responsible for the
2 cleanup. That's it, though. Not why he's not an expert in
3 the rules. But I think the jury is allowed to understand
4 where he's coming from. I don't want the technical term
5 "generator" used. I'm not going there. I'm not going to
6 allow him or you to put up the environmental regulations on
7 the board or pass them out. We haven't gotten there, and I
8 appreciate you stepping around. But I will allow you to ask
9 this witness if be believes, under the environmental laws as
10 he understood it, that Penske was the individual under the
11 environmental laws that should be responsible for this
12 cleanup. His understanding is fair game, and you can
13 cross-examine it, bring on your experts.
14 I will also allow him to testify that Zenith
15 agreed. And that's why he -- no, I'm not going to go there.
16 We have already been over that a hundred times. He's already
17 testified that Zenith said to go to Penske. And you are
18 right, that's not an admission against interest, and it is
19 highly prejudicial against Penske. But I will allow him to
20 say that Zenith told him to go to Penske, which is fact. We
21 just can't get around that. That was his belief.
22 What I'm avoiding, what I'm very careful -- and
23 I want to be careful and I want the witness in here to listen
24 to this. I don't want to go into "generator." I don't want
25 to go into the environmental laws. He's not an expert in

1 that. And I do not want to go into -- I don't want to leave
2 the impression with the jury that that's what we are
3 litigating here today. So I'm not going to allow you to go
4 out -- I think this witness is allowed to say under the
5 environmental laws as he understood it, Penske was
6 responsible.
7 MR. CHRISTIAN: May I for two minutes when we come
8 back from lunch have a short voir dire of the witness outside
9 the presence of the jury regarding the facts ---well, maybe
10 right now.
11 THE COURT: I would rather you do it right now so
12 when we come back from lunch, we will know where we stand.
13 VOIR DIRE EXAMINATION
14 (BY MR. CHRISTIAN)
15 Q Mr. Herman, you are not a lawyer, correct?
16 A Correct.
17 Q Have you ever taken any courses regarding environmental
18 law?
19 A Not that I recall. I mean sessions, but if you mean
20 college courses, no.
21 Q Were you aware of the environmental laws as they relate
22 to this situation in 1997?
23 A I'm aware that environmental laws exist that deal with
24 this type of situation, yes, sir.
25 Q What is your awareness based on?

1

2 REPORTER'S RECORD

3 VOLUME 1 OF 1 VOLUME(S)

4 TRIAL COURT CAUSE NO(S). 98-0159-CV

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TEXAS DISPOSAL SYSTEMS LANDFILL, INC.	)	IN THE DISTRICT COURT
VS.	)	274TH JUDICIAL DISTRICT
PENSKE TRUCK LEASING COMPANY L.P., ET AL	)	HAYS COUNTY, TEXAS

10

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12 **********
PRETRIAL HEARING
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15 ORIGINAL

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17 On the 6th day of January, A.D., 2004, the
18 Pretrial Hearing came on to be heard outside the presence of a
19 jury, in the above-entitled and numbered cause; and the
20 following proceedings were had before the Honorable Gary L.
21 Steel, Judge presiding, held in San Marcos, Hays County,
22 Texas:
23 Proceedings reported by computerized stenotype
24 machine; Reporter's Record produced by computer-assisted
25 transcription.

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EXHIBIT
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1 cubic yards has, over the years, become a 1,600 yard volume in
2 a synthetic liner that the TNRCC has said can stay there, can
3 remain disposed there, "No problem," "Treat it like any other
4 material."
5 But they've transformed 58 cubic yards or less
6 of television tubes and packaging debris. They transformed
7 that into 1,660 cubic yards, and that's what they want us to
8 pay for to get out of their facility. Now it would only have
9 to get out of their facility if someone determines that it is
10 hazardous waste and the TNRCC will not let it stay there. And
11 if it has to get out of the facility, they want us to pay for
12 it.
13 They have to prove that this is -- that this
14 1,660 cubic yard lined mass is, in fact, today hazardous
15 material -- hazardous waste.
16 THE COURT: Well, let me ask you this. This is
17 a '97 case. Why are we sitting here 50 days -- 30 days before
18 trial asking for this testing? It's your motion.
19 MR. COMELLA: Number one, we didn't get that
20 analytical data until December 17th of this year. We were
21 unaware it existed. To us, if they don't detect -- that's .1
22 parts per million. If they don't detect any lead, even if
23 it's mixed with soil, that strongly suggests that the
24 mixture -- the 1,660 cubic yards that they want us to treat
25 as hazardous waste is not a hazardous waste.

1 Number two --

2 THE COURT: This is the document that is dated

3 April 2nd, 1998?

4 MR. COMELLA: Right. We didn't get that until

5 December 17th. Our discovery requests that we served in 1998,

6 Your Honor, asked for all analyses. I do not believe TDSL got

7 that -- well, my understanding is they got that in October of

8 this year. Clearly, if we would have had it in October, we

9 move have moved faster.

10 The other side of the coin, Your Honor, is that

11 we believe it's their burden -- TDSL's burden to prove that

12 it's a hazardous -- that the 1,600 cubic yards is a hazardous

13 waste. And by bringing it to your attention, we think this --

14 that this needs to be brought to your attention now.

15 Because otherwise we're going to be in the

16 midst of speculation and guessing at trial over: What is this

17 material? We're going to be engaging in hypotheticals: "Well,

18 if it is a hazardous waste" or "It might be a hazardous waste"

19 instead of answering the question: Is it or is it not?

20 I just don't think they can have it both ways.

21 I don't think that they can argue to the jury that it's

22 hazardous waste and the sky is going to fall, but not test the

23 material. So that's why we --

24 THE COURT: Okay. Last time around.

25 MR. DONALDSON: Okay. Your Honor, first of

1 handed it over, they have reviewed the entire case, they have
2 been in it since the beginning. And in your cross-examination
3 I'm sure you will point out to the jury that there is no
4 specific area or specific thing that they can actually hang
5 their hat on.
6 So I will deny that motion. I think all -- you
7 have been given what they say they have used, and I'm sure you
8 can use that well in your cross-examination.
9 That brings us to the TDSL -- finally, the TDSL
10 financials.
11 MR. CHRISTIAN: Your Honor, we have moved to
12 compel -- and that's a very straightforward issue. We want
13 monthly and annual financial statements of TDSL. We're happy
14 to enter into a confidentiality agreement and to jointly
15 propose a protective order.
16 And the argument is very straightforward. They
17 have a serious -- at least it's a claim that is a big-ticket
18 claim, part of which is damage to reputation and/or stigma.
19 So they're going to argue that their reputation has been
20 damaged, but we don't get their financial records that are --
21 they're clearly relevant on that point.
22 And more specifically, they are arguing -- we
23 asked -- one of the questions that we have asked in this case
24 is: "Look. The TNRCC said you can leave that in there. No
25 harm, no foul."

1 THE STATE OF TEXAS)

2 COUNTY OF HAYS)

3 I, RICHARD E. ROBERTS, JR., Official Court Reporter in
4 and for the 274th District Court of Hays County, State of
5 Texas, do hereby certify that the above and foregoing contains
6 a true and correct transcription of all portions of evidence
7 and other proceedings requested in writing by counsel for the
8 parties to be included in this volume of the Reporter's
9 Record, in the above-styled and numbered cause, all of which
10 occurred in open court or in chambers and were reported by me.

11 I further certify that this Reporter's Record of the
12 proceedings truly and correctly reflects the exhibits, if
13 any, offered by the respective parties.

14 I further certify that the total cost for the preparation
15 of this Reporter's Record is $469.00 and will be paid by
16 Mr. David Donaldson.

17 WITNESS MY OFFICIAL HAND this 7th day of
18 January, 2004.

19

20

21 RICHARD E. ROBERTS, JR., CSR #5411
Official Court Reporter
22 274th District Court, Comal County, Texas
P.O. Box 311905
23 New Braunfels, Texas 78131-1905
(830) 303-4188 Ext. 273
24 Texas CSR #5411, Expires 12-31-04

25

1

2 REPORTER'S RECORD

3 VOLUME 1 OF 1 VOLUME(S)

4 TRIAL COURT CAUSE NO(S). 98-0159-CV

5

6

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.	)	IN THE DISTRICT COURT
VS.	)	274TH JUDICIAL DISTRICT
PENSKE TRUCK LEASING COMPANY L.P., ET AL	)	HAYS COUNTY, TEXAS

10

11

12 **********
HEARING ON MOTIONS
****

13

14

15 ORIGINAL

16

17

18 On the 8th day of July, A.D., 2004, the Hearing
19 came on to be heard outside the presence of a jury, in the
20 above-entitled and numbered cause; and the following
21 proceedings were had before the Honorable Gary L. Steel, Judge
22 presiding, held in San Marcos, Hays County, Texas:
23 Proceedings reported by computerized stenotype
24 machine; Reporter's Record produced by computer-assisted
25 transcription.

RECEIVED
JUL 14 2004

EXHIBIT
E

1 landfill was hazardous and that Penske Truck Leasing Co.,
2 Inc., L.P., and Penske Logistics, Inc. had violated at least
3 five different provisions of the Texas regulations in both --
4 in regard to handling that waste.
5 We think -- and that has not been appealed. No
6 action has been taken to try to get that reversed. As a
7 matter of fact --
8 THE COURT: Does that include an order for
9 removal of the waste?
10 MR. DONALDSON: Yes, sir, it did. And they
11 were required to make arrangements for proper disposal of the
12 hazardous material prior to July 13th; and remove it prior to
13 July 13th; and remove all of the material -- not just the CRT
14 waste, but all of the comingled waste.
15 THE COURT: It appears to me -- and that's
16 basically what I heard. It appears to me that we're playing
17 in a whole new ball game, gentlemen. I remember two comments
18 that I made from the last trial when we mistrialed.
19 Number one is I told you guys that you're
20 right. Be careful what you ask for, because I may grant it,
21 regarding the motion for new trial -- I mean the mistrial.
22 And number two is we spent a majority of our
23 time dealing with the fact that TCEQ had not made any movement
24 in this: fed, state, strict liability. I mean, everything
25 from your pleadings down to probably the last ruling that I

1 made in the case had to do with "Who is the generator?" and
2 "We're not going to let the generator in" and the
3 responsibility for moving, which is the majority of these
4 damages.
5 I know this is on old case, but it's -- I'm not
6 saying that it's moot. And I'm telling you what I'm thinking
7 and then I will let you respond to that, if you really want to
8 proceed into trial, and I will listen to the arguments. That
9 is why we're doing this on the record instead of going back to
10 my quaint surroundings in Chambers.
11 To me, I'm looking at going this direction on
12 all of our rulings. First of all, it was a mistrial. So I
13 assume that some of your requests for revision of rulings had
14 to do with the trial and the discovery and the experts, et
15 cetera.
16 MR. DONALDSON: And frankly, Your Honor, the
17 effect of the mistrial -- and I don't think any of us knew
18 this at the time. But the effect of the mistrial is that it's
19 just as if the first trial never happened. We start all over
20 again. There is no scheduling order. There is nothing. We
21 start all over again.
22 MR. CHRISTIAN: And we -- we absolutely
23 disagree with that.
24 THE COURT: Well, I'll bet you your
25 disagreement is that it does not go to the fact that I don't

1 have the discretion to do it, if I should want to.
2 MR. CHRISTIAN: The Court certainly has the
3 discretion.
4 MR. DONALDSON: Every case that we have found
5 in which the Court has --
6 THE COURT: You know what? You're winning. To
7 argue I don't have discretion just pisses me off.
8 MR. DONALDSON: Okay. Then I will say nothing.
9 THE COURT: It almost starts with your
10 pleadings, Counsel. I have gone back and looked at those. And
11 if we have got TCEQ moving, it looks like to me it's now
12 totally a different lawsuit, from the pleadings, down to every
13 ruling.
14 MR. DONALDSON: We think so.
15 MR. CHRISTIAN: Your Honor, we have a serious
16 disagreement with --
17 THE COURT: Well, now it's your turn, Counsel.
18 MR. CHRISTIAN: -- that position. The TCEQ
19 looked at the issue. The TCEQ issued a notice of violation.
20 The TCEQ said that Penske could remove that material as a
21 special waste, not as a hazardous waste. Penske stood ready,
22 willing and able to do that. We showed up at TDSL and TDSL
23 said, "I'm not letting you take that out unless you take it
24 out as hazardous waste" in complete disregard of what the TCEQ
25 had said.

1 THE STATE OF TEXAS)

2 COUNTY OF HAYS)

3 I, RICHARD E. ROBERTS, JR., Official Court Reporter in
4 and for the 274th District Court of Hays County, State of
5 Texas, do hereby certify that the above and foregoing contains
6 a true and correct transcription of all portions of evidence
7 and other proceedings requested in writing by counsel for the
8 parties to be included in this volume of the Reporter's
9 Record, in the above-styled and numbered cause, all of which
10 occurred in open court or in chambers and were reported by me.

11 I further certify that this Reporter's Record of the
12 proceedings truly and correctly reflects the exhibits, if
13 any, offered by the respective parties.

14 I further certify that the total cost for the preparation
15 of this Reporter's Record is $277.00 and will be paid by
16 Mr. David Donaldson.

17 WITNESS MY OFFICIAL HAND this 9th day of
18 July, 2004.

19

20

21 RICHARD E. ROBERTS, JR., CSR #5411
Official Court Reporter
22 274th District Court, Comal County, Texas
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(830) 303-4188 Ext. 273
24 Texas CSR #5411, Expires 12-31-04

25

CAUSE NO. GN402245

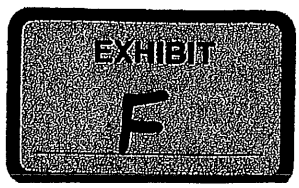
TEXAS DISPOSAL SYSTEMS LANDFILL, INC. AND TEXAS CAMPAIGN FOR THE ENVIRONMENT	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	TRAVIS COUNTY, TEXAS
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PENSKE TRUCK LEASING CO., L.P., AND PENSKE LOGISTICS LLC,	§	
Defendants	§	200TH JUDICIAL DISTRICT

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION

COME NOW Texas Disposal Systems Landfill, Inc., ("TDSL") and Texas Campaign for the Environment (collectively, "Plaintiffs") and file this their First Amended Original Petition seeking (1) judicial review of actions of Defendant, the Texas Commission on Environmental Quality ("TCEQ" or "Commission") and (2) declaratory relief against Defendants TCEQ and Penske Truck Leasing Co., L.P. and Penske Logistics LLC (collectively, "Penske"). In support, Plaintiffs would respectfully show the following:

I. CASE OVERVIEW

1. On July 19, 2004, Plaintiffs filed an appeal of prior decisions made by the Executive Director of the TCEQ; these decisions were memorialized in letters dated June 18, 2004 and June 30, 2004. TCEQ Commissioners reviewed the Executive Director's decisions that were the subject of the appeal and reversed those decisions on September 16, 2004. The cause number for this original petition is the cause number all causes have been consolidated into.



2. On September 24, 2004 the Executive Director issued another decision that authorizes the management of hazardous waste in violation of Texas and federal law. The September 24 decision provides in part:

> Alternatively, Penske may pursue the actions . . . relating to the assessment and any necessary extraction of the waste in the roll-off containers. If Penske pursues this approach, all activities associated with the assessment, characterization and extraction of the contents of the roll-off containers must be conducted at a separate authorized facility . . . . [T]he waste [must be] manifested as hazardous waste until such time as it is conclusively determined that no D008 waste at the level that is characteristically hazardous remains.

3. On October 18, 2004, Plaintiff TDSL filed a Motion to Overturn with TCEQ seeking to overturn a portion of the September 24, 2004 decision (the portion quoted above). TCEQ allowed TDSL's Motion to be denied by operation of law.[1] Plaintiffs also filed a second appeal of the September 24, 2004 decision, once TDSL's Motion was overruled, as a protective appeal.

4. Plaintiffs also seek declaratory relief against both TCEQ and Penske regarding TCEQ's interpretation of various regulations and its application of (or failure to apply) those regulations to Penske.

5. Plaintiffs further seek a declaration of the rights of the parties under the proper interpretation of TCEQ regulations.

II. DISCOVERY

6. This case is an appeal of an action of an administrative agency that occurred outside the contested case process of Texas Government Code Chapter 2001 and a suit for declaratory relief. The case, therefore, should be controlled by a Level 3 order, and

---

[1] *See* 30 Tex. Admin. Code § 50.139(f)(1) (motion to overturn is denied if not acted on by Commission within 45 days after date agency mails notice of executive director's action).

Plaintiffs may need to conduct discovery pursuant to the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 190.4.

III. JURSDICTION AND VENUE

7. Jurisdiction of this action lies in this Court pursuant to sections 5.351 and 5.352 of the Texas Water Code, section 361.321 of the Texas Health and Safety Code, Section 2001.038 of the Texas Government Code, sections 37.002 through 37.004 of the Texas Civil Practice and Remedies Code, and Article V, section 8 of the Texas Constitution. Venue is proper in this Court under section 5.354 of the Texas Water Code, section 361.321 of the Texas Health and Safety Code, and section 2001.038(b) of the Texas Government Code. Jurisdiction and venue are also proper in Travis County, Texas, because all or part of the acts and omissions complained of occurred in Travis County. TCEQ is located in Travis County.

IV. PARTIES

8. Plaintiff Texas Disposal Systems Landfill, Inc. is a Texas Corporation 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 for the management and disposal of municipal solid wastes pursuant to authorizations granted by TCEQ including MSW Permit No. 2123. TCEQ's decisions that are the subject of this appeal will have direct and adverse impacts on TDSL.

9. Plaintiff Texas Campaign for the Environment ("TCE") is a non-profit corporation operating as an environmental and conservation membership organization with offices in Austin, Texas. TCE has members who live or own land in many areas of Texas, including areas near municipal solid waste landfills. Members of TCE will be

directly and adversely affected by the decisions of TCEQ that are the subject of this appeal.

10. Defendant Texas Commission on Environmental Quality is an agency of this Sate responsible for, *inter alia*, implementation and administration of certain laws of Texas, including Chapter 361 of the Texas Health and Safety Code, which provides for regulation of the hazardous and municipal solid wastes that are the subject of the challenged action of TCEQ. Defendant TCEQ has been served with citation and has answered in this cause.

11. Defendant Penske Truck Leasing Co., L.P. is a Delaware limited partnership that conducts business in Texas. Defendant Penske Truck Leasing Co., L.P. has filed a Petition in Intervention in this cause and a general denial. It has also filed appeals of the decisions of TCEQ, appeals that have been consolidated with this proceeding.

12. Defendant Penske Logistics LLC is a Delaware limited liability company that conducts business in Texas. Defendant Penske Logistics LLC has filed a Petition in Intervention in this cause and a general denial. It has also filed appeals of the decisions of TCEQ, appeals that have been consolidated with this proceeding.

V. FACTUAL BACKGROUND

13. On October 9, 1997, a highway accident involving a truck owned by Defendant Penske Truck Leasing Co., L.P. and operated by Defendant Penske Logistics LLC resulted in the generation of a waste comprised of broken and discarded cathode ray tubes ("CRTs"). These CRTs were owned by Zenith Electronics Corporation ("Zenith"). Because of the lead content of the broken and discarded CRTs, the resulting waste (the "D008 CRT Waste") was and remains D008 CRT toxic characteristic hazardous waste.

14. Instead of sending the D008 CRT Waste to a facility authorized to accept hazardous waste, Penske initially designated the D008 CRT Waste as non-hazardous waste and authorized the D008 CRT Waste to be taken to the municipal solid waste landfill operated in Travis County, Texas, operated by TDSL. TDSL is not authorized by TCEQ or EPA to accept or manage hazardous waste. Upon later notification by Penske that the CRT Waste was actually hazardous waste, TDSL refused to accept additional loads of D008 CRT Waste, demanded that Penske remove its D008 CRT Waste, and isolated the D008 CRT Waste that had been commingled in the working face with municipal solid waste (the "commingled D008 CRT Waste"). The commingled D008 CRT Waste is currently stored at the TDSL landfill in secure containers awaiting removal by Penske under hazardous waste manifest for transportation to an authorized facility for proper treatment and disposal.

15. Penske corrected its initial misclassification of the D008 CRT Waste before all of the D008 CRT Waste was delivered to the TDSL landfill. The remainder of the D008 CRT Waste from the accident scene was properly managed by Penske for ultimate treatment and disposal at an authorized facility.

16. Landfills authorized to accept municipal waste and non-hazardous industrial waste are not designed or operated in a manner required for landfills or other facilities authorized to accept hazardous waste. Transport to and management of hazardous waste at landfills authorized for municipal or non-hazardous industrial waste create unreasonable risks to the landfill operators, to surrounding residents, and to the environment.

17. On May 13, 2004, TCEQ issued a notice of violation to Penske for failure to properly characterize and manage the D008 CRT Waste in accordance with Texas law.

18. On June 18, 2004, the Executive Director issued a letter authorizing Penske to transport and dispose of the commingled D008 CRT Waste in a manner that is inconsistent with Texas and federal law. On June 30, 2004, the Executive Director reaffirmed that decision. On September 16, 2004, the TCEQ Commissioners reversed those two decisions by granting TDSL's Motion to Overturn.

19. On September 24, 2004, the Executive Director issued another letter still allowing Penske the option of managing the commingled D008 CRT Waste in a manner that is inconsistent with Texas and federal law. TDSL filed a Motion to Overturn the Executive Director's September 24, 2004 decision. TDSL's Motion was denied by operation of law.

20. TCEQ's actions will set a precedent that creates new risks to the environment and to the public, including members of TCE who live, work, or own land near facilities, such as municipal solid waste landfills or non-hazardous industrial waste landfills. Individuals who live or work near such landfills have relied on TCEQ to enforce Texas and federal law in a manner that prevents hazardous waste, such as the D008 CRT Waste, from being disposed of at such landfills. Many such individuals have participated in permitting decisions by TCEQ on such landfills in large part to assure that the prohibitions for shipment of hazardous wastes to such landfills were clear and enforceable in agency-issued permits.

21. TCEQ's actions, to the extent they authorize the management of the commingled D008 CRT Waste in a manner inconsistent with Texas and federal law, will create civil

and criminal liability for TDSL under federal law if the commingled D008 CRT waste is allowed to be disposed of in a municipal solid waste landfill.

VI. ERROR OF DEFENDANT TCEQ

22. TCEQ, through its Executive Director, erred insofar as the September 24, 2004 decision allows the commingled D008 CRT Waste to be managed as non-hazardous waste, which is inconsistent with Texas and federal law. TCEQ's action is arbitrary and capricious, an abuse of discretion, inconsistent with Texas and federal law, and not supported by the evidence before the Commission.

VII. REQUEST FOR DECLARATORY RELIEF

23. In addition to seeking reversal and remand of TCEQ's actions, Plaintiffs seek a judgment declaring that TCEQ has improperly interpreted statutes and regulations and exceeded its statutory authority, adversely affecting Plaintiffs' rights.

24. Plaintiffs seek a declaration that a waste that has been classified as hazardous waste because of its toxic characteristics in accordance with TCEQ regulations must be manifested and managed as hazardous waste from the point of generation to the point of ultimate disposal under TCEQ rules. *See* 30 Tex. Admin. Code §§ 335.1, 335.10, 335.62, 335.431, 335.503, & 335.504.

25. Plaintiffs seek a declaration that the point of generation of the D008 CRT Waste was the October 9, 1997 accident scene.

26. Plaintiffs seek a declaration that the D008 CRT Waste generated at the accident scene is D008 toxic characteristic hazardous waste.

27. Plaintiffs seek a declaration that, under TCEQ rule 335.1(58), Penske was the generator of the D008 CRT Waste at the October 9, 1997 accident scene. *See* 30 Tex. Admin. Code § 335.1(58).

28. Plaintiffs seek a declaration that once the D008 CRT Waste was classified as D008 toxic hazardous waste, that waste classification cannot be changed even when the D008 CRT Waste was commingled with other waste.

29. Plaintiffs seek a declaration that the land disposal restrictions ("LDRs") attached at the point of generation of the D008 CRT Waste.

30. Plaintiffs seek a declaration that under 40 C.F.R. § 268.3 (the "Dilution Rule"), the commingled D008 CRT Waste stored at the TDSL landfill must be manifested, transported, treated, and disposed of at an authorized facility in accordance with the LDRs.

31. Plaintiffs seek a declaration that, under Texas and federal law, Penske, as generator of the D008 CRT Waste, is legally responsible for transportation of the commingled D008 CRT Waste under hazardous waste manifest to an authorized facility for treatment and disposal in accordance with the LDRs. *See* 30 Tex. Admin. Code §§ 335.10(a)(5), 335.431 (adopting by reference 40 C.F.R. Part 268).

VIII. PRAYER

WHEREFORE PREMISES CONSIDERED, Plaintiffs respectfully pray that this Court:

1. Reverse TCEQ's September 24, 2004 decision to the extent that such action authorizes the management of the commingled D008 CRT Waste as non-hazardous waste or in a manner inconsistent with Texas and federal law;

2. Declare that:

   - TCEQ has improperly interpreted Texas and federal law and exceeded its statutory authority, adversely affecting Plaintiffs' rights;

   - Waste that has been classified under 30 Tex. Admin Code §§ 335.1, 335.503, and 335.504 as hazardous waste because of its toxic characteristics must be manifested and managed as hazardous waste from the point of generation to the point of ultimate disposal in accordance with Texas and federal law;

   - The point of generation of the D008 CRT Waste was the October 9, 1997 accident scene;

   - The D008 CRT Waste generated at the accident scene was D008 toxic characteristic hazardous waste because of its lead content;

   - Under 30 Tex. Admin. Code § 331.1(58), Penske was the generator of the D008 CRT Waste at the October 9, 1997 accident scene;

   - Once the D008 CRT Waste was classified as D008 toxic characteristic hazardous waste, that classification cannot be changed even if the D008 CRT Waste was commingled with other waste;

   - The LDRs attached at the point of generation of the D008 CRT Waste;

   - Under 40 C.F.R. § 268.3, the commingled D008 CRT Waste stored at the TDSL landfill must be manifested, transported, treated, and disposed of at an authorized facility in accordance with the LDRs; and

   - Under Texas and federal law, Penske, as generator of the D008 CRT Waste, is legally responsible for transportation of the commingled D008 CRT Waste under hazardous waste manifest to an authorized facility for treatment and disposal in accordance with the LDRs;

3. Award Plaintiffs their costs, including attorneys' fees, under section 37.009 of the Texas Civil Practice and Remedies Code; and

4. Grant such further relief at law or in equity to which Plaintiffs may show themselves entitled.

Respectfully submitted,

LOWERRE & FREDERICK
Attorneys at Law
44 East Ave., Suite 100
Austin, Texas 78701
(512) 469-6000 phone, (512) 482-9346 fax

By: _____
Richard W. Lowerre
State Bar No. 12632900

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Plaintiffs' First Amended Original Petition has been sent by Fax and U.S. Mail, postage prepaid, on this the 23rd day of February, 2006 to the following:

Pamela M. Giblin
Derek R. McDonald
William P. Johnson
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Fax (512) 322-2501

Cynthia Woelk
Thomas Edwards
Natural Resources Division
Office of the Texas Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Fax (512) 320-0052

Richard W. Lowerre

No. 98-0159

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	)	IN THE DISTRICT COURT OF
Plaintiff,	)	
vs.	)	HAYS COUNTY, TEXAS
PENSKE TRUCK LEASING CO. L.P., PENSKE LOGISTICS, INC., and ZENITH ELECTRONICS CORP.	)	
Defendants,	)	207th JUDICIAL DISTRICT

PLAINTIFF'S REQUEST TO TAKE JUDICIAL NOTICE

TO THE HONORABLE GARY STEEL, JUDGE OF SAID COURT:

Now comes Texas Disposal Systems Landfill, Inc. ("TDSL"), and requests that the Court, pursuant to Rules 202 and 204, Texas Rules of Evidence, take judicial notice of the following statutory and regulatory provisions:

1. 30 TEX. ADMIN. CODE § 327.2(15)(C);
2. 30 TEX. ADMIN. CODE § 335.1(58);
3. 30 TEX. ADMIN. CODE § 327.2(15)(B);
4. TEXAS WATER CODE § 26.121;
5. TEXAS WATER CODE § 26.266;
6. TEXAS HEALTH AND SAFETY CODE § 361.134;
7. 30 TEX. ADMIN. CODE § 327.3;
8. 30 TEX. ADMIN. CODE § 330.5;
9. 30 TEX. ADMIN. CODE § 335.2;
10. 30 TEX. ADMIN. CODE § 335.10;
11. 30 TEX. ADMIN. CODE § 335.43;

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DISTRICT CLERK
HAYS COUNTY, TEXAS

EXHIBIT
G

12. 30 TEX. ADMIN. CODE § 335.62;

13. 30 TEX. ADMIN. CODE § 335.63;

14. 30 TEX. ADMIN. CODE § 335.65;

15. 30 TEX. ADMIN. CODE § 335.66;

16. 30 TEX. ADMIN. CODE § 335.67;

17. 30 TEX. ADMIN. CODE § 335.68;

18. 30 TEX. ADMIN. CODE § 335.69;

19. 30 TEX. ADMIN. CODE § 335.431;

20. 40 C.F.R. § 268.3;

21. 30 TEX. ADMIN. CODE § 335.504.

Respectfully submitted,

By: _____

David H. Donaldson, Jr.
State Bar No. 05969700
James A. Hemphill
State Bar No. 00787674
Graves Dougherty Hearon & Moody, P.C.
515 Congress Ave., Suite 2300
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Donaldson Fax: (512) 536-9905
Hemphill Fax: (512) 536-9907

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this ____ day of July 2004, to the following:

Douglas Y. Christian Reed Smith, L.L.P. 2500 One Liberty Place 1650 Market St. Philadelphia, PA 19103-7301 *via* Hand Delivery	William P. Johnson Baker Botts, L.L.P. 1500 San Jacinto Center 98 San Jacinto Blvd. Austin, Texas 78701-4039 *via* Hand Delivery
Attorneys for Penske Truck Leasing Co., L.P., and Penske Logistics, Inc.	
Philip L. Comella Seyfarth Shaw, LLP 55 East Monroe, Suite 4200 Chicago, Illinois 60603 *via* Hand Delivery	David W. Waddell Seyfarth Shaw, LLP 700 Louisiana Street, Suite 3850 Houston, Texas 77002-2731 *via* Hand Delivery
Attorneys for Zenith Electronics Corp.	

David H. Donaldson, Jr.
James A. Hemphill

CAUSE NO. GN401709

ASARCO INCORPORATED, Plaintiff,	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Defendants.	§	261ST JUDICIAL DISTRICT

FILED
05 MAR -9 PM 2:00
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

ORDER ON APPEAL FROM TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S ORDER DATED MAY 14, 2004

Came on for consideration on February 25, 2005 Plaintiff's Initial Brief, Defendants' Brief on the Merits, the City of El Paso's (Intervenor's) Brief, Plaintiff's Reply thereto, and numerous *amicus curiae* briefs. After considering the same, and after hearing arguments of counsel, the Court is of the opinion that the City of El Paso and Texas Commission on Environmental Quality's Pleas to the Jurisdiction should be denied.

With respect to Plaintiff's appeal, the Court will affirm the May 14, 2004 Order of the Texas Commission on Environmental Quality referring Plaintiff's application to renew to the State Office of Administrative Hearings. The Court is of the opinion that §382.056 only refers to public requests for a hearing, and therefore does not refer to the Commission's *sua sponte* right to refer for a contested case hearing. Additionally, the Legislative history refers to preventing costly hearings when requested by a concerned citizen, and does not refer to the Commission's right to refer a hearing in the public interest. Further, the language as set out in §382.056(g) that provides a hearing will not be held "in response to a request" is not superfluous, in that the language refers to hearings when requested, as opposed to hearings when referred *sua sponte* by the Commission. Based on this reasoning, the Court affirms the May 14, 2004 Order of the Commission.

All other relief not expressly granted is denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the City of El Paso and Texas Commission on Environmental Quality's Pleas to the Jurisdiction are DENIED.

VL 6778 PG 222

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Commission's May 14, 2004 Order is AFFIRMED.

SIGNED on March 9, 2005.

W. JEANNE MEURER
PRESIDING JUDGE

VL 6778 PG 223

APPENDIX

Penske Fact Chronology and Exhibits

Exhibit A — Fact Chronology

1997 Accident

1. On October 9, 1997, a Penske truck that was transporting new television picture tubes owned by Zenith braked and swerved to avoid a car that had crossed the median from northbound to southbound I-35 near Buda, Texas.[1] The Penske truck tipped over and slid down an exit ramp.[2] There is no dispute that the driver who crossed the median, not Penske, caused the accident.[3] In fact, after the accident the driver who crossed the median ran over and hugged the Penske driver and thanked him for saving his life.[4]

2. It is not clear how many, if any, tubes were broken as a result of the accident itself.[5] It is clear that cleanup contractors not hired by or affiliated in any way with Penske caused the picture tubes to spill from the truck and waste to be generated during the course of uprighting the truck and clearing the debris from the accident scene.[6]

3. Minutes after the accident, Texas Public Safety Officer Brian Acker arrived at the scene.[7] He was the "on scene commander" in charge of the activities in the aftermath of the

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[1] (Ex. 1, McCain Deposition at 71.4 – 71.25; Ex. 2, McCain Trial Transcript at 355.16 – 358.14)

[2] *Id.*

[3] (Ex. 3, Acker Trial Transcript at 141.5 – 142.6; Ex. 1, McCain Deposition at 166.15 – 168.15)

[4] (Ex. 2, McCain Trial Transcript at 359.2 – 360.2; Ex. 1, McCain Deposition at 166.15 – 168.15)

[5] (Ex. 4, Villapando Trial Transcript at 319.25 – 320.13; Ex. 2, McCain Trial Transcript at 360.3 – 360.20; Ex. 3, Acker Trial Transcript at 140.19 – 140.25; Ex. 5, Lee Machen Trial Transcript at 268.10 – 268.12)

[6] (Ex. 1, McCain Deposition at pp. 111.17 – 112.13, 112.24 – 113.7, 170.12 – 170.24, 175.13 – 180.25; Ex. 2, McCain Trial Transcript at 360.21 – 365.3; Ex. 4, Villapando Trial Transcript at 319.25 – 320.13, 321.17 – 321.24; Ex. 5, Lee Machen Trial Transcript at 246.11 – 247.9, 254.23 – 254.25; Ex. 6, Vallejo Deposition at p. 44.1 – 44.21; Ex. 7, Vallejo Trial Transcript at 900.17 – 900.24; Ex. 3, Acker Trial Transcript at 141.1 – 141.4, 145.10 – 145.19)

[7] (Ex. 3, Acker Trial Transcript at 97.2 – 97.10)

accident.[8] Penske played no role in the clean-up of the accident, the selection of the transporter, or the decision to send the accident debris to TDSL.[9]

4. Harry McCain, the Penske driver, was asked by Trooper Acker if he was hauling "haz-mat" or "hazardous materials," a term defined under the Department of Transportation regulations.[10] Mr. McCain answered correctly and truthfully that he was not.[11] It is undisputed that the intact television picture tubes that Mr. McCain was transporting for Zenith were not hazardous materials or hazardous waste.[12]

5. Mr. McCain was not asked any further questions regarding the characteristics of the television picture tubes.[13] Specifically, Mr. McCain was never asked if the accident debris (broken picture tubes, packaging materials, soils, and other debris) co nstituted a hazardous waste.[14]

6. Officer Acker called Special Automotive ("Special"), a wrecker service, to assist in the cleanup.[15] While Special was uprighting the truck, the side gave way, and the tubes fell out.[16]

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[8] (Ex. 8, Acker Deposition at 77.10 – 78.19; Ex. 3, Acker Trial Transcript at 116.22 – 117.2, 135.22 – 136.7; Ex. 2, McCain Trial Transcript at 360.21 – 361.3)

[9] (Ex. 2, McCain Trial Transcript at 364.6 – 365.3; Ex. 1, McCain Deposition at pp. 111.17 – 112.13, 113.24 – 114.3; 170.12 – 170.24, 179.22 – 180.25; Ex. 5, Lee Machen Trial Transcript at 246.11 – 247.9; Ex. 6, Vallejo Deposition at p. 21.15 – 22.3; Ex. 7, Vallejo Trial Transcript at 900.17 – 900.24)

[10] (Ex. 3, Acker Trial Transcript at 150.8 – 150.18; Ex. 2, McCain Trial Transcript at 351.9 – 352.9)

[11] *Id.*

[12] (Ex. 3, Acker Trial Transcript at 140.16 – 18; Ex. 2, McCain Trial Transcript at 351.9 – 351.19; Ex. 9, Reske Trial Transcript at 530.16 – 530.25; Ex. 10, Newton Deposition (7/25/2003) at 309.18 – 309.25; Ex. 11, James Gregory Deposition at p. 120.7 – 120.23; Ex. 12, Allen Deposition at 124.12 – 124.23; Ex. 13, Chandler Deposition at 91.11 – 91.16)

[13] (Ex. 2, McCain Trial Transcript at 351.20 – 353.6)

[14] (Ex. 2, McCain Trial Transcript at 351.9 – 353.6, 365.10 – 365.23; Ex. 12, Allen Deposition at 124.12 – 124.19)

[15] (Ex. 8, Acker Deposition at p. 27.5 – 27.21; Ex. 5, Lee Machen Trial Transcript at 250.24 – 251.7, 252.8 – 252.11)

7. A front-end loader was brought in to clean up the tubes.[17] The front-end loader brought in from the Texas Department of Transportation ("TxDOT") ran over and broke many tubes during the clean up.[18]

8. Rather than piling the material in the vicinity of the accident, as suggested by TxDOT, Special decided to take it away for disposal.[19] Officer Acker relied on Special to choose the disposal site.[20] Special asked Alfred Vallejo and M&M Trucking to go to the scene to remove the material.[21] Mr. Vallejo made the decision to take the tubes to TDSL because he had used that landfill before.[22] No one else had a say in the decision.[23] The debris was taken to TDSL by trucks lined up by Mr. Vallejo and M&M Trucking.[24]

9. Penske did not hire Special, TxDOT, Mr. Vallejo, or M&M Trucking and played no role in the decision to send the accident debris to TDSL.[25]

Disposal of the accident debris at TDSL

10. On the day of the accident, Penske worked diligently to assess the damage at the accident scene and take appropriate action. At 3:38 p.m., Penske personnel spoke with Zenith

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[16] (Ex. 1, McCain Deposition at pp. 175.13 – 180.25; Ex. 4, Villapando Trial Transcript at 319.25 – 320.13, 321.17 – 321.24; Ex. 2, McCain Trial Transcript at 361.21 – 363.11; Ex. 3, Acker Trial Transcript at 145.10 – 145.19; Ex. 5, Lee Machen Trial Transcript at 254.23 – 254.25)

[17] (Ex. 2, McCain Trial Transcript at 363.12 – 364.5)

[18] (Ex. 2, McCain Trial Transcript at 363.12 – 364.5; Ex. 1, McCain Deposition at pp. 112.24 – 113.7, 178.13 – 180.25; Ex. 6, Vallejo Deposition at p. 44.1 – 44.21; Ex. 3, Acker Trial Transcript at 141.1 – 141.4)

[19] (Ex. 14, Lee Machen Deposition at pp. 52-53, 75-76; Ex. 5, Lee Machen Trial Transcript at 189.23 – 190.7, 255.8 – 255.22)

[20] (Ex. 8, Acker Deposition at p. 85.2 – 85.25; Ex. 3, Acker Trial Transcript at 138.9 – 138.13)

[21] (Ex. 15, Judy Machen Deposition at pp. 12.23 – 13.24; Ex. 7, Vallejo Trial Transcript at 868.19 – 869.4)

[22] (Ex. 6, Vallejo Deposition at p. 21.2 – 22.3; Ex. 7, Vallejo Trial Transcript at 873.14 – 874.5, 894.25 – 895.3, 900.17 – 900.24)

[23] (Ex. 6, Vallejo Deposition at p. 21.15 – 22.3; Ex. 7, Vallejo Trial Transcript at 900.17 – 900.24)

[24] (Ex. 10, Newton Deposition (07/24/2003) at p. 108.13 – 108.24)

[25] (Ex. 2, McCain Trial Transcript at 364.6 – 365.3; Ex. 5, Lee Machen Trial Transcript at 246.11 – 247.9; Ex. 6, Vallejo Deposition at p. 21.15 – 22.3; Ex. 7, Vallejo Trial Transcript at 900.17 – 900.24; Ex. 1, McCain Deposition at pp. 111.17 – 112.13, 170.12 – 170.24, 179.22 – 180.25)

personnel and learned that broken television tubes were possibly hazardous.[26] At 4:03, Penske contacted the Texas Natural Resources Conservation Commission ("TNRCC") (predecessor to the Texas Commission on Environmental Quality ("TCEQ")) and informed it that the tubes contained lead and could be hazardous.[27]

11. At 4:08, the first dump trucks arrived at TDSL.[28] At 4:33, Penske spoke with Jim Gregory at TDSL and informed him that the load could be hazardous.[29] If TDSL had required a manifest or had inspected or held the loads for twenty-five minutes in order to contact Penske, Zenith, or state regulators, it could have avoided disposing of any accident debris into its landfill.

12. TDSL, however, accepted the accident debris for disposal without any contract, manifest, shipping document, or communication whatsoever with or from Penske or Zenith.[30]

13. In addition, at the time it accepted the accident debris, TDSL knew the debris contained broken television picture tubes (among other debris) and that television tubes contained lead.[31] Significantly, TDSL knew that it could accept television tubes in small quantities, but not larger quantities.[32]

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[26] (Ex. 16, Tony Marinello letter, October 16, 1997. TDSL claims that Penske was warned that broken tubes might contain hazardous waste earlier in the day and in a transportation agreement with Zenith. Penske disputes these claims.)

[27] (Ex. 17, Verbal Spill Incident Checklist)

[28] (Ex. 11, James Gregory Deposition at pp. 114.1 – 114.13; Ex. 18, Bob Gregory Deposition (05/29/2003) at pp. 224.24 – 225.19)

[29] (Ex. 11, James Gregory Deposition at p. 60.24 – 61.6; Ex. 18, Bob Gregory Deposition (05/29/2003) at pp. 224.24 – 225.19)

[30] (Ex., 11, James Gregory Deposition at pp. 25.25 – 26.17, 36.20 – 37.8, 122.3 – 123.17, 126.6 – 128.20, 132.19 – 133.8; Ex. 18, Bob Gregory Deposition (5/29/2003) at pp. 211.7 – 211.22 and Bob Gregory Deposition (2/10/2004) at pp. 273.20 – 274.7; Ex. 10, Newton Deposition (7/24/2003) at p. 200.20 – 200.24 and Newton Deposition (7/25/2003) at 308.9 – 308.16, 312.19 – 313.1)

[31] (Ex. 18, Bob Gregory Deposition (5/29/2003) at p. 273.5 – 273.14; Ex. 10, Newton Deposition (07/24/2003) at p. 205.22 – 205.25, 207.14 – 207.22, 208.17 – 208.25; Ex. 19, Hermann Trial Transcript at 983.10 – 983.18. 984.6 – 984.10)

[32] (Ex. 11, James Gregory Deposition at pp. 153.6 – 154.18; Ex. 19, Hermann Trial Transcript at 938.18 – 939.10)

14. Notwithstanding this knowledge, TDSL did not pass that information along to any of its employees.[33] Furthermore, TDSL failed to hold the accident debris in order to contact Penske, Zenith, or state regulators before allowing the accident debris past its gatehouse.[34] Instead, TDSL rushed seven dump-truck loads (98 cubic yards) of undocumented accident debris into its landfill.[35]

15. TDSL claims that it spoke with one person before accepting the waste.[36] TDSL alleges that Jim Gregory of TDSL spoke with Alfred Vallejo, an occasional hauler of construction debris to TDSL who helped arrange for dump trucks the day of the accident.[37] Mr. Vallejo, however, denies that he discussed the characteristics of the waste with Mr. Gregory.[38] Thus, at best TDSL spoke with one person, the dump-truck arranger, before rushing an unusually large load of TV tube debris into the working face of its landfill. At worst, TDSL spoke with no one.

16. There is no dispute that TDSL did not attempt to speak with Penske, Zenith, DPS, the Buda Fire Department, or the TNRCC about the characteristics of the undocumented waste before accepting the waste for disposal.[39]

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[33] (Ex. 18, Bob Gregory Deposition (5/29/2003) at p. 273.5 – 273.19; Ex. 19, Hermann Trial Testimony 984.17 – 985.3)

[34] (Ex. 11, James Gregory Deposition at p. 121.23 – 123.17; Ex. 10, Newton Deposition (7/24/2003) at 191.12 – 191.19)

[35] (Ex. 20, Jim Gregory's "Diary and Work Record" at TDS 02377; Ex. 19, Hermann Trial Transcript 1017.4 – 1017.16, 1101.2 – 1101.4)

[36] (Ex. 11, James Gregory Deposition at pp. 24.3 – 24.18, 26.23 – 27.15, 34.12 – 34.19, 37.4 – 38.23, 104.7 – 104.22)

[37] *Id.*

[38] (Ex. 7, Vallejo Trial Transcript at 884.11 – 884.22, 887.9 – 889.15)

[39] (Ex. 19, Hermann Trial Transcript at 1079.12 – 1079.19; Ex. 11, James Gregory Deposition at 25.25 – 26.17, 26.23 – 27.4, 34.12 – 34.19, 36.20 – 37.8, 37.4 – 38.23, 122.3 – 123.17, 126.6 – 128.20, 132.19 – 133.8; Ex. 18, Bob Gregory Deposition (5/29/2003) at pp. 211.7 – 211.22 and Bob Gregory Deposition (2/10/2004) at pp. 273.20 – 274.7; Ex. 10, Newton Deposition (7/24/2003) at p. 200.20 – 200.24 and Newton Deposition (7/25/2003) at 308.9 – 308.16, 312.19 – 313.1)

Removal of the accident debris from TDSL

17. On the day of the accident, TDSL disposed of 98 cubic yards of accident debris consisting of television picture tubes, packaging materials, soils, and other materials from the scene of the accident.[40] In other words, the 98 cubic yards did not consist purely of damaged tubes; rather, the waste was a mixture of broken tubes and all of the other debris and materials generated at the scene of the accident.

18. After Penske told TDSL to stop dumping the accident debris into the landfill's working face, a company called Code 3 was hired to complete the clean-up process and remove all remaining debris from the accident scene.[41] Code 3 removed the remaining debris from the accident scene and placed the debris into four lined roll-off containers.[42] The four roll-offs were stockpiled (not disposed of) at TDSL awaiting further instructions.

19. On October 10, 1997 (the day after the accident), TDSL removed approximately 80 cubic yards of television-tube glass and waste mixed with the television-tube glass from its working face.[43] TDSL used both heavy machinery and hand-picked out the television-tube glass.[44] TDSL placed the 80 cubic yards of television-tube glass debris into roll-off containers and stockpiled the roll-offs with the four other roll-offs from the accident scene.[45]

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[40] (Ex. 21, Code 3 Segregation Report; Ex. 19, Hermann Trial Transcript at 1101.9 – 1102.6; Ex. 22, Newton Trial Transcript at 1279.20 – 1280.5; Ex. 11, James Gregory Deposition at 251.25 – 252.4; Ex. 18, Bob Gregory Deposition (10/13/2003) at p. 20.22 – 21.1)

[41] (Ex. 23, Code 3 to Penske letter, November 24, 1997)

[42] (Ex. 23, Code 3 to Penske letter, November 24, 1997; Ex. 21, Code 3 Segregation Report; Ex. 19, Hermann Trial Transcript at 1100.23 – 1101.01; Ex. 22, Newton Trial Transcript at 1292.9 – 1292.18)

[43] (Texas Disposal Systems Landfill, Inc.'s Brief in Support of Motions to Overturn ("Motion to Overturn Brief") at p. 5 ("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."); Ex. 20, Jim Gregory's "Diary and Work Record" at TDS 02377 ("We spent the whole day working on the 98 yds of hazardous that was dumped over the entire area. We loaded up 2 40 yds with stuff from the wreck that the 7 small dump trucks dumped on our working face."))

[44] (Ex. 18, Bob Gregory Deposition (10/13/2003) at 16.24 – 17.21)

[45] *Id.*

20. After TDSL's removal of all visible glass, approximately 18 cubic yards of accident debris remained disposed of in TDSL's landfill on the day after the accident. Because TDSL removed all visible television-tube glass and waste mixed with television-tube glass from its working face, it is highly questionable whether any leaded glass remained in the working face of TDSL's landfill. TDSL has never proved, or even bothered to prove, that any appreciable lead remained after its excavation the day after the accident.

21. It is clear that on the day after the accident, the overwhelming majority of the accident debris were stockpiled (not disposed of) in seven roll-off containers (approximately 280 cubic yards) at TDSL awaiting final disposal.[46] In February 1998, Code 3 was hired to separate the "hazardous" portion of the accident debris waste stockpiled in the roll off containers from the non-hazardous portion.[47] It separated two roll-offs of what it conservatively considered "hazardous" waste, including glass-containing soil.[48] The five remaining roll-offs contained the "non-hazardous" accident debris.[49]

22. On March 23, 1998, the two roll-offs containing the television-tube glass were shipped to Texas Ecology ("TECO") for disposal.[50] The remaining roll-offs were sent to a municipal solid waste facility for disposal.[51]

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[46] Code 3's records indicate that it removed four roll-off containers of debris from the accident scene on October 9, 1997. Code 3's records further indicate that it sorted through seven roll-off s stockpiled at TDSL in February, 1998. Based on these records, it is likely that TDSL removed three, not two, roll-offs of television-tube glass debris from its working face on the day after the accident.

[47] (Ex. 21, Code 3 Segregation Report, January 19, 1998)

[48] (Ex. 21, Code 3 Segregation Report, January 19, 1998; Ex. 19, Hermann Trial Transcript at 1101.5 – 1101.8)

[49] (Ex. 21, Code 3 Segregation Report, January 19, 1998; Ex. 22, Newton Trial Transcript at 1292.9 – 1292.18)

[50] (Ex. 18, Bob Gregory Deposition (10/13/2003) at 32.13 – 32.23; Ex. 22, Newton Trial Transcript at 1399.2 – 1399.12)

[51] (Ex. 18, Bob Gregory Deposition (10/13/2003) at 32.13 – 32.23; Ex. 22, Newton Trial Transcript at 1292.9 – 1292.18, 1399.2 – 1399.12)

23. On April 2, 1998, TECO tested a representative sample of the television-tube glass and soil-glass mixture using the Toxicity Characteristic Leaching Procedure ("TCLP") method. It detected no leachable lead in the sample at a reporting level of 0.1 ppm.[52] To reiterate, TECO conducted the test on the "worst" part of the accident debris that was collected in two roll-offs. Thus, the only data on the accident debris itself (in fact, the worst part of the debris) shows that the material TDSL accepted for disposal was not a hazardous waste.

TNRCC Inspection

24. The TNRCC was responsive and involved in the appropriate disposal of the accident debris from day one. Jim Gregory testified that he notified Mr. Ben Milford at the TNRCC immediately after TDSL had disposed of the seven dump trucks loads of potentially hazardous waste.[53] Representatives from Penske and/or Zenith spoke with Mr. Milford at approximately 5:30 p.m. on the day of the accident.[54] Mr. Milford then immediately contacted TDSL and personally visited the accident scene.[55]

25. On November 5, 1997, the TNRCC requested that Penske provide a description of the incident and documentation of the proper disposal of the waste generated.[56]

26. On December 2, 1997, Marc Althen, Senior Vice President at Penske, wrote a letter to Chris Smith at the TNRCC detailing Penske's plan to remove the "stockpiled waste" stored at TDSL's landfill.[57] As stated, Penske's contractor removed the stockpiled waste contained in the seven roll-off containers on March 23, 1998.

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[52] (Ex. 24, TECO Test Results)

[53] (Ex. 11, Jim Gregory Deposition at p. 71.4 – 71.24)

[54] (Ex. 25, Milford Deposition at 61.11 – 63.24, 64.7 – 64.23)

[55] *Id.*

[56] (Ex. 26, TNRCC to Penske letter, November 5, 1997)

[57] (Ex. 27, Penske to TNRCC letter, December 2, 1997)

27. On May 20, 1998, Marc Althen informed Ben Milford that the stockpiled waste had been removed from TDSL and provided Mr. Milford with copies of the transportation manifests.[58] Penske took all precautions and removed and disposed of the stockpiled waste as hazardous.[59] Later testing by the disposal facility, TECO, confirmed that the waste was in fact non-hazardous.[60]

28. On May 21, 1998, TNRCC Regional Inspector Ben Milford issued an inspection report to TDSL stating that: "The TNRCC allowed the spill waste that was inadvertently deposited in the landfill to remain there."[61] Ben Milford testified that the report meant that TDSL could permanently dispose of the tubes, not simply temporarily store the tubes.[62]

29. On June 10, 1998, the TNRCC issued a spill report that stated that "the TNRCC allowed them [TV tube debris] to remain in the landfill."[63] Again, Ben Milford testified that the TNRCC "allowed it [the waste] to stay there just like any other waste."[64]

TDSL agreed that the waste could remain at its landfill

30. Like the TNRCC, TDSL agreed in 1998 that the waste could remain at its landfill.

31. On January 28, 1998, Mr. Gary Newton (TDSL's general counsel) sent Mr. Gerald Bolmer (TNRCC Waste Evaluation Section) a draft request to classify the waste as Class 1, non-hazardous waste and permanently dispose of the waste in TDSL's landfill.[65] Mr. Newton testified that he spoke with the TNRCC and they "didn't have any problem" with the material

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[58] (Ex. 28, Penske to TNRCC letter, May 20, 1998)

[59] *Id.*

[60] (Ex. 24, TECO Test Results)

[61] (Ex. 29, TNRCC Inspection Report, May 21, 1998)

[62] (Ex. 25, Milford Deposition at 47.24 – 49.13)

[63] (Ex. 30, TNRCC Spill Report, June 10, 1998)

[64] Ex. 25, Milford Deposition at 67.20 – 68.8)

[65] (Ex. 31, Newton to Bolmer facsimile, January 28, 1998)

remaining in the landfill.[66] Bob Gregory agreed that TDSL could permanently dispose of the waste with special authorization from the TNRCC, and that the TNRCC "would and could allow them [the waste] to remain if we requested it."[67]

32. On February 3, 1998, TDSL wrote Penske a letter offering to resolve the incident with Penske and permanently dispose of the material in its landfill. TDSL stated that "[n]ow it appears that the TNRCC is willing to allow the tubes to remain in the TDSL landfill without further testing."[68] TDSL attached a draft request for Penske's signature asking the TNRCC for approval to permanently dispose of the material at TDSL.[69]

33. On February 6, 1998, Penske responded to TDSL and stated that it agreed to send the "written request to the Texas Natural Resource Conservation Commission ("TNRCC") for permission to permanently dispose of the television tubes already in place at the landfill."[70] Penske also agreed to pay for and remove all the material stockpiled in the roll-off boxes at TDSL.[71]

34. The proposed resolution, however, fell through for one reason — money. TDSL demanded approximately $320,000 in alleged damages and Penske refused to pay this amount.[72] The parties agreed that the remaining television tube debris could be disposed of at TDSL with TNRCC authorization, but could not agree on monetary terms.[73]

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[66] (Ex. 10, Newton Deposition (07/24/2003) at p. 224.4 – 224.21)

[67] (Ex. 18, Bob Gregory Deposition (05/29/2003) at 164.7 – 164.21, 189.14 – 189.24)

[68] (Ex. 32, TDSL to Penske, February 3, 1998)

[69] *Id*

[70] (Ex. 33, Penske to TDSL, February 6, 1998)

[71] *Id.*

[72] (Ex. 32, TDSL to Penske, February 3, 1998; Ex. 33, Penske to TDSL, February 6, 1998)

[73] *Id.*

35. After Penske refused to pay TDSL $320,000 in alleged damages, TDSL sued Penske in February, 1998.

TDSL's claims that the TCEQ failed to act are false

36. TDSL's claim that the TCEQ failed to act timely is simply false. In early 1998, Penske removed the waste stockpiled in the roll-offs as requested and the TNRCC allowed the 18 cubic yards of disposed-of waste to remain safely in TDSL's landfill, which is permitted to accept such waste. Neither Penske nor TDSL was under any obligation to ever remove the 18 cubic yards of waste disposed of at TDSL's landfill.

37. While TDSL could have allowed the 18-cubic yards to remain at its landfill in accordance with the TNRCC's decision in 1998, this would have conflicted with TDSL's litigation strategy to sue Penske and Zenith to recover millions in alleged damages.

38. TDSL did not seek further TNRCC or TCEQ involvement until six years later in March, 2004, on the eve of trial in its lawsuit against Penske, Zenith, and Harry McCain (the Penske driver). From February 1998 through March 2004, TDSL pursued common-law tort claims against Penske, Zenith, and McCain in an effort to recover millions in an opportunistic lawsuit.[74] TDSL continues to pursue its claims against Penske and Zenith seeking to recover over seven and a half million dollars in alleged damages and attorneys' fees.[75]

39. In January 13, 2004 (on the eve of an earlier trial setting) Bob Gregory sent Wade Wheately a letter with many questions including "Does the attached TNRCC Oil or Hazardous Substances Spill or Discharge Report signed June 10, 1998, which states that, 'The TNRCC

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[74] TDSL sued but later settled with Dax Taylor (the Mustang driver who caused the accident).

[75] (Ex. 34, TDSL's Eleventh Supplemental Responses to Request for Disclosure Under Rule 194.2)

allowed them to remain in the landfill,' in any way ***require*** TDSL to permanently keep the generator designated hazardous waste in the TDSL landfill against its will?"[76]

40. On January 15, 2004, Mr. Wheatley responded that "given the environmental considerations associated with this waste material being managed in your landfill, it is ***acceptable*** to place the referenced waste material into transport containers and to ship the waste material to an authorized facility."[77]

41. TDSL then voluntarily choose to remove the municipal solid waste from its facility. Neither the TCEQ nor Mr. Wheatley stated that TDSL was required to remove the municipal solid waste.

42. Rather, TDSL fabricated an alleged "emergency" situation by digging up the municipal solid waste and placing it into roll-off boxes 11 days before a scheduled trial as a litigation strategy. Until Penske received the NOV, the TCEQ had allowed the waste to remain safely disposed of at TDSL's site and Penske had previously complied with all TCEQ requests by removing the waste stockpiled in the roll-off containers.

Excavation and testing of municipal solid waste

43. In early 2004, over six years after TDSL removed all but 18 yards of the accident debris from its landfill, TDSL voluntarily excavated approximately 1600 cubic yards of waste from the landfill and placed it into 99 roll-offs. TDSL excavated all the waste it had received on October 9, 1997 even though there was no indication that any leaded glass from the accident remained in the landfill after TDSL's removal of all visible glass the next day.

44. While it was being removed from the landfill, it was sampled by Penske's contractor SKA Consulting LP ("SKA"). The result of the sampling performed by SKA, as well

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[76] (Ex. 35, Gregory letter to Wheatley, January 13, 2004) (emphasis added)

[77] (Ex. 36, Wheatley letter to Gregory, January 15, 2004) (emphasis added)

as the sampling later performed by the Executive Director, confirm that the waste is non-hazardous. In fact, out of the numerous representative samples tested, none detected leachable lead greater than 0.1 mg/L.[78]

45. The waste has remained in the roll-offs at the landfill since that date as TDSL made no arrangements for its disposal. TDSL alleges that Penske and Zenith must remove all 1600 cubic yards as hazardous waste, despite the testing results to the contrary from TECO, SKA, and the Executive Director.

TDSL holds the excavated municipal solid waste hostage

46. Although Penske continues to believe that it did not violate any rule and that the material does not need to be removed from TDSL's landfill — a fact borne out by the TNRCC's conclusion years ago that the material could remain in the TDSL landfill and the results of recent testing by Penske and the TCEQ — on June 1, 2004, Penske proposed a plan for the removal and disposal of the waste from the TDSL landfill as a non-hazardous waste at another permitted municipal solid waste landfill in accordance with the actions requested of it by the Executive Director on May 13, 2004.[79]

47. That plan was approved by the Executive Director on June 18, 2004, and specific authorization was granted by the Executive Director for disposal of the waste as a special waste in any one of seven permitted landfills on June 30, 2004.[80]

48. Penske's efforts culminated in final preparations for the pick up of the waste by its contractor USA Environment on July 7, 2004.[81] TDSL, however, refused to allow access to the landfill for removal of the waste unless the waste was managed as a hazardous waste.[82]

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[78] (Ex. 37, SKA Testing Results)

[79] (Ex. 38, Penske to TCEQ, June 1, 2004)

[80] (Ex. 39, TCEQ to Penske, June 18, 2004, and Ex. 40, TCEQ to Penske, June 30, 2004)

49. In response to TDSL's refusal to allow Penske to remove the waste, the TCEQ performed independent representative sampling and testing of the waste.[83] On July 12, 2004, the Executive Director collected 20 representative samples of the waste in the roll-offs. The testing of those samples by MicroLife Laboratories, Ltd. further confirms the non-hazardous character of the stored waste, with no TCLP result exceeding 0.092 mg/L.[84] TDSL, however, has again refused to allow Penske to remove the waste unless the waste is managed as a hazardous waste.[85]

50. TDSL actions crystallize what this dispute is about – TDSL would rather keep the waste and claim it is hazardous in an effort to improve its chances of recovering millions in a civil lawsuit than allow Penske to dispose of the waste as non-hazardous pursuant to TCEQ's approved disposal plan.

TDSL sues the TCEQ

51. Instead of rejoicing that the waste is non-hazardous and facilitating the removal of the waste, on July 9 and July 22, 2004, TDSL filed motions to overturn the Executive Director's decisions on the classification of the waste. A hearing is schedule on TCEQ's motions on September 16, 2004.

52. On July 19, TDSL appealed the Executive Director's ruling classification of the waste and sued the TCEQ in Travis County District Court.

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[81] (Ex. 41, Penske to TDSL, July 1, 2004)

[82] (Ex. 42, Penske letter to TCEQ, July 7, 2004)

[83] (Ex. 43, TCEQ letter to TDSL, July 8, 2004, and Ex. 44, TCEQ letter to Penske, July 13, 2004)

[84] (Ex. 45, MicroLife Testing Results; Ex. 46, TCEQ letter to Penske, July 23, 2004, and Ex. 47, TCEQ letter to TDSL, July 28, 2004)

[85] (Ex. 48, TDSL letter to Penske, July 27, 2004)

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS * IN THE DISTRICT COURT
LANDFILL, INC., *
3 Plaintiff, *
*
4 VS. * OF HAYS COUNTY, TEXAS
*
5 PENSKE TRUCK LEASING CO., *
L.P., PENSKE LOGISTICS, *
6 INC., ZENITH ELECTRONICS *
CORP., ZENITH ELECTRONICS *
7 OF TEXAS, INC., and HARRY *
ERNEST McCAIN, *
8 Defendants. * 207TH JUDICIAL DISTRICT

9 **********

10 VIDEOTAPED DEPOSITION OF

11 HARRY ERNEST McCAIN

12 TAKEN JUNE 9, 2003

13 **********

14 VIDEOTAPED DEPOSITION of HARRY ERNEST McCAIN,
15 produced as a witness at the instance of the Plaintiff,
16 and duly sworn, was taken in the above-styled and
17 numbered cause on the 9th day of June, 2003, from
18 10:07 a.m. to 3:45 p.m., before Janet L. Hamm, CSR in
19 and for the State of Texas, reported by machine
20 shorthand, at the offices of George & Donaldson, L.L.P.,
21 1100 Norwood Tower, 114 West Seventh Street, Austin
22 Texas, pursuant to the Texas Rules of Civil Procedure
23 and the provisions stated on the record or attached
24 hereto.
25

1 A P P E A R A N C E S

2 FOR THE PLAINTIFF:

3 Mr. David H. Donaldson, Jr.
GEORGE & DONALDSON, L.L.P.
4 1100 Norwood Tower
114 West Seventh Street
5 Austin, Texas 78701

6
FOR DEFENDANTS PENSKE TRUCK LEASING CO., L.P., PENSKE
7 LOGISTICS, INC., and HARRY ERNEST McCAIN:

8 Mr. Douglas Y. Christian
REED SMITH, LLP
9 2500 One Liberty Place
1650 Market Street
10 Philadelphia, Pennsylvania 19103

11
FOR DEFENDANTS ZENITH ELECTRONICS CORP. AND ZENITH
12 ELECTRONICS OF TEXAS, INC.:

13 Mr. Philip L. Comella
SEYFARTH SHAW
14 55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
15

16 ALSO PRESENT:

17 Mr. Jim Gregory
Mr. Tim Bishop, Videographer
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:48:55 1 accident?

11:48:55 2 A It had been raining, and at the time it was

11:48:58 3 sprinkling. The roads were still wet, though.

11:49:06 4 Q Okay. Why don't you tell me in your own words,

11:49:08 5 as you can remember it now, how the accident happened.

11:49:11 6 A Well, I was rolling south in the center lane

11:49:15 7 and traffic fairly far behind me, a little less than a

11:49:19 8 mile but more than a half-mile, from what I could see.

11:49:21 9 I was watching oncoming traffic, and this little green

11:49:26 10 car, he just -- you could see him heading for the

11:49:29 11 median.

11:49:31 12 He went into the median. I seen him, and

11:49:34 13 I figured with the angle we had, if I move to the left,

:49:38 14 he's going to come right across in front of me. With no

11:49:41 15 traffic behind me, he's going to slide right off the

11:49:43 16 other side.

11:49:44 17 And like I said, when he came up through

11:49:46 18 the median and came up on top of the roadway, it was

11:49:48 19 like we made eye contact. And apparently he must have

11:49:51 20 hit the brakes or did something because it caused him to

11:49:55 21 spin, at which time I applied the brakes harder, and my

11:50:00 22 front -- right front clipped his right rear, I guess,

11:50:04 23 depending on the angle. And when the tire blew out, it

11:50:08 24 caused it to dig in, the trailer came up, and we laid

11:50:12 25 over and slid right down the exit ramp.

:35:08 1 Q (By Mr. Donaldson) You were still in the
13:35:09 2 trooper's car at that point?
13:35:11 3 A Yes, sir.
13:35:12 4 Q Did you ever get involved -- actually get out
13:35:14 5 of the car and get over there and start working on the
13:35:17 6 truck itself?
13:35:18 7 A Working on the truck?
13:35:20 8 Q Like pick --
13:35:22 9 A I sat in the truck. Yes, sir. I went in and
13:35:25 10 put my stuff together, moved stuff around. It was my
13:35:27 11 job to ensure there weren't no fluids on the ground and
13:35:31 12 make sure that area was squared away. Once they
13:35:33 13 uprighted it I had to make sure I had no fluid leaks,
13:35:36 14 which we didn't -- well, we had a small amount of
13:35:39 15 antifreeze, but not much. So I just secured my scene
13:35:43 16 and let them do what they've already done.
13:35:46 17 Q Did you have any involvement in the decision on
13:35:49 18 how to clean up --
13:35:52 19 A No, sir.
13:35:52 20 Q -- the stuff?
13:35:52 21 A I lost control of that once Officer Acker got
13:35:57 22 there.
13:35:57 23 Q Did you observe Officer Acker take any action
13:36:00 24 with regard to cleaning up the stuff once it was on the
13:36:03 25 highway?

:36:03 1 A No, sir. He just sat in his car.
13:36:05 2 Q Was there anyone else that you saw that seemed
13:36:08 3 to be acting like they were in charge of the cleanup
13:36:11 4 operation?
13:36:12 5 A Of the cleanup itself?
13:36:14 6 Q Yes, sir.
13:36:16 7 MR. CHRISTIAN: Object to the form.
13:36:18 8 A Yeah, because that's -- that's once again a
13:36:21 9 timing thing. Officer Acker contacted the wrecker. The
13:36:25 10 wrecker called in a front-end loader -- or he called in
13:36:28 11 the trucks first and then the trucks called in the
13:36:32 12 front-end loader. So I think after the wrecker got
13:36:34 13 there he kind of took control of the cleanup.
13:36:37 14 Q (By Mr. Donaldson) And the front-end loader,
13:36:48 15 do you know --
13:36:49 16 A From what I overheard from discussions, it was
13:36:51 17 brought in from the cement plant there in Buda.
13:36:58 18 Q And who was operating it? Do you know?
13:37:00 19 A I assume it was an employee of the cement
13:37:02 20 plant. I didn't question him.
13:37:04 21 MR. CHRISTIAN: Harry, if you don't know,
13:37:06 22 just tell him you don't know.
13:37:08 23 THE WITNESS: Oh, okay.
13:37:10 24 Q (By Mr. Donaldson) And how -- how was the
13:37:12 25 loader -- was it just scraping -- picking it up and

:37:18 1 dropping it into the dump trucks?
13:37:23 2 A No, sir. He was driving up onto the product --
13:37:26 3 you could hear the tubes busting under the wheels --
13:37:29 4 trying to shift it around. He climbed up the tubes to
13:37:32 5 get to what was laying -- what was left at the bottom of
13:37:35 6 the trailer to lift that out first, and then he dumped
13:37:39 7 the tubes into the truck.
13:37:44 8 Q How many dump trucks were filled?
13:37:49 9 MR. CHRISTIAN: Object to the form.
13:37:51 10 A I don't know, four or five, maybe less, maybe
13:38:00 11 more.
13:38:00 12 Q (By Mr. Donaldson) Did anyone ask you how
13:38:06 13 Penske disposed of the broken tubes?
14 A No, sir.
13:38:08 15 MR. COMELLA: Objection, form.
13:38:11 16 MR. CHRISTIAN: Excuse me. First of all,
13:38:13 17 were you finished with your question?
13:38:14 18 MR. DONALDSON: Well, let me try again.
13:38:15 19 Q (By Mr. Donaldson) Did anyone ask you how
13:38:18 20 Penske would dispose of broken tubes if they were broken
13:38:20 21 at a warehouse or some other location?
13:38:22 22 MR. CHRISTIAN: Object to the form.
13:38:24 23 A No, sir.
13:38:24 24 Q (By Mr. Donaldson) Did you make any
13:38:29 25 suggestions to anyone at the scene as to how these tubes

13:38:32 1 ought to be disposed of?
13:38:35 2 A Once they dumped them out on the ground and
13:38:37 3 destroyed them? No, sir.
13:38:43 4 Q As far as you knew, could those tubes be
13:38:46 5 disposed of in the same way you dispose of any other
13:38:50 6 household waste?
13:38:51 7 MR. COMELLA: Objection, form.
13:38:54 8 A I don't know, to my knowledge.
13:38:56 9 Q (By Mr. Donaldson) What was the next thing --
13:39:06 10 the loading is going on. You get into the truck. You
13:39:08 11 kind of secure the truck, make sure that it's not
13:39:11 12 leaking. Where were you -- did you stay in the cab of
13:39:14 13 the truck at that point?
13:39:15 14 A I just sat in the passenger seat for a while,
13:39:17 15 and I got out and I talked to him (indicating) for a
13:39:19 16 while, and I talked to other people who were there.
13:39:23 17 There must -- there were a good 10, 15 different people
13:39:26 18 walking that scene.
13:39:27 19 MR. CHRISTIAN: By "him" you mean Jim
13:39:29 20 Gregory?
13:39:30 21 THE WITNESS: Yes, sir.
13:39:32 22 Q (By Mr. Donaldson) Well, describe for me your
13:39:34 23 conversations with Mr. Gregory.
13:39:37 24 A Just -- well, we spent a lot of time talking
13:39:39 25 about his pickup truck, I know that, and we just talked

14:55:49 1 Q At the time you had your cruise control set --
14:55:53 2 A 55, yeah.
14:55:53 3 Q At the time -- you had your cruise control set
14:55:57 4 well within the speed limit at the time; is that
14:55:59 5 correct?
14:55:59 6 A Yes, sir, in accordance with conditions.
14:56:04 7 Q And prior to this incident you had not had a
14:56:08 8 traffic accident while driving a commercial semi-truck;
14:56:13 9 is that correct?
14:56:13 10 A That's correct.
14:56:14 11 Q And you had one prior speeding ticket --
14:56:17 12 A That's correct.
14:56:17 13 Q -- when you were going 68 in a 55, correct?
14:56:20 14 A Yes, sir.
14:56:21 15 Q And at the time of the accident you recall
14:56:25 16 seeing the Mustang swerve into the median strip and head
14:56:34 17 towards the southbound lane of Highway 35, correct?
14:56:41 18 A Yes, sir.
14:56:42 19 Q And you recall specifically seeing the eyes of
14:56:48 20 the driver of the Mustang, correct?
14:56:50 21 A Yes, sir.
14:56:50 22 Q And did it flash in your mind at that time that
14:56:53 23 if you did not do something while driving, that you
14:56:56 24 might have seriously injured the driver, if not killed
14:57:00 25 him?

14:57:00 1 A Yes, sir, that's all that was going through my
14:57:03 2 mind.
14:57:03 3 Q And at that time, Mr. McCain, I understand that
14:57:08 4 you reacted as you did, which is to swerve your truck
14:57:11 5 out of the way in order not to seriously, if not
14:57:17 6 fatally, injure the driver of this -- of that Mustang;
14:57:21 7 is that correct?
14:57:22 8 A Correct.
14:57:22 9 Q And you took the evasive action that you
14:57:24 10 believed was necessary based upon your experience and
14:57:26 11 training, correct?
14:57:27 12 A Yes.
14:57:30 13 Q And if I understand this correctly, Mr. McCain,
14:57:33 14 because you did swerve, you avoided a direct collision
14:57:38 15 with the Mustang; is --
16 A Yes.
14:57:40 17 Q -- that correct? And is there any doubt in
14:57:43 18 your mind following this incident that other people
14:57:47 19 acknowledged that your evasive action helped prevent a
14:57:52 20 more serious accident from occurring?
14:57:54 21 A Yes, sir [sic].
14:57:56 22 Q And did you receive any comments from those at
14:58:00 23 the scene about the evasive action you took?
14:58:03 24 A Yes, sir.
14:58:03 25 Q And from who, for example?

58:05 1 A Oh, just about everybody that was there.
14:58:08 2 Q And what --
14:58:09 3 A To include the -- the individual, Dax Taylor,
14:58:13 4 who was driving the Mustang, who --
14:58:14 5 Q And what did he say to you?
14:58:15 6 A He ran up and gave me a hug and told me I saved
14:58:19 7 his life; if not for the evasive action he would have
14:58:23 8 been pinned under my front axle, probably to up to his
14:58:28 9 headlights -- I mean, windshield.
14:58:30 10 Q And leaving aside this incident with the TV
14:58:33 11 tubes, are you proud of what you did that day?
14:58:35 12 A Yes, sir.
14:58:37 13 Q Because, in fact, you probably did save Mr. Dex
14:58:42 14 Taylor's life; is that correct?
14:58:44 15 A Yes, sir.
14:58:44 16 Q Because your semi-truck was a bit -- let me
14:58:48 17 scratch that question. When you swerved to avoid the
14:59:02 18 direct collision with the Mustang, that's when your
14:59:06 19 truck tipped over; is that correct?
14:59:07 20 A Yes.
14:59:09 21 Q And you said that it felt like you were sliding
14:59:12 22 for a hundred miles but it was more like 50 feet or a
14:59:16 23 hundred feet?
14:59:17 24 A Yeah, approximately, more like that.
14:59:18 25 Q And then you worked to get yourself out of the

00:19 1 Q Isn't it -- isn't it accurate, Mr. McCain, that
15:00:25 2 at the time of the accident there had been no spill of
15:00:31 3 television tubes outside this trailer?
15:00:34 4 MR. DONALDSON: Object to form.
15:00:35 5 A None.
15:00:36 6 Q (By Mr. Comella) There may have been broken
15:00:38 7 TVs in the trailer, but as you sit here today you really
15:00:41 8 don't know, correct?
15:00:42 9 A No, I have no idea.
15:00:44 10 Q And you didn't pack this trailer, correct?
15:00:46 11 A No, sir, I did not.
15:00:56 12 Q Now, what I would like you to do is to try to
15:01:03 13 describe who arrived at the scene in what sequence,
15:01:07 14 okay? And I believe you testified that the -- Mr. Acker
15:01:11 15 from the DPS --
15:01:13 16 A Yes.
15:01:13 17 Q -- arrived soon after the accident, correct?
15:01:16 18 A Yes, sir.
15:01:17 19 Q And is it your understanding that Mr. Acker
15:01:21 20 telephoned Specialty Wrecker Service [sic]?
15:01:23 21 A Yes, Mr. Acker contacted the wrecker service.
15:01:32 22 Q And you didn't have any role in deciding who
15:01:37 23 was going to perform the wrecking service, correct?
15:01:42 24 A None, none at all.
15:01:43 25 Q Now, at this time, Mr. McCain, and up to the

15:06:56 1 MR. DONALDSON: Object to form.
15:06:58 2 A Exactly right, yes, sir.
15:06:59 3 Q (By Mr. Comella) And at that point you were
15:07:00 4 relying upon his judgment in bringing this accident to
15:07:03 5 the proper conclusion --
15:07:04 6 MR. DONALDSON: Object to form.
15:07:10 7 Q (By Mr. Comella) -- correct?
15:07:11 8 A Yes, sir.
15:07:11 9 Q Now, do you recall when in the sequence the
15:07:14 10 dump trucks arrived?
15:07:19 11 A No. After it was uprighted it all moved along
15:07:23 12 pretty good.
15:07:26 13 Q Do you know who called the dump trucks to the
15:07:29 14 scene?
15:07:30 15 A The information I have, which is secondhand, is
15:07:35 16 the dump trucks were called by the wrecker service.
15:07:38 17 They contacted the dump trucks to have it hauled off.
15:07:43 18 Q Did you actually observe the wrecker service
15:07:46 19 righting your trailer?
15:07:47 20 A Oh, yes, sir.
15:07:50 21 Q And I assume you -- you saw it with some
15:07:54 22 frustration because they were going against what your
15:07:55 23 recommendation was --
15:07:56 24 A Yes, sir.
15:07:56 25 Q -- to Mr. Acker, correct?

07:58 1 MR. DONALDSON: Object to form.
15:08:00 2 Q (By Mr. Comella) I'm sorry. Is that correct?
15:08:01 3 A Yes, sir.
15:08:02 4 Q And did you personally see the -- your cargo of
15:08:07 5 these box TV tubes fall out of the trailer as the
15:08:12 6 trailer is being righted?
15:08:15 7 A No, sir. I was on the blind side of the
15:08:16 8 trailer in the car. What I heard was the crashing of
15:08:20 9 the tubes coming out of the trailer as it was being
15:08:23 10 lifted and the ripping of it. As you can see from these
15:08:26 11 pictures, this rip here is where one of the chains were.
15:08:31 12 Where they hooked it up, see the rip there, where the
15:08:34 13 chain dug into the roof of the trailer? That's where
15:08:37 14 they had one of the chains, and the other chain was at
15:08:38 15 this end, at the other end.
15:08:41 16 And if you look -- you can't see it. One
15:08:43 17 of these pictures you can see the trailer doors -- oh, I
15:08:47 18 thought you could see the trailer doors were still
15:08:50 19 closed on it.
15:08:52 20 MR. COMELLA: For the record, the witness
15:08:54 21 has first --
15:08:55 22 A There it is right there. You can see the
15:08:57 23 trailer doors are still closed, and what they did is
15:08:59 24 when that load laid over and they lifted up and ripped
15:09:04 25 out that whole side, you can see the whole roof is

15:09:06 1 intact, so there was no place for them tubes to flip out
15:09:11 2 until it was raised up.
15:09:12 3 MR. DONALDSON: Object to responsiveness.
4 MR. COMELLA: For the record, the
5 witness --
15:09:13 6 MR. CHRISTIAN: I'm sorry, I didn't hear
15:09:15 7 that.
8 MR. DONALDSON: Object to responsiveness.
15:09:16 9 Q (By Mr. Comella) For the record, the witness
15:09:18 10 has pointed to, first, Deposition Exhibit 75 --
15:09:21 11 A Yes.
15:09:22 12 Q -- to illustrate the condition of the side of
15:09:29 13 the trailer after the trailer was righted, correct?
15:09:31 14 A Yes, sir.
15:09:31 15 Q And also to point out the positioning of the
15:09:37 16 chains --
15:09:37 17 A Yes, sir.
15:09:38 18 Q -- installed by the wrecker service, correct?
15:09:41 19 A Yes, sir.
15:09:41 20 Q And the witness has also pointed to Deposition
15:09:48 21 Exhibit 74 --
15:09:49 22 A Yes, sir.
15:09:50 23 Q -- to show the same details of the condition of
15:09:56 24 the trailer following the righting of the trailer --
15:09:59 25 A Yes, sir.

15:09:59 1 Q -- correct? And you've pointed out Deposition
15:10:04 2 Exhibit 73 to show that the door of the trailer was
15:10:08 3 still in position --
15:10:10 4 A Yes, sir.
15:10:10 5 Q -- following the righting of the --
6 A Yes, sir.
15:10:11 7 Q -- trailer, correct? So you were on the blind
15:10:19 8 side of the trailer, and as the trailer is being
15:10:23 9 righted, the side of the trailer collapses from the
15:10:27 10 weight of the load, correct?
11 A Yes, sir.
15:10:28 12 MR. DONALDSON: Object to form.
15:10:30 13 Q (By Mr. Comella) And you hear this crashing,
15:10:32 14 which you concluded were the TV sets striking the
15:10:37 15 ground, correct?
15:10:38 16 A The tubes, yes, sir.
15:10:39 17 Q Tubes. After the trailer was righted, and I
15:10:46 18 will direct your attention to Deposition Exhibit 74, did
15:10:55 19 you observe the open side of the trailer?
15:10:57 20 A Yes, sir.
15:10:58 21 Q And you walked around and looked at it?
15:11:00 22 A Yes, sir. That's me standing there observing
15:11:02 23 what's going on.
15:11:02 24 Q And what were your thoughts as you turned
15:11:05 25 around and looked at the -- at the condition of the

11:07 1 trailer?

15:11:10 2 A Tens of thousands of dollars worth of stuff

15:11:14 3 damaged that I'm responsible for for no reason.

15:11:17 4 Q Were there still -- turning to Deposition

15:11:19 5 Exhibit 74, were there still crates in the trailer after

15:11:24 6 it was righted?

15:11:24 7 A Yes, sir. They were like that (indicating).

15:11:26 8 The front-end loader would drive up -- as you can see

15:11:29 9 the crushing here -- drive up, the ones on the ground.

15:11:34 10 They would bring the ones out of the trailer, like

15:11:38 11 cupping them and dragging them out.

15:11:40 12 Q So in other words, what crates were still

15:11:46 13 intact in the trailer the front-end loader managed to

15:11:54 14 destroy --

15:11:54 15 A Destroy, pulled out any --

15:11:54 16 MR. DONALDSON: Object to form.

15:11:56 17 Q (By Mr. Comella) -- in the process of

15:11:58 18 shoveling up the debris from the aftermath of righting

15:12:03 19 the trailer?

15:12:04 20 MR. DONALDSON: Object to form.

15:12:06 21 A Yes.

15:12:07 22 Q (By Mr. Comella) So isn't it correct,

15:12:10 23 Mr. McCain, that the accident that you unfortunately

15:12:14 24 were a part of on October 9, 1997, did not cause these

15:12:19 25 television tubes to break upon the roadway? Isn't that

15:12:24 1 correct?

15:12:25 2 MR. DONALDSON: Object to form.

15:12:26 3 A That's correct.

15:12:27 4 Q (By Mr. Comella) It was the righting of the

15:12:29 5 trailer by the wrecking service that caused the side of

15:12:35 6 the trailer to collapse and thus further leading to the

15:12:41 7 spilling of the crates and the TVs onto the road,

15:12:45 8 correct?

15:12:45 9 MR. DONALDSON: Object to form.

15:12:46 10 A That is correct.

15:12:47 11 Q (By Mr. Comella) And then following that the

15:12:48 12 cement front-end loader came along and finished the job

15:12:52 13 by crushing what was left on the road and extracting in

15:13:02 14 a -- in a less -- let me scratch that question. The

15:13:10 15 front-end loader finished the job by crushing the

15:13:12 16 remaining tubes that were on the road and by forcibly

15:13:18 17 extracting the tubes in the trailer with no regard to

15:13:25 18 damaging them?

15:13:25 19 MR. DONALDSON: Object to form.

15:13:26 20 A That's correct.

15:13:28 21 Q (By Mr. Comella) And this caused you concern

15:13:30 22 because as a professional truck driver you take

15:13:37 23 responsibility and pride in ensuring that your load goes

15:13:40 24 from Point A to Point B safely, correct?

15:13:43 25 A That's correct. That's what they pay me to do.

17:03 1 that far apart, but I can't be sure.
15:17:07 2 Q When you spoke to Mr. Gregory at the scene of
15:17:11 3 the accident, did you understand who Mr. Gregory worked
15:17:13 4 for?
15:17:14 5 A I assumed he was the owner of the landfill,
15:17:17 6 so --
15:17:18 7 Q And what was your first knowledge that a
15:17:24 8 landfill was even involved in this accident?
15:17:28 9 A When he arrived and told me.
15:17:30 10 Q So you saw Mr. Gregory arrive, and as you
15:17:33 11 testified earlier, you engaged in conversation with
15:17:36 12 Mr. Gregory?
15:17:36 13 A With him. Mr. Acker told me that it would be
15:17:40 14 going to a landfill; there were going to be people
15:17:43 15 coming out and hauling the stuff off.
15:17:48 16 Q And it was your understanding that the debris
15:17:52 17 was going to go to Mr. Gregory's landfill?
15:17:55 18 A Yes, sir.
15:17:56 19 Q And at that time did you assume that
15:18:00 20 Mr. Gregory knew what kinds of debris he could take and
15:18:03 21 not take?
15:18:04 22 MR. DONALDSON: Object to form.
15:18:06 23 A Yes, sir, he was the boss.
15:18:08 24 Q (By Mr. Comella) It was just like your
15:18:09 25 reliance upon Mr. Acker as being in charge of the scene

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	*	IN THE DISTRICT COURT
3	*	
Plaintiff,	*	
4	*	
VS.	*	OF HAYS COUNTY, TEXAS
5	*	
PENSKE TRUCK LEASING CO.,	*	
6 L.P., PENSKE LOGISTICS,	*	
INC., ZENITH ELECTRONICS	*	
7 CORP., ZENITH ELECTRONICS	*	
OF TEXAS, INC., and HARRY	*	
8 ERNEST McCAIN,	*	
	*	
9 Defendants.	*	207TH JUDICIAL DISTRICT

10

REPORTER'S CERTIFICATION
11 VIDEOTAPED DEPOSITION OF HARRY ERNEST McCAIN
JUNE 9, 2003
12

13 I, Janet L. Hamm, Certified Court Reporter in and
14 for the State of Texas, hereby certify to the following:
15 That the witness, HARRY ERNEST McCAIN, was duly
16 sworn by the officer and that the transcript of the oral
17 deposition is a true record of the testimony given by
18 the witness;
19 That the deposition transcript was submitted on the
20 17th day of June, 2003, to the witness or to the
21 attorney for the witness for examination, signature and
22 return to me by the 7th day of July, 2003;
23 That the amount of time used by each party at the
24 deposition is as follows:
25 Mr. Donaldson - 3 hours, 31 minutes
Mr. Comella - 34 minutes

1 Mr. Christian - 4 minutes

2 That pursuant to information given to the deposition

3 officer at the time said testimony was taken, the

4 following includes counsel for all parties of record:

5 Mr. David H. Donaldson, Jr., Attorney for Plaintiff
Mr. Douglas Y. Christian, Attorney for Defendants
6 Penske Truck Leasing Co., L.P., Penske Logistics, Inc., and Harry Ernest McCain
7 Mr. Philip L. Comella, Attorney for Defendants Zenith Electronics Corp. and Zenith Electronics of
8 Texas, Inc.

9 I further certify that I am neither counsel for,

10 related to nor employed by any of the parties or

11 attorneys in the action in which this proceeding was

12 taken, and, further, that I am not financially or

13 otherwise interested in the outcome of the action.

14 Further certification requirements pursuant to

15 Rule 203 of TRCP will be certified to after they have

16 occurred.

17 Certified to by me this 16th day of June, 2003.

18

19

20 Janet L. Hamm

21 JANET L. HAMM, Texas CSR #5029
Expiration Date: 12/31/03
805 West 10th, Suite 400
22 Austin, Texas 78701
(512) 478-2762

23

24

25

1 **FURTHER CERTIFICATION UNDER RULE 203 TRCP**

2

3 The original deposition was/was not returned to the
4 deposition officer on _____;
5 If returned, the attached Changes and Signature page
6 contains any changes and the reasons therefor;
7 If returned, the original deposition was delivered
8 to Mr. David H. Donaldson, Jr., Custodial Attorney;
9 That $_____ is the deposition officer's
10 charges to the Plaintiff for preparing the original
11 deposition transcript and any copies of exhibits;
12 That the deposition was delivered in accordance with
13 Rule 203.3 and that a copy of this certificate was
14 served on all parties shown herein and filed with the
15 Clerk.
16 Certified to by me this ____ day of _____,
17 2003.
18
19 _____
JANET L. HAMM, Texas CSR #5029
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1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS) IN THE DISTRICT COURT
LANDFILL, INC.,)
3 Plaintiff,)
)
4 VS.)
) HAYS COUNTY, TEXAS
5 PENSKE TRUCK LEASING CO.,)
L.P., PENSKE LOGISTICS, INC.,)
6 ZENITH ELECTRONICS CORP.,)
AND HARRY ERNEST MCCAIN,)
7)
Defendants.) 207TH JUDICIAL DISTRICT
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11
APRIL 14, 2004
12 Volume 2

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1 A It included broken picture tubes and the cartons
2 that they were in.
3 Q Did it include any dirt from the scene?
4 A No, sir, didn't see any dirt go in there. If it
5 was, it was very little.
6 Q Did -- was the driver around when some of this
7 material was going into the dump trucks?
8 A Sir, I'm sure he was, but I couldn't, you know, say
9 for sure that I was standing there looking at him or
10 anything. We were pretty busy helping.
11 Q Do you know whether or not the driver -- well, let
12 me ask it this way. Did you ever tell -- did you know where
13 this material was going to go after it went into the dump
14 trucks?
15 A Yes, sir.
16 Q And did you talk to the driver and discuss that
17 with him?
18 A I don't believe so.
19 Q Do you know if -- were you present when there were
20 any conversations with the driver where he was told where
21 this material was going?
22 MR. CHRISTIAN: Objection, hearsay, Your
23 Honor.
24 THE COURT: Yes, sustained.
25 A I don't recall that.

1 Q (By Mr. Donaldson) Just a minute.

2 THE COURT: "Sustained" means don't answer the

3 question. I'm sorry.

4 Q (By Mr. Donaldson) Did you personally hear the

5 driver say or give any indication that he knew where the

6 material was going to go?

7 MR. CHRISTIAN: Objection, asked and answered,

8 Your Honor.

9 A No, sir, I didn't know.

10 THE COURT: When you hear an objection, wait

11 for me to rule. I'll try to be a little quicker next time

12 so you don't get bored on us. But overruled.

13 Q (By Mr. Donaldson) Now, now, based on what you saw

14 at the scene and what happened at the scene afterwards, if

15 there had been an indication early on, before you ever

16 picked up the trailer, and even after you picked up the

17 trailer but before those dump trucks arrived, that this tube

18 material had to be cleaned up as hazardous, would you expect

19 that material to go to Texas Disposal Systems' landfill?

20 MR. CHRISTIAN: Objection, lack of relevance

21 and calls for opinion testimony.

22 THE COURT: Sustained. That means don't

23 answer the question. I'm not meaning to be a smart alec.

24 I'm just trying to make sure we do it right.

25 THE WITNESS: Glad you told me that. Keep on

1 A Sir, I don't know.

2 Q You mentioned yesterday that you were out on the

3 scene for quite a long time. You had the truck uprighted

4 before there was any indication that anything was hazardous.

5 Why couldn't -- why couldn't you just go ahead and take the

6 truck away right at that point?

7 A They won't let us move it when it comes up as

8 haz-mat until the haz-mat part of it has been cleaned up and

9 it is located in the hauler.

10 Q And approximately when was it that you got the okay

11 so that you could haul it away?

12 A I don't know the exact time, but like I say, it was

13 getting pretty late at night and had been dark for several

14 hours.

15 Q Did you have to do anything special in order to be

16 able to haul this away, particularly with the trailer?

17 A We had to -- it would be the normal things. You

18 had to unlock the brakes, pull the drive shaft, and we

19 throwed a couple chains and booms around it to keep the top

20 and the side from flopping so bad.

21 MR. DONALDSON: I'll pass the witness.

22 CROSS EXAMINATION

23 BY MR. CHRISTIAN:

24 Q Mr. Machen, good morning.

25 A How are you doing, sir?

1 Q I'm doing well, thanks. How are you?

2 A I'm just fine.

3 Q As you might remember, my name is Doug Christian,

4 and I represent two Penske companies that were sued by TDSL.

5 A Yes, sir.

6 Q And I have some questions for you, sir.

7 A Yes, sir.

8 Q And if you can't hear me, please let me know and

9 I'll speak up.

10 A Okay, sir.

11 Q Okay. I'll give it my best shot, my best imitation

12 of Perry Mason, which is not very good. This accident

13 happened six and a half years ago, correct?

14 A Been a long time.

15 Q Been a long time. You've handled a lot of

16 accidents since then; isn't that true, Mr. Machen?

17 A Yes, sir.

18 Q Now, did you meet with Mr. Donaldson, sir, to

19 prepare for your testimony?

20 A I met with him for about five minutes before

21 you-all took that deposition.

22 Q Did you meet with him to prepare for your trial

23 testimony?

24 A No, sir.

25 Q Did you meet with any lawyer from his firm?

1 A No, sir.

2 Q Have you had a chance to look at your deposition

3 transcript?

4 A Yes, sir.

5 Q Did you read that in preparation for your trial

6 testimony?

7 A No, sir.

8 Q Now, let's talk about the scene of the accident.

9 That day you took direction at the scene from Trooper Acker;

10 is that correct?

11 A Yes, sir, it was a DPS trooper.

12 Q And he asked you to get the truck upright and off

13 the road; isn't that true?

14 A Yes, sir.

15 Q He wanted to get I-35 open?

16 A Yes, sir.

17 Q TxDOT is the Texas Department of Transportation; is

18 that correct?

19 A Yes, sir. Yes, sir.

20 Q Both the DPS and TxDOT wanted that road cleaned and

21 opened promptly; isn't that true?

22 A Yes, sir.

23 Q And they told you that, correct?

24 A Yes, sir, more than one time.

25 Q And you felt that you were under some pressure to

1 and there doesn't appear to be, at least in -- a lot of tube
2 debris on the right-hand side. Would you agree with that?
3 A Would you repeat the question again, sir?
4 Q I'm not going to repeat it. I'll ask it in a
5 better way. See where I'm pointing, about halfway the
6 length of the truck? Most of the debris appears to be to
7 the left of that; isn't that true?
8 A In that picture? Yes, sir.
9 Q And do you know for a fact that the cleanup had not
10 started when that picture was taken?
11 A I couldn't say sir. I don't know.
12 Q Okay. Thank you.
13 MR. CHRISTIAN: Thank you.
14 Q (By Mr. Christian) Now, you testified yesterday
15 that you uprighted the truck two and a half to three hours
16 after the first call, and that was at 1:00, the first call,
17 correct?
18 A Yes, sir, I believe it was around 1:00 when they
19 called us.
20 Q Two and a half to three hours later is when you
21 uprighted the truck?
22 A Yes, sir, somewhere in that neighborhood.
23 Q And many tubes fell out when you were uprighting
24 the truck, but you don't know how many; is that correct?
25 A That's right, sir.

1 Q Because you were on the other side of the truck.

2 You were in one of the tow trucks --

3 A Yes.

4 Q -- that was pulling the truck up, so you didn't

5 have the best position to see exactly how many fell out,

6 true?

7 A That's right.

8 Q Now, Mr. Machen, you testified yesterday that TxDOT

9 was going to put all the materials by the side of the road.

10 Do you remember that?

11 A Yes, sir.

12 Q But then you suggested that instead of doing that,

13 to save some effort, that they should just be put in dump

14 trucks and sent away; is that true?

15 A Yes, sir.

16 Q Now, was that to save time?

17 A Save time and money both.

18 Q So the TxDOT made that -- someone from TxDOT made

19 that suggestion, but you thought it was more appropriate

20 to --

21 A Made more sense to move it once than moving it

22 twice.

23 Q Let's talk for a minute about the concept of

24 off-loading, taking the product out of the truck before it's

25 uprighted. Do you understand what I mean by that?

1 Q Was it a surprise to you to learn that cathode ray
2 tubes could be considered hazardous waste?
3 A Yes, sir.
4 MR. DONALDSON: Pass the witness.
5 CROSS-EXAMINATION
6 BY MR. CHRISTIAN:
7 Q Mr. Villalpando, good afternoon. My name is Doug
8 Christian, and I represent two Penske companies that were
9 sued by TDSL in this lawsuit, and I have just a few minutes
10 of questions for you, sir.
11 I'd like to talk with you first about the
12 location of the truck when it was on its side. The end of
13 the truck was on the shoulder; is that correct?
14 A It's -- it's in -- the accident has a lot of hot
15 mix blacktop, and it was sitting almost right on the
16 shoulder, edge of the main lane -- main lanes and the edge
17 of the pavement. It was near the edge of it.
18 Q And the Mustang and the Thunderbird, the two cars
19 involved in the accident, were on the actual main lanes,
20 correct?
21 A Yes, sir, when I arrived.
22 Q And do you remember, was there broken glass from
23 those automobiles? Do you remember?
24 A No, I don't remember.
25 Q You don't remember any TV tubes on the road before

1 the truck was uprighted, do you? Let me ask it differently.

2 Do you remember seeing any TV tubes on the ground before the

3 truck was uprighted?

4 A No, sir.

5 Q You saw tubes fall from the truck when the truck

6 was being uprighted; is that true?

7 A Yes, sir. I didn't see them. I heard the side

8 ripped -- or the truck ripped open.

9 Q When the -- when the wrecker service was trying to

10 upright the truck, you heard the side rip and the tubes fall

11 out; is that right?

12 A I heard from employees that were away from the --

13 from the -- lifting -- lifting the trailer heard it ripped.

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1 Q. Here is a page of notes that I believe Mr. Donaldson
2 just showed you.
3 A. Yes, sir.
4 Q. Just a couple of questions, sir. Do you see the
5 reference to 4 -- it's about halfway down --
6 A. Yes, sir.
7 Q. -- the column.
8 A. Yes, sir.
9 Q. Would you read that for the record, please?
10 A. "4, 10-yard trucks to haul material to dumpground,
11 Creedmoore."
12 Q. Dumpground Creedmoore, is that TDSL?
13 A. Yes, sir.
14 Q. And you indicated those are 10-yard dump trucks?
15 A. Yes, sir. That's what they told us that they were
16 coming, four dump trucks.
17 Q. And then this fourth line down, "Truck," would you
18 read that, please, for the jury?
19 A. Fourth line down from the top?
20 Q. Yes, sir.
21 A. Trailer ripped as wrecker company was trying to
22 stand it up.
23 Q. Mr. Villalpando, thank you very much. I appreciate
24 it, sir.
25 MR. CHRISTIAN: Pass the witness, Your Honor.

1 license.

2 (BY MR. JOHNSON)

3 Q Have you hauled hazardous materials before?

4 A Yes, sir.

5 Q Can you give us an example of some of the hazardous

6 materials that you have hauled in the past.

7 A Gasoline, diesel fuel, jet fuel, bulk oil, paints,

8 turpentines, stuff like that.

9 Q This is on TDSL Number 1, Officer Acker's report.

10 Highlighted here is the question. I want to ask you this.

11 Did anyone ask you if you were transporting hazardous

12 materials?

13 A Yes, they did.

14 Q Did Officer Acker ask you?

15 A Yes, he did.

16 Q What did you say?

17 A No.

18 Q Sitting here today is that a true answer?

19 A Yes, sir. I wasn't hauling hazardous materials.

20 Q The second question: Hazardous materials released. Did

21 Officer Acker ask you if hazardous materials were released?

22 A No, sir. We weren't hauling hazardous materials. There

23 was no need to ask the question.

24 Q All right. Did anyone ask you if broken picture tubes

25 contained hazardous materials?

1 A No, sir.

2 Q Did you tell anyone that broken picture tubes do not

3 contain hazardous materials?

4 A Pardon?

5 Q Did you tell anyone at the accident scene that broken

6 picture tubes do not contain hazardous materials?

7 A No. I wouldn't have been asked that.

8 Q I'm just asking if you said that to anyone.

9 A No.

10 Q Now, we have heard the term "hazardous waste." Are you

11 familiar through your experience as a truck driver with the

12 term "hazardous waste"?

13 A I have heard the term, yes, sir.

14 Q Is that a term you use in the trucking industry,

15 hazardous waste?

16 A Not me personally, no, sir.

17 Q Is that a term that's used on things that you are

18 familiar with in the trucking industry like a bill of lading

19 or a placard?

20 A No, sir, not if you don't haul them.

21 Q What term do you use in the trucking business?

22 A Hazardous materials.

23 Q Did anyone ask you at the accident scene if you were

24 hauling hazardous waste?

25 A No, sir.

1 Q Did anyone ask you if broken picture tubes contained
2 hazardous waste?
3 A No, sir.
4 Q Did you tell anyone at the accident scene that broken
5 picture tubes do not contain hazardous waste?
6 A No, sir, I did not.
7 Q I want to talk about the training. And you went over
8 some of that with Mr. Donaldson. How many trucking companies
9 have you worked for?
10 A Approximately ten.
11 Q Ten trucking companies. In working for those ten
12 trucking companies, did you receive training on accident
13 scenes from each one of them?
14 A On each and every one of them, yes, sir.
15 Q Was the training you received from Penske on an accident
16 scene any different from the training you received from the
17 other ten trucking companies?
18 A No, sir; it's all the same.
19 Q Now, from any of the companies, these ten trucking
20 companies that you worked for, did any of them train you in a
21 situation where you are transporting a material that is not a
22 hazardous material, but if it's broken or if it's crushed, it
23 might have hazardous waste under some state or federal
24 regulation? Did you receive that training from any of the
25 ten trucking companies you worked for?

1 did you have any placards, a hazardous-material placard?

2 A No, sir. I wasn't hauling hazardous materials.

3 Q In your 15 years of experience have you seen a placard

4 to the effect of it's not hazardous material, but if it's

5 broken, it might have hazardous waste?

6 A No, sir, I haven't.

7 Q Mr. McCain, as a truck driver do you feel that you need

8 that information? When you are driving down the road with a

9 load that is not hazardous material, do you feel you need to

10 be trained on whether if it's broken or crushed, it might

11 have hazardous waste?

12 MR. DONALDSON: Objection, Your Honor. Opinion

13 testimony. He's not designated as an expert.

14 THE COURT: Sustained.

15 (BY MR. JOHNSON)

16 Q Let's talk a little bit about the accident scene or the

17 accident itself.

18 A Yes.

19 Q This is the low tech part of the presentation. I have a

20 Penske truck. And I don't know where I'm going to put it.

21 But I'll try to do it right here. I'll try not to repeat

22 what we went over earlier. So I'll just bring us up to

23 speed. You were driving south?

24 A Southbound, yes, sir.

25 Q So this is south, the center lane. Hang on. And my

1 Mustang. What color was the Mustang?

2 A Green.

3 Q All right. Okay. So the Mustang was -- I don't have a

4 very big highway here. Okay. The Mustang was on the other

5 side of the highway heading northbound?

6 A Northbound, yes, sir.

7 Q And could you describe for me what happened with the

8 Mustang.

9 A Like I said, I was going southbound on Interstate 35.

10 The Mustang was going northbound. Due to the fact it was

11 raining and stuff like that, you know, you check your mirrors

12 or watch for little things. I observed the Mustang appeared

13 to look like he was losing control and started heading into

14 the median.

15 Q Let me ask you, when you saw him start losing control

16 and heading into the median, what did you do?

17 A I signaled to make a left-hand turn. I checked my

18 mirrors to see where traffic was behind me because if there

19 would have been a lot of traffic, what I was trying to do

20 wouldn't work.

21 Q Was there a lot of traffic?

22 A No, sir; it was more than an eighth of a mile back, from

23 what I could tell. I shifted -- I went to the left-hand lane

24 thinking when he came up out of the median, with the speed he

25 was moving, he would pass in front of me across the rest of

1 the freeway and end up on the frontage road On the other side

2 missing me completely.

3 Q So we only have one lane on our highway. But you moved

4 over one lane; is that right?

5 A Correct.

6 Q Then what happened?

7 A Well, he crosse din front of the truck, and I guess if I

8 was in his position, I might have done the same thing;

9 however, we looked at each other, and he must have hit the

10 brakes or done something because he caused the car to slow

11 down, and I ended up clipping the right rear of his car with

12 the right front of my truck, which caused that front tire to

13 blow out. The nose dug in, tried to straighten it back up;

14 however, the load pushed the low trailer over to the side.

15 Slid. And he in turn continued across the --

16 Q Okay. And again we don't have much room.

17 THE COURT: You can pull that up. Nobody has their

18 headphones on. Just pull up the tape on that mic.

19 MR. JOHNSON: Pull this up?

20 THE COURT: No. Right here. Keep rolling it back.

21 (BY MR. JOHNSON)

22 Q Let's see our truck again. How did it end up?

23 A Okay. We just set it at this angle. This would be

24 north and south, north being here; south being here.

25 Interstate, three lanes of 35 south is here. The fog line is

1 approximately here. Fog line, as I said, that white line
2 that runs along the shoulder. The nose of the truck was
3 approximately to the center line of the frontage road on the
4 southbound side of the interstate.
5 MR. JOHNSON: I'm going to have this exhibit -- can
6 I see 3E?
7 MR. DONALDSON: Sure.
8 MR. JOHNSON: Thank you. Here's the high tech part.
9 Three E. Okay.
10 (BY MR. JOHNSON)
11 Q Is this how it looked?
12 A Yes, sir. As you see, the nose is approximately to the
13 center line. The tail end, you can see, is barely up on the
14 shoulder there.
15 Q Okay. Thank you. Now, I think you said you crawled
16 out. Did you crawl out of --
17 A Out of this side here, the passenger window.
18 Q And after you crawled out, what happened next?
19 A Well, I went to the Air Force officer and I got his
20 phone and I made my contacts.
21 Q I don't know what happened to our green Mustang. Did
22 you see what happened to the green Mustang on the day of the
23 accident?
24 A No, sir. I lost sight of it after I laid over. I knew
25 it had gone by, laid over. Well, I laid over, not the

1 Mustang. That was thrown across the freeway.

2 Q After you got out of your truck, did you have a chance

3 to see if the driver of the green Mustang was injured?

4 A Yes, as a matter of fact I did. I talked to the

5 lieutenant to ask him, you know, what happened to the car I

6 hit, because I couldn't see it no more. What it had done, it

7 had gone down the highway a little further and bumped into

8 another vehicle, Thunderbird.

9 Q Okay. So there was a Thunderbird and a Mustang

10 involved.

11 A The Thunderbird and the Mustang were involved and me and

12 the Mustang were involved. The Mustang and I.

13 Q What about the driver of the Mustang?

14 A Well, it turned out he was okay. And so I was standing

15 on the side of the frontage road talking to this officer, and

16 I seen this guy racing at me, running at me. My first

17 thought was, this guy is mad. I was going to go the other

18 way.

19 Q Do you know if he was running to come get you or what?

20 A That was my first instinct. His car was messed up, and

21 he was upset.

22 Q Now, when he ran up to you, what happened?

23 A Oh, he just hugged me and thanked me.

24 Q What did he do?

25 A He hugged me.

1 Q What did he say?

2 A He thanked me for saying his life.

3 Q Now, did you have a chance to look at your truck at that

4 point, the status of your truck and trailer?

5 A Yes, sir. I determined the status was laid over on its

6 side.

7 Q Now, did you have an opportunity to look underneath --

8 it's laid on -- is this usually more attached when you are

9 driving down the road?

10 A I try to keep it that way.

11 Q Damaged in shipping. It's laying on its side. Did you

12 have a chance to -- let me ask this: Was the back open?

13 A No, sir. The doors was still secured.

14 Q Did you have a chance to look underneath the truck?

15 A No, sir. I didn't get down on all fours and look

16 underneath it.

17 Q Could you see how many tubes inside this truck were

18 broken?

19 A No, sir, other than what I guess I just saw in that

20 picture there. That's the only thing you could see.

21 Q Now, let's talk about the accident cleanup. I believe

22 you testified at some point a wrecker service came and hooked

23 onto the truck?

24 A Yes, sir.

25 Q I may have to turn this around. I want to talk about

1 how they did that. Before we get to that, who was in charge
2 of the scene?
3 A Officer Acker was.
4 Q Now, at any point did you become concerned about how the
5 scene was being cleaned up?
6 A Oh, my concern started with how they actually destroyed
7 the scene before the cleanup.
8 Q Okay. Let me ask you a better question. Were you
9 concerned at any point about your load that was in the truck?
10 A Yes, sir.
11 Q Did you express that concern to anyone?
12 A Yes, sir. Officer Acker.
13 Q When did that happen?
14 A Mr. Taylor and I were sitting in Officer Acker's car
15 filling out the accident reports, exchanging insurance and,
16 you know, trying to get over what just occurred.
17 Q Okay. This is no longer the Mustang. This is Officer
18 Acker's car. Where were you when you were sitting in the
19 car?
20 A Here.
21 Q What concerns did you express to Officer Acker?
22 A Well, they were going to stand the truck up. Okay?
23 From what I observed, they put a chain approximately this big
24 around about a foot in from the tail of the trailer and about
25 a foot in from the nose of the trailer. And their plan was

1 with one big wrecker here and one little car wrecker down
2 here, they were going to upright this 53-foot trailer with
3 approximately 40,000 pounds on it.
4 Q What were your concerns about that method of uprighting
5 the trailer?
6 A If they attempted -- the minute they attempted the
7 upright -- set this off to the side. The minute they
8 attempted -- as it raised up, the trailer walls are
9 approximately this thick. I don't know if any of you all
10 have seen them. With 44,000 pounds laying on that wall, the
11 minute this trailer starts to get raised, that wall breaks
12 away and the load stays on the ground as the trailer comes
13 up.
14 Q Did you object to Trooper Acker about the way the
15 wrecker service was about to upright your truck?
16 A I told him I would rather -- it's not a good idea to do
17 that. I told him what was going to happen. And this was my
18 load and I was responsible for it. However, it was his scene
19 and he was responsible for that.
20 Q After you told him this, did he stop the wreckers from
21 uprighting the truck in that manner?
22 A No, sir.
23 Q What happened after they pulled the truck up?
24 A I had three-fourths of my load laying on the ground.
25 Q Okay. What happened next after the truck was uprighted

1 and -- this will be my third -- this is something that fell
2 out of the truck. Put it on this side now so everyone can
3 see it. Assume there's some CRTs laying on this side. What
4 happened after that as far as how they cleaned it up?
5 A Okay. This is actually in reverse. The debris would
6 actually be on this side in this situation; however, you put
7 here, the debris fell out from the center of the trailer,
8 which is of course -- you know, you have got the bands here.
9 They are going to hold this part together. Nothing's holding
10 the center, which of course causes it to fall out. And it
11 pretty much fell out in the center area.
12 Q How did -- well, did they try to clean up what had fell
13 out? Or what happened next in the cleanup process?
14 A Oh, they brought in one of them big bucket front-end
15 loaders. I don't know if any of you all have seen them.
16 They use them to load dump trucks and stuff with. Got the
17 2-ton bucket on the front.
18 Q And what did the front-end loader do?
19 A He was using what had fallen out of the vehicle, out of
20 the trailer, as a ramp in order to get stuff that was still
21 in the trailer. And because it was a bucket loader with the
22 long prongs on it, it would just jam into the stuff, and they
23 would flip it up, drop it into the bucket and take it out of
24 the trailer.
25 Q What happened to the --

1 A This stuff was just crushed and destroyed. You can hear
2 the picture tubes popping and exploding.
3 Q Let me ask for the record what happened to the tubes
4 that were underneath the front-end loader.
5 A They were crushed.
6 Q Mr. McCain, did you call the wrecker service?
7 A No, sir.
8 Q Did you hire the wrecker service?
9 A No, sir.
10 Q Did the wrecker service ask your opinion on how to
11 upright this truck?
12 A No, sir.
13 Q Did you call anyone to bring out a front-end loader?
14 A No, sir.
15 Q Did anyone operating the front-end loader ask your
16 opinion on how to unload those tubes?
17 A No, sir.
18 Q How about the dump trucks that came out there? Did you
19 call the dump trucks?
20 A No, sir.
21 Q Did you hire the dump trucks to come out?
22 A No, sir, I did not.
23 Q Did they ask your opinion about loading these tubes onto
24 the dump trucks?
25 A No, sir.

1 Q How about where the tubes went after they were in the
2 dump trucks. Did you tell anyone to send them to anywhere?
3 A No, sir, I did not.
4 Q I want to go back to this notification issue that came
5 up in this phone call.
6 A Yes, sir.
7 Q I think you said at that point Mr. Jim Gregory was
8 already there. You were using his phone.
9 A Yes, sir.
10 Q Now, before the call came in, I think you said you were
11 talking with Jim Gregory.
12 A Yes, sir.
13 Q Did Jim Gregory ask you if broken picture tubes
14 contained hazardous waste?
15 A No, sir, he did not.
16 Q Did he ask you if the broken picture tubes contained
17 hazardous materials?
18 A No, sir, he didn't.
19 Q Did he ask you anything about your load and whether it
20 had any hazardous characteristics?
21 A No, sir, he didn't.
22 Q What did you and Mr. Gregory talk about?
23 A His pickup truck.
24 Q Let me ask you one final question. Did you tell anyone
25 at the scene that if a picture tube breaks at the loading

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1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS) IN THE DISTRICT COURT
LANDFILL, INC.,)
3 Plaintiff,)
)
4 VS.)
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5 PENSKE TRUCK LEASING CO.,)
L.P., PENSKE LOGISTICS, INC.,)
6 ZENITH ELECTRONICS CORP.,)
AND HARRY ERNEST MCCAIN,)
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Defendants.) 207TH JUDICIAL DISTRICT
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12 Volume 1

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1 MR. DONALDSON: Thank you, Your Honor.

2 Q (By Mr. Donaldson) Now, Mr. Acker, let's look at

3 the Hays County Sheriff's Office report, and it shows that

4 October 9, 1997, dispatched 12:55. Can you explain to us

5 what that means?

6 A That's the time the sheriff's office advised me of

7 the accident.

8 Q All right. And it shows an arrival around 13:11.

9 What is your recollection as to when you arrived?

10 A That's -- around that time.

11 Q All right. And when you got to the accident scene,

12 can you tell us what you first saw when you got there?

13 A I arrived about the same time that the deputy did,

14 the first deputy listed above my name on this call sheet,

15 but there were -- there was a truck tractor involved and two

16 passenger cars.

17 Q And did you -- I think we previously had admitted

18 some photographs of the scene. Let me show you Plaintiff's

19 Exhibit 3E. I think that's -- you don't have that one. Let

20 me show you Plaintiff's Exhibit 3A, please. Let me show you

21 what's been marked as -- it's part of Plaintiff's Exhibit 3.

22 This is some shots that we have from the scene. There's a

23 car that's shown right here in the foreground. Do you

24 recognize that?

25 A Yes, sir, I recognize the scene.

1 handles or primarily has responsibility for truck-tractor and
2 commercial vehicles and what they transport.
3 Q And are they -- do you consider them to be experts? Do
4 you rely on their expertise in terms of dealing with a
5 situation regarding commercial vehicles that you are not
6 familiar with?
7 A Yes, sir.
8 Q Now, you mentioned earlier that there were other people
9 on the scene. Who else was there?
10 A The sheriff's department and the Buda Volunteer Fire
11 Department and, for a short time, the EMS units.
12 Q Was anyone from the Texas Department of Transportation
13 involved?
14 A They showed up later.
15 Q What did they do at the accident scene?
16 A They asked if they could help or assist in any way.
17 Anything they could do.
18 Q What did you ask them to do?
19 A By the time they showed up, we were, I believe, looking
20 for a way to expeditiously load the tubes into containers or
21 dump trucks to remove them off the roadway.
22 Q In your experience, who is supposed to be in charge of
23 the cleanup operations of an accident scene?
24 A Primarily I oversee it, but I just oversee that each
25 particular individual company or, in this instance, like a

1 wrecker company cleans up the mess that their particular
2 vehicle has made.
3 Q Is there any special responsibility that a wrecker has
4 when they are called to handle a particular vehicle in terms
5 of cleanup?
6 A As long as they don't leave anything of significance on
7 the roadway or on the right-of-way, the highway. If they
8 remove everything.
9 Q You mentioned that you were trying to expeditiously have
10 these materials cleaned up. Why couldn't you just leave them
11 on the side of the road?
12 A Primarily I was trying to clear the roadway before the
13 rush hour started, but also I didn't want us to run into it
14 being dark before it got off the roadway.
15 Q Did you give any directions to the wrecker driver on how
16 to upright the trailer or how to do the cleanup?
17 A Generally they will ask me -- let me know how they were
18 going to do it. And then I may agree or offer suggestions.
19 I don't recall specifically what conversation he and I had.
20 Q Did you have any concern about the way that the wrecker
21 folks uprighted the trailer?
22 A Not that I'm recalling.
23 Q How were the tubes actually cleaned up after the trailer
24 was upright?
25 A The department of transportation used a loader,

1 Q 2001?

2 A I believe so.

3 Q So when you gave your deposition, you were no longer

4 with the DPS?

5 A Correct.

6 JUROR: I can't hear.

7 (BY MR. CHRISTIAN)

8 Q I'm sorry. When you gave your deposition in October of

9 2002, were you employed by the DPS?

10 A No, sir.

11 THE COURT: Are you having trouble hearing the

12 witness or just Mr. Christian?

13 JUROR: Both.

14 THE COURT: Both. I will ask the witness -- we do

15 have your microphone working. Mr. Christian, you are just

16 going to need to yell, I guess.

17 MR. CHRISTIAN: I'm sorry.

18 (BY MR. CHRISTIAN)

19 Q Do you mind if I ask you some questions while I'm

20 seated?

21 A No problem.

22 Q Mr. Acker, you were the on-scene commander of the

23 cleanup; is that correct?

24 A A little elaborate, but I guess that's -- I was in

25 charge of the accident investigation. They sort of put us in

1 coordinating the other activities there.

2 Q You were in charge of the cleanup; is that correct?

3 A In charge of putting people in charge of it. In other

4 words, I have responsibility for the accident scene,

5 including the cleanup, but the wrecker services are the ones

6 who are in charge of each -- the cleanup of each vehicle that

7 they pick up.

8 Q Do you recall being asked at your deposition at Page 77,

9 Line 10 -- are you there, sir?

10 A Yes, sir.

11 Q Page 77, Line 10. "Is it fair to say that at the scene

12 of the accident you were the on-scene commander?

13 ANSWER: "Kind of lofty, but okay."

14 You didn't disagree with that at your

15 deposition, correct?

16 A No, sir.

17 Q People at the scene consider you to be in charge of the

18 scene, correct?

19 MR. DONALDSON: Objection, Your Honor. Calls for

20 speculation, what other people think.

21 THE COURT: It is sustained.

22 (BY MR. CHRISTIAN)

23 Q Did you review your deposition transcript in preparing

24 for this testimony, Mr. Acker?

25 A A little bit.

1 A Yes, sir.

2 Q Did you fill that out?

3 A Yes, sir.

4 Q And someone typed it up?

5 A Yes, sir.

6 Q You arrived at the accident scene at 1:01, right?

7 A Approximately.

8 Q And that's why you put it on there.

9 A Yes, sir. Mr. Acker, did you rely on the wrecker

10 service to determine how to dispose of the accident debris?

11 A Yes, sir.

12 Q That's the job of a wrecker service; is that correct?

13 A Yes, sir.

14 Q You testified in your response to some of

15 Mr. Donaldson's questions about salvage -- salvaging the

16 tubes. Do you remember that?

17 A Yes, sir.

18 Q Do you have a recollection of actually considering the

19 concept of salvaging tubes on the day of the accident?

20 A Yes, sir.

21 Q You said something about the cost being prohibitive; is

22 that right?

23 A Yes, sir.

24 Q Would you look at Page 29 of your deposition, please.

25 Mr. Acker, I'm referring you to Page 29, Line 12 to Line 21.

1 it's handled and what dangers there are consistent with that
2 particular item.
3 Q And those are placards that are part of the federal
4 transportation scheme; is that correct?
5 A Yes, sir.
6 Q And there are only a certain number of placards,
7 correct?
8 A Yes, sir.
9 Q There is not a placard for a nonhazardous material being
10 carried which may become hazardous if broken. Would you
11 agree with that?
12 A Not that I'm aware of.
13 Q This truck was not required to be placarded; isn't that
14 correct?
15 A Yes, sir.
16 Q Because what was being carried was not hazardous
17 material. Correct?
18 A Correct.
19 Q With regard to the accident, sir, you never knew how
20 many tubes were broken and how many tubes were not broken;
21 isn't that true?
22 A Yes, sir.
23 Q You don't know what proportion of the tubes were broken
24 as opposed to being unbroken; is that correct?
25 A Yes, sir.

1 Q With regard to the issue of how some of the tubes broke,
2 some of the tubes broke when the front-end loaders were
3 dealing with them; isn't that true?
4 A Broken and rebroken, I'm sure.
5 Q Broken and rebroken? Let's take a look again at the
6 accident report. Now, David Dax Taylor, the driver of the
7 vehicle that crossed the median, was the cause of this
8 accident, correct?
9 A Yes, sir.
10 Q He was driving at an unsafe speed; isn't that true?
11 A Yes, sir.
12 Q You believe that you cited him for that, but there's no
13 indication on your report; isn't that correct?
14 A My usual method would be that I would file on the
15 individual that caused the initiating action that resulted in
16 the accident.
17 Q Because it's not on your report, does that mean you
18 didn't charge him?
19 A No, sir.
20 Q Do you remember at your deposition testifying that you
21 believe you did charge him?
22 A Yes, sir.
23 Q David Dax Taylor, the driver of the car that crossed the
24 median, initiated everything, as you put it in your
25 deposition; isn't that true?

1 A He was the initiating cause of the accident.

2 Q You did not cite Mr. Harry McCain for any violation that

3 day; isn't that true?

4 A No, sir. I did not.

5 Q Nor did you cite his employer, Penske; isn't that true?

6 A Right.

7 Q Let's take a look at the accident report right now.

8 Mr. Donaldson questioned you about this box item 27,

9 hazardous materials, transporting hazardous materials, and

10 hazardous materials released. You asked Mr. McCain -- do you

11 need a minute to find that, sir?

12 A I seem to. I'm missing the ST3-C and --

13 MR. CHRISTIAN: May I approach?

14 THE COURT: You may.

15 (BY MR. CHRISTIAN)

16 Q Mr. Acker, I'm not sure it's in this pile. Maybe

17 Mr. Donaldson has -- thank you. Does that have what you were

18 looking for?

19 A Yes.

20 Q Mr. Acker, you asked Mr. McCain whether he was carrying

21 hazardous materials, correct?

22 A Well, there is a load that was hazardous.

23 Q Did you ask him whether he was carrying hazardous

24 materials?

25 A I asked, "Was your load hazardous?"

1 Q The truck was on its side. At one point it was
2 uprighted. It was --
3 A Okay.
4 Q How did that happen? Do you remember?
5 A The wreckers -- large wreckers uprighted it.
6 Q How did they do it? Do you remember?
7 A With a wench.
8 Q Is that a guess?
9 A With a wench. I'm not sure what exactly you are --
10 Q I want you to tell the ladies and gentlemen of the jury
11 what you recall, if anything, about how the truck was
12 uprighted.
13 A It was uprighted with the wrecker using the wrecker's
14 wench hooked onto the trailer and then to the truck.
15 Q Onto the wheels?
16 A I don't recall specifically.
17 Q You do recall that many TV tubes fell out of the truck
18 when that happened, isn't that true?
19 A Yes, sir.
20 Q Now, at some point you were sitting in your patrol car.
21 Is that the right terminology, patrol car?
22 A Yes, sir.
23 Q At some point you were sitting in your patrol car with
24 Harry McCain, the Penske driver, isn't that true?
25 A I don't recall.

1 you're welcome to do so. I'm going to. If you don't mind,

2 Counsel.

3 MR. CHRISTIAN: Your Honor, I don't mind at

4 all.

5 THE COURT: There you go. When you're ready,

6 Counsel.

7 MR. CHRISTIAN: Thank you, Your Honor.

8 Q. (By Mr. Christian) Mr. Acker, I just have one or

9 two additional questions for you, sir.

10 One question; we talked about whether you had

11 a -- whether you asked Mr. Acker -- Mr. McCain if he was

12 hauling or carrying hazardous waste. Did you ask him whether

13 he was hauling hazardous materials?

14 A. I would say haz-mat.

15 Q. You asked him whether he was hauling haz-mat?

16 A. Yes.

17 Q. And his response was?

18 A. No.

19 Q. Mr. Acker, thank you.

20 MR. CHRISTIAN: Pass the witness, Your Honor.

21 CROSS EXAMINATION

22 BY MR. WADDELL:

23 Q. Mr. Acker, are you aware that the bill of lading

24 required to identify what is being transported?

25 A. Yes, sir.

1 away from the accident scene?

2 A It was late at night.

3 Q Okay. And why was that?

4 A Because when they shut us down from cleaning up the

5 scene, said it was hazardous material, we couldn't do

6 anything any longer. We had to wait till the haz-mat team

7 got there. I think they had to come out of San Antone.

8 Q Now, prior to that taking place, what sort of

9 cleanup activities -- once you got the truck upright, what

10 sort of cleanup activities had been going on before there

11 was any sort of declaration that this was a haz-mat

12 situation?

13 A TxDOT had a front-end loader there, and they were

14 loading it into dump trucks and hauling it to TDS.

15 Q Let me show you Plaintiff's Exhibit 17. This is

16 another one of those photographs, and ask you if you can

17 tell us -- looks like there's the truck that's been

18 uprighted in the background, and there's -- there's two

19 other trucks there. What are those other two trucks? Do

20 you know?

21 A Those are two of the dump trucks that were hauling

22 stuff to the landfill.

23 Q Now, how did it come to pass that those dump trucks

24 were hauling materials to the landfill? How did that come

25 about?

1 A Well, you have to clean up the wreck scene, and
2 TxDOT was going to pile it all up on the side of the road
3 with this front-end loader, and we talked to them and told
4 them it's got to be hauled off, why don't you load it one
5 time and load it into dump trucks. And they agreed to that,
6 and we, I believe, called back to my office and got them to
7 round us up some dump trucks.
8 Q And who ended up coming to the accident scene with
9 dump trucks?
10 A I'm not sure. I think Alfred Vallejo was called,
11 and I'm not -- I'm not sure who all sent trucks.
12 Q All right.
13 A But it was more than one person, I think.
14 Q Did you have any concern at the time that these
15 dump trucks were being called for that you had any sort of
16 hazardous materials or haz-mat situation that you were
17 having to deal with?
18 A No, sir.
19 Q Did you have -- in your experience in cleaning up
20 wrecks, had anybody ever suggested to you that CRTs or
21 picture tubes that are busted up or thrown away -- that any
22 of those had to be cleaned up as hazardous material or
23 hazardous waste?
24 A No, sir.
25 Q Have you ever dealt with a situation where someone

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11
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1 Q Was it a surprise to you to learn that cathode ray
2 tubes could be considered hazardous waste?
3 A Yes, sir.
4 MR. DONALDSON: Pass the witness.
5 CROSS-EXAMINATION
6 BY MR. CHRISTIAN:
7 Q Mr. Villalpando, good afternoon. My name is Doug
8 Christian, and I represent two Penske companies that were
9 sued by TDSL in this lawsuit, and I have just a few minutes
10 of questions for you, sir.
11 I'd like to talk with you first about the
12 location of the truck when it was on its side. The end of
13 the truck was on the shoulder; is that correct?
14 A It's -- it's in -- the accident has a lot of hot
15 mix blacktop, and it was sitting almost right on the
16 shoulder, edge of the main lane -- main lanes and the edge
17 of the pavement. It was near the edge of it.
18 Q And the Mustang and the Thunderbird, the two cars
19 involved in the accident, were on the actual main lanes,
20 correct?
21 A Yes, sir, when I arrived.
22 Q And do you remember, was there broken glass from
23 those automobiles? Do you remember?
24 A No, I don't remember.
25 Q You don't remember any TV tubes on the road before

1 the truck was uprighted, do you? Let me ask it differently.

2 Do you remember seeing any TV tubes on the ground before the

3 truck was uprighted?

4 A No, sir.

5 Q You saw tubes fall from the truck when the truck

6 was being uprighted; is that true?

7 A Yes, sir. I didn't see them. I heard the side

8 ripped -- or the truck ripped open.

9 Q When the -- when the wrecker service was trying to

10 upright the truck, you heard the side rip and the tubes fall

11 out; is that right?

12 A I heard from employees that were away from the --

13 from the -- lifting -- lifting the trailer heard it ripped.

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1 Q. Here is a page of notes that I believe Mr. Donaldson

2 just showed you.

3 A. Yes, sir.

4 Q. Just a couple of questions, sir. Do you see the

5 reference to 4 -- it's about halfway down --

6 A. Yes, sir.

7 Q. -- the column.

8 A. Yes, sir.

9 Q. Would you read that for the record, please?

10 A. "4, 10-yard trucks to haul material to dumpground,

11 Creedmoore."

12 Q. Dumpground Creedmoore, is that TDSL?

13 A. Yes, sir.

14 Q. And you indicated those are 10-yard dump trucks?

15 A. Yes, sir. That's what they told us that they were

16 coming, four dump trucks.

17 Q. And then this fourth line down, "Truck," would you

18 read that, please, for the jury?

19 A. Fourth line down from the top?

20 Q. Yes, sir.

21 A. Trailer ripped as wrecker company was trying to

22 stand it up.

23 Q. Mr. Villalpando, thank you very much. I appreciate

24 it, sir.

25 MR. CHRISTIAN: Pass the witness, Your Honor.

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1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS) IN THE DISTRICT COURT
LANDFILL, INC.,)
3 Plaintiff,)
)
4 VS.)
) HAYS COUNTY, TEXAS
5 PENSKE TRUCK LEASING CO.,)
L.P., PENSKE LOGISTICS, INC.,)
6 ZENITH ELECTRONICS CORP.,)
AND HARRY ERNEST MCCAIN,)
7)
Defendants.) 207TH JUDICIAL DISTRICT
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11
APRIL 14, 2004
12 Volume 2

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1 APPEARANCES

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1 A It included broken picture tubes and the cartons
2 that they were in.
3 Q Did it include any dirt from the scene?
4 A No, sir, didn't see any dirt go in there. If it
5 was, it was very little.
6 Q Did -- was the driver around when some of this
7 material was going into the dump trucks?
8 A Sir, I'm sure he was, but I couldn't, you know, say
9 for sure that I was standing there looking at him or
10 anything. We were pretty busy helping.
11 Q Do you know whether or not the driver -- well, let
12 me ask it this way. Did you ever tell -- did you know where
13 this material was going to go after it went into the dump
14 trucks?
15 A Yes, sir.
16 Q And did you talk to the driver and discuss that
17 with him?
18 A I don't believe so.
19 Q Do you know if -- were you present when there were
20 any conversations with the driver where he was told where
21 this material was going?
22 MR. CHRISTIAN: Objection, hearsay, Your
23 Honor.
24 THE COURT: Yes, sustained.
25 A I don't recall that.

1 Q (By Mr. Donaldson) Just a minute.

2 THE COURT: "Sustained" means don't answer the

3 question. I'm sorry.

4 Q (By Mr. Donaldson) Did you personally hear the

5 driver say or give any indication that he knew where the

6 material was going to go?

7 MR. CHRISTIAN: Objection, asked and answered,

8 Your Honor.

9 A No, sir, I didn't know.

10 THE COURT: When you hear an objection, wait

11 for me to rule. I'll try to be a little quicker next time

12 so you don't get bored on us. But overruled.

13 Q (By Mr. Donaldson) Now, now, based on what you saw

14 at the scene and what happened at the scene afterwards, if

15 there had been an indication early on, before you ever

16 picked up the trailer, and even after you picked up the

17 trailer but before those dump trucks arrived, that this tube

18 material had to be cleaned up as hazardous, would you expect

19 that material to go to Texas Disposal Systems' landfill?

20 MR. CHRISTIAN: Objection, lack of relevance

21 and calls for opinion testimony.

22 THE COURT: Sustained. That means don't

23 answer the question. I'm not meaning to be a smart alec.

24 I'm just trying to make sure we do it right.

25 THE WITNESS: Glad you told me that. Keep on

1 A Sir, I don't know.

2 Q You mentioned yesterday that you were out on the

3 scene for quite a long time. You had the truck uprighted

4 before there was any indication that anything was hazardous.

5 Why couldn't -- why couldn't you just go ahead and take the

6 truck away right at that point?

7 A They won't let us move it when it comes up as

8 haz-mat until the haz-mat part of it has been cleaned up and

9 it is located in the hauler.

10 Q And approximately when was it that you got the okay

11 so that you could haul it away?

12 A I don't know the exact time, but like I say, it was

13 getting pretty late at night and had been dark for several

14 hours.

15 Q Did you have to do anything special in order to be

16 able to haul this away, particularly with the trailer?

17 A We had to -- it would be the normal things. You

18 had to unlock the brakes, pull the drive shaft, and we

19 throwed a couple chains and booms around it to keep the top

20 and the side from flopping so bad.

21 MR. DONALDSON: I'll pass the witness.

22 CROSS EXAMINATION

23 BY MR. CHRISTIAN:

24 Q Mr. Machen, good morning.

25 A How are you doing, sir?

1 Q I'm doing well, thanks. How are you?

2 A I'm just fine.

3 Q As you might remember, my name is Doug Christian,

4 and I represent two Penske companies that were sued by TDSL.

5 A Yes, sir.

6 Q And I have some questions for you, sir.

7 A Yes, sir.

8 Q And if you can't hear me, please let me know and

9 I'll speak up.

10 A Okay, sir.

11 Q Okay. I'll give it my best shot, my best imitation

12 of Perry Mason, which is not very good. This accident

13 happened six and a half years ago, correct?

14 A Been a long time.

15 Q Been a long time. You've handled a lot of

16 accidents since then; isn't that true, Mr. Machen?

17 A Yes, sir.

18 Q Now, did you meet with Mr. Donaldson, sir, to

19 prepare for your testimony?

20 A I met with him for about five minutes before

21 you-all took that deposition.

22 Q Did you meet with him to prepare for your trial

23 testimony?

24 A No, sir.

25 Q Did you meet with any lawyer from his firm?

1 A No, sir.
2 Q Have you had a chance to look at your deposition
3 transcript?
4 A Yes, sir.
5 Q Did you read that in preparation for your trial
6 testimony?
7 A No, sir.
8 Q Now, let's talk about the scene of the accident.
9 That day you took direction at the scene from Trooper Acker;
10 is that correct?
11 A Yes, sir, it was a DPS trooper.
12 Q And he asked you to get the truck upright and off
13 the road; isn't that true?
14 A Yes, sir.
15 Q He wanted to get I-35 open?
16 A Yes, sir.
17 Q TxDOT is the Texas Department of Transportation; is
18 that correct?
19 A Yes, sir. Yes, sir.
20 Q Both the DPS and TxDOT wanted that road cleaned and
21 opened promptly; isn't that true?
22 A Yes, sir.
23 Q And they told you that, correct?
24 A Yes, sir, more than one time.
25 Q And you felt that you were under some pressure to

1 and there doesn't appear to be, at least in -- a lot of tube
2 debris on the right-hand side. Would you agree with that?
3 A Would you repeat the question again, sir?
4 Q I'm not going to repeat it. I'll ask it in a
5 better way. See where I'm pointing, about halfway the
6 length of the truck? Most of the debris appears to be to
7 the left of that; isn't that true?
8 A In that picture? Yes, sir.
9 Q And do you know for a fact that the cleanup had not
10 started when that picture was taken?
11 A I couldn't say sir. I don't know.
12 Q Okay. Thank you.
13 MR. CHRISTIAN: Thank you.
14 Q (By Mr. Christian) Now, you testified yesterday
15 that you uprighted the truck two and a half to three hours
16 after the first call, and that was at 1:00, the first call,
17 correct?
18 A Yes, sir, I believe it was around 1:00 when they
19 called us.
20 Q Two and a half to three hours later is when you
21 uprighted the truck?
22 A Yes, sir, somewhere in that neighborhood.
23 Q And many tubes fell out when you were uprighting
24 the truck, but you don't know how many; is that correct?
25 A That's right, sir.

1 Q Because you were on the other side of the truck.

2 You were in one of the tow trucks --

3 A Yes.

4 Q -- that was pulling the truck up, so you didn't

5 have the best position to see exactly how many fell out,

6 true?

7 A That's right.

8 Q Now, Mr. Machen, you testified yesterday that TxDOT

9 was going to put all the materials by the side of the road.

10 Do you remember that?

11 A Yes, sir.

12 Q But then you suggested that instead of doing that,

13 to save some effort, that they should just be put in dump

14 trucks and sent away; is that true?

15 A Yes, sir.

16 Q Now, was that to save time?

17 A Save time and money both.

18 Q So the TxDOT made that -- someone from TxDOT made

19 that suggestion, but you thought it was more appropriate

20 to --

21 A Made more sense to move it once than moving it

22 twice.

23 Q Let's talk for a minute about the concept of

24 off-loading, taking the product out of the truck before it's

25 uprighted. Do you understand what I mean by that?

1 Q. Now, Mr. Machen, do you know how these TV tubes were
2 packaged?
3 A. It was in some type of package, you know, I don't
4 know, cardboard, plastic of some sort, and it was wrapped
5 with -- like some kind of cellophane wrapping-type stuff
6 around them.
7 Q. But you don't -- but I assume you've never seen TV
8 tubes packaged into a trailer?
9 A. No, sir, sure haven't.
10 Q. And it's correct, isn't it, that you don't know how
11 many tubes broke as a result of the accident, right?
12 A. No, sir.
13 Q. Now, Mr. Machen, I understand that you rent a
14 dumpster, correct, for your garbage at your shop?
15 A. Yes, sir.
16 Q. And that dumpster is taken to TDSL, correct?
17 A. I suppose so, sir.
18 Q. And have you ever thrown out a TV into that
19 dumpster?
20 A. I probably have. I've owned about three in my life,
21 I think. And when I use them up, get rid of them.
22 Q. And you would throw it into the dumpster?
23 A. I'm sure we probably did.
24 MR. COMELLA: No more questions.
25 REDIRECT EXAMINATION

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INC., ZENITH ELECTRONICS)
7 CORP. AND ZENITH)
ELECTRONICS CORP. OF TEXAS,)
8 AND HARRY ERNEST MCCAIN,)
AND DAX DAVID TAYLOR,)
9)
Defendant(s).) HAYS COUNTY, TEXAS

10 **********

11 ORAL DEPOSITION OF ALFRED VALLEJO, JR.

12 OCTOBER 9, 2002

13 **********

14 ORAL DEPOSITION OF ALFRED VALLEJO, JR.,
15 produced as a witness at the instance of the
16 Defendant, Penske Truck Leasing Co., Et Al, and duly
17 sworn, was taken in the above-styled and numbered
18 cause on October 9, 2002 from 1:35 p.m. to 3:02 p.m.,
19 before Dicie Lee Eytcheson, CSR, RPR in and for the
20 State of Texas, reported by method of machine
21 shorthand, at the Office of Baker Botts, 98 San
22 Jacinto Blvd., Suite 1500, Travis County, Austin,
23 Texas, pursuant to the Texas Rules of Civil Procedure
24 and the provisions stated on the record or attached
25 hereto.

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ALSO PRESENT:
15 Gary Newton
Bob Gregory
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1 ALFRED VALLEJO, JR.,
2 having been first duly sworn, testified as follows:
3 EXAMINATION
4 BY MR. COMELLA:
5 Q. Mr. Vallejo?
6 A. Vallejo.
7 Q. Vallejo?
8 A. Vallejo.
9 Q. Would you kindly state and spell your name
10 for the record, again, please.
11 A. Last name only?
12 Q. Your -- your entire name.
13 A. Alfred Vallejo, Jr. is A-l-f-r-e-d
14 V-a-l-l-e-j-o, Jr.
15 Q. Have you ever been deposed before?
16 A. No, sir.
17 Q. I will cover the basic ground rules very
18 quickly. No. 1, make sure your answers are verbal.
19 Body language the Court Reporter can't transcribe. If
20 you don't understand a question, just say so. If you
21 need to take a break, say so, and you'll be able to
22 interrupt the deposition. If you answer a question, I
23 will assume that you understand it, and that your
24 answer is the best information you have in response to
25 that question. And at any time during the deposition

1 that reason.
2 Q. Did any of your dumpsters deliver debris from
3 the accident scene to Texas Disposal?
4 A. The dump trucks, yes, sir. The 12 yard --
5 the 12 cubic yard dump trucks, that's where they went.
6 Q. Did you call up Jim Gregory before your
7 dumpsters went to the landfill?
8 A. No, sir. I started -- I called Jim Gregory
9 after, since I have an account there, and I just
10 started sending trucks to the -- to the -- to the
11 dump. Because the way -- I mean, I -- when we were
12 there on the scene, as far as anybody -- you know, it
13 was just -- to me it was just debris. We got to get
14 it hauled off to the dump and get it out of here.
15 Q. Before -- Okay. So is it fair to say that
16 you made the decision to send the four dumpsters to
17 TDSL because you had an open account with them?
18 A. That's correct.
19 MR. DONALDSON: Object to form.
20 Q. (BY MR. COMELLA) Did anybody else at the
21 scene of the accident have a say in where to send the
22 debris?
23 A. No, sir. As far as my -- as whoever I talked
24 to, no, sir. Just -- my job was there to -- to get
25 the debris off the roadway. That was the main concern

1 for the wrecker service and -- and, I guess, also
2 TxDot. I mean, it was in the bar ditch and they
3 wanted to get it all gone.
4 Q. At the time you arrived at the scene of the
5 accident, are you aware of any discussion, whatsoever,
6 with regard to whether the broken picture tubes were a
7 hazardous waste?
8 A. No, sir.
9 Q. Did you ever become aware that the broken
10 picture tubes might constitute hazardous waste?
11 A. No, sir.
12 Q. Did you ever tell Jim Gregory that the broken
13 picture tubes were not hazardous waste?
14 A. No, sir.
15 Q. Did anybody at TDSL ask you whether the
16 broken picture tubes were hazardous waste?
17 A. No, sir.
18 Q. Is it fair to say that the following
19 statement, Mr. Vallejo, is, therefore, incorrect?
20 Here's the statement.
21 Quote, "Alfred Vallejo, Captain with the
22 Southeast Travis County Volunteer Fire Department told
23 TDSL that the television tubes were not hazardous
24 waste"; is that true?
25 A. No, sir.

1 Q. The -- early on in response to Mr. Comella's
2 questioning you described the piling up of the debris
3 at the site. What do you -- what did you mean when
4 you said piling up of the debris? How was that
5 occurring?
6 A. The -- they had a rubber tire loader there,
7 big -- I mean, I'm -- a big John Deere. I -- I don't
8 know what it was, but it -- it was doing a lot of
9 crushing. It was just pushing debris, just making a
10 big old pile just -- also with -- with the -- I guess,
11 what -- with the -- the debris that was being piled
12 there was a lot of plastic type of container
13 looking -- that was holding the -- I guess the bulbs
14 at the time that -- after -- after the fact. But
15 that's what it was; the machine was just sitting there
16 pushing everything up making a big pile.
17 Q. And when you say crushing, do you -- do you
18 mean crushing of the picture tubes?
19 A. There was a lot of -- yes, sir -- a lot of
20 breakage going on.
21 Q. Okay.
22 MR. CHRISTIAN: Well, that's all I
23 have. Thank you very much. Appreciate it.
24 THE WITNESS: You're welcome, sir.
25 MR. CHRISTIAN: Mr. Donaldson, I may

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Defendant(s).) HAYS COUNTY, TEXAS

10 REPORTER'S CERTIFICATION
DEPOSITION OF ALFRED VALLEJO, JR.
11 OCTOBER 9, 2002

12 I, DICIE LEE EYTCHESON, Certified Shorthand
13 Reporter in and for the State of Texas, hereby certify
14 to the following:
15 That the witness, ALFRED VALLEJO, JR., was duly
16 sworn by the officer and that the transcript of the
17 oral deposition is a true record of the testimony
18 given by the witness;
19 That the deposition transcript was submitted on
20 _____ to the witness or to the attorney
21 for witness for examination, signature, and return to
22 me by _____;
23 That the amount of time used by each party at the
24 deposition is as follows:
25 Douglas Y. Christian - 17 Minutes

1 David H. Donaldson, Jr. - 20 Minutes
2 Philip L. Comella - 43 Minutes
3 That pursuant to information given to the
4 deposition officer at the time said testimony was
5 taken, the following includes counsel for all parties
6 of record:
7 David H. Donaldson, Jr., Attorney for
Plaintiff(s), Texas Disposal Systems
8
Douglas Y. Christian, Attorney for Defendant(s),
9 Penske Truck Leasing Co.
10 Mr. Philip L. Comella, Attorney for Defendant(s),
Zenith Electronics
11
12 I further certify that I am neither counsel for,
13 related to, nor employed by any of the parties or
14 attorney in the action in which this proceeding was
15 taken, and further that I am not financially or
16 otherwise interested in the outcome of the action.
17 Further certification requirements pursuant to
18 Rule 203 of TRCP will be certified to after they have
19 occurred.
20 Certified to by me this 24th day of
21 October, 2002.
22
23 Dicie Lee Eytcheson
DICIE LEE EYTCHESON, Texas CSR 5392
24 Expiration Date: 12/31/02
7800 IH-10 West, Suite 100
25 San Antonio, Texas 78230
(210) 377-3027

1 FURTHER CERTIFICATION UNDER RULE 203 TRCP
2
3 The original deposition ( ) was ( ) was not
4 returned to the deposition officer on
5 _____;
6 If returned, the attached Changes and Signature
7 page contains any changes and the reasons therefor;
8 If returned, the original deposition was delivered
9 to Philip L. Comella, Custodial Attorney;
10 That $ _____ is the deposition officer's
11 charges to the Defendant for preparing the original
12 deposition transcript and any copies of exhibits;
13 That the deposition was delivered in accordance
14 with Rule 203.3, and that a copy of the certificate
15 was served on all parties shown herein and filed with
16 the Clerk.
17 Certified to by me this _____ day of
18 _____, 2002.
19
20 _____
DICIE LEE EYTCHESON, Texas CSR 5392
21 Expiration Date: 12/31/02
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11
APRIL 20, 2004
12 Volume 6

13 **********

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1 Lee Machen, and how do you know Mr. Machen?

2 A. I've known Mr. Machen throughout the years. He's in

3 the wrecker business and lives there close to my community --

4 my area, in the community area.

5 Q. And have you seen him on accident scenes when

6 you're --

7 A. Yes, sir, I do.

8 Q. And, of course, you know Texas Disposal Systems.

9 What occasions have you had to be involved with Texas Disposal

10 Systems?

11 A. I was -- back in 1994, I used to have a cleanup -- I

12 was working for Doyle Wilson homebuilders, and I used to do a

13 lot of cleanup. Whenever they build houses, I do a lot of the

14 frame work and cleanup and everything, and that's what I -- I

15 had my account set up at Texas Disposal, and I was hauling all

16 of my debris over there, back in 1994.

17 Q. And by 1997, were you still doing any of that?

18 A. No, sir.

19 Q. Now, let me focus your attention now on the day of

20 the accident, October 9th of 1997. How did you first become

21 involved in dealing with that accident scene?

22 A. My -- the initial phone call came from Judy Machen,

23 Lee Machen's wife, and she needed some dump trucks. And so I

24 told her I could locate her, you know, a couple of dump

25 trucks, two or three dump trucks. And I got ahold of my

1 nephew, Eddie Vallejo, and I got ahold of David Riojas. And

2 then that's how -- the initial call came from Judy Machen, --

3 Q. Okay.

4 A. -- needing some help.

5 Q. Now, did you have a -- did you do all of this work

6 on your cell phone?

7 A. Yes, sir.

8 Q. And did you provide a copy of your cell phone

9 records to us for us to review?

10 A. Yes, sir.

11 MR. DONALDSON: Your Honor, we would offer

12 Plaintiff's Exhibit 18, which is a copy of Mr. Vallejo's cell

13 phone records.

14 (Discussion off the record)

15 MR. JOHNSON: No objection, Your Honor.

16 THE COURT: It will be admitted.

17 (Discussion off the record)

18 THE COURT: It's admitted.

19 MR. DONALDSON: Thank you.

20 If we may, can we put that up on the scene?

21 And go to the second page.

22 THE WITNESS: A lot of phone bill here.

23 MR. DONALDSON: I guess we'll go to the third

24 page. There we are. And let's center, if we can, in the

25 middle here. Right in here. Let's take that little box kind

1 the debris to be loaded up on dump trucks.
2 Q. All right. And tell us about the conversation with
3 the gentleman with TxDOT.
4 A. Just when I pulled up there, the law enforcement had
5 the road blocked off, and I told them I needed to gain access
6 into the accident scene. When I gained access, I went up
7 there and they told me I needed to get ahold of the TxDOT guy,
8 who was -- he was overlooking, I guess at the time, the
9 situation, the cleanup situation. And he told me just to get
10 on around here and let's load them up.
11 Q. Any indication or any concern that you got from the
12 TxDOT guy that any of this material was hazardous?
13 A. No, sir. No indication at all.
14 Q. Now, at some point, you called -- you have a call up
15 here at 3:19 -- at 15:19, Creedmoore, 243-4100. Do you
16 recognize that as the phone number at Texas Disposal Systems?
17 A. Yes, sir. That is their number.
18 Q. So at 3:19, you called Texas Disposal Systems. And
19 that looks like it's a six-minute call. Tell the jury about
20 that phone call.
21 A. That six-minute phone call was, I needed to
22 verify -- I had been doing business with Texas Disposal in the
23 prior years. And the reason I made that phone call was to
24 make sure that my charge account was active with them at the
25 time, and to tell them that I was going to be bringing in some

1 debris. And that was the initial phone call that lasted six
2 minutes. We talked about -- I was trying to verify my
3 account.
4 Q. All right. And did you get a verification?
5 A. Yes, sir.
6 Q. Okay.
7 A. Because see, I have two accounts. At the time, I
8 had a small Dumpster account that I keep on my place there at
9 the ranch.
10 Q. Uh-huh.
11 A. And, of course, the other account that I used when I
12 was working for Doyle Wilson homebuilders bringing in debris.
13 Q. All right. Did you talk to Jim Gregory in that
14 first phone call?
15 A. No, sir.
16 Q. How many times did you talk to Jim Gregory that day?
17 A. The -- I talked -- when I got on -- okay. I didn't
18 talk to Jim Gregory until I actually got on the scene, the
19 accident scene.
20 Q. Okay.
21 A. That was the initial time. That was the first time
22 that I talked to Jim Gregory.
23 Q. Sure. Were you on the accident scene when you made
24 that first call to TDSL at 3:19?
25 A. No, sir. I was -- I was in route to the accident

1 to be the only opportunity for the ladies and gentlemen of
2 the jury to hear your version of what happened on that
3 conversation.
4 MR. DONALDSON: Your Honor, you are allowed to lead
5 on cross-examination, but arguing is a different issue. I
6 object.
7 THE COURT: Watch the flowers, counsel. Let's get
8 to the question.
9 MR. JOHNSON: Yes, Your Honor.
10 (BY MR. JOHNSON)
11 Q I want you to focus on that one conversation you had
12 with Mr. Gregory.
13 A Yes, sir.
14 Q Did Jim Gregory ask you if broken picture tubes
15 contained hazardous waste?
16 A No, sir.
17 Q Did anyone at TDSL ask you if broken picture tubes
18 contained hazardous waste?
19 A No, sir.
20 Q Did you tell anyone at TDSL that broken picture tubes
21 did not contain hazardous waste?
22 A No, sir.
23 Q Sir, we heard that you are a member of the SETCO Fire
24 Department.
25 A Yes, sir. At the time it was called SETCO Volunteer

1 that true?

2 A No, sir.

3 Q Maybe that's a bad question. You didn't know whether

4 they could or couldn't.

5 A No, sir.

6 Q And at the accident scene you didn't speak to anyone

7 about how to dispose of television picture tubes.

8 A No, sir.

9 Q All right, sir. Let me ask you a few true or false

10 questions. Is this true or false? Alfred Vallejo made the

11 decision that broken picture tubes were not hazardous waste

12 and could be disposed of at TDSL.

13 A False.

14 Q True or false. Alfred Vallejo and Jim Gregory discussed

15 the characteristics of broken picture tubes.

16 A No, sir.

17 Q True or false. You called Jim Gregory before this waste

18 went to their landfill and asked him if you could bring

19 broken picture tubes there.

20 A That's false.

21 Q In fact, these dump trucks were already on their way to

22 TDSL before you ever spoke to anyone at TDSL.

23 A Other than to verify my charge account at TDS, the

24 office. I talked to the personnel at the office.

25 Q So these dump trucks were on the way to TDSL before you

1 spoke to anyone about what was in the dump trucks.

2 A That's correct.

3 Q The first time you did that, sir -- let me back up. The

4 only call you had with Jim Gregory was at 4:04, correct?

5 A Yes.

6 Q True or false. Jim Gregory asked you if there was any

7 problem with the tubes as far as the state, at the time,

8 TNRCC, would be concerned. And you said no. Either we or

9 they had talked with the TNRCC about the tubes, and that it

10 could come into the landfill. Did you say that, sir?

11 A No, that's false.

12 Q Have you ever spoken with anyone at the TNRCC?

13 A No.

14 Q I just realized I'm saying TNRCC. I'll explain what

15 that is. Are you familiar with the state environmental

16 agency?

17 A Yes.

18 Q And I think it was known at the time as the TNRCC?

19 A Yes, sir. Police Department. They were policing the

20 environmental.

21 Q You have never spoken with anyone at that state agency?

22 A No.

23 Q And you have never spoken with anyone at any state

24 agency about environmental issues.

25 A No. Are we still under true and false? I wanted to

1 make sure.
2 Q Did you tell anyone back in October 1997 that you had
3 spoken with the state, anyone at the state, and determined
4 that these tubes could be disposed at TDSL's landfill?
5 A No.
6 Q Did you hear anyone say at that accident scene that they
7 had spoken with the state and found out these TV tubes could
8 be disposed of in TDSL's landfill?
9 A No.
10 Q No, sir?
11 A No, sir.
12 Q Sir, if Jim Gregory testifies in this case you told him
13 that the state was okay with disposing of these tubes in
14 TDSL's landfill, is that true or false?
15 A That's false.
16 MR. JOHNSON: No further questions.
17 THE COURT: While he's doing that, I'll explain real
18 quick. Mr. Johnson represents Penske. This is Mr. Comella.
19 He represents Zenith. He's going to have some questions for
20 you. And I'll allow them to go back through once or twice,
21 but that will be short. Okay?
22 THE WITNESS: Thank you.
23 CROSS-EXAMINATION
24 (BY MR. C0MELLA)
25 Q Mr. Vallejo, Phil Comella for Zenith. Thank you for

1 A No, sir.

2 Q Do you recall if the dump trucks made round trips to the

3 landfill on October 9th?

4 A Yes, sir, they did. I think they made like two rounds

5 each.

6 Q Do you know approximately how long it took for this

7 round trip to occur?

8 A No, sir. It would be fair to say that it took at

9 least -- from where we were at on the accident scene to where

10 the TDS landfill is at, it shouldn't take over ten minutes to

11 get there. Make a round trip in 25 minutes, 30 minutes.

12 Q So to load the truck and to make a round trip would take

13 about 20 or 30 minutes?

14 A I would say -- they had a pretty good sized loader on

15 the scene. TxDOT had a huge loader on there, so it wasn't

16 taking them long. They were wanting to clean up the debris

17 off the roadway.

18 Q They were trying to get the debris --

19 A Off the road. That's correct.

20 Q And it would take only about 20 to 30 minutes?

21 A To load, yes, sir, to go and dump and come right back.

22 Provided that the line was not long at TDS either. A lot of

23 times they have a line of trucks, people coming in with small

24 trailers to dump debris.

25 Q And last, Mr. Vallejo, you simply made the decision to

1 take this debris to Texas Disposal because you had an open
2 account there; is that correct?
3 A That's correct.
4 Q Thank you for your time.
5 THE COURT: Redirect. So we are back to
6 Mr. Donaldson.
7 REDIRECT EXAMINATION
8 (BY MR. DONALDSON)
9 Q Mr. Vallejo, was the location of this accident scene
10 near the Travis County/Hays County line?
11 A It was south of the Travis County line. I would
12 guesstimate maybe half a mile. Between a half mile and a
13 quarter mile.
14 Q If it happened half a mile father north, would it have
15 been in your jurisdiction?
16 A That would have been in, actually, the City of Austin
17 jurisdiction. APD would handle that.
18 Q Have you ever gone on APD scenes and been requested for
19 assistance?
20 A We have gone into there as mutual aid, as far as, you
21 know, helping out, but that was as far as that -- I-35 going
22 north of the City of Austin. So that was there's.
23 Q In addition to the one hazardous material scene --
24 hazardous scene that you had been on, had you had training on
25 what another hazardous scene should look like?

1 A That's correct.

2 Q You did not speak to Mr. Jim Gregory on this call.

3 A No, sir.

4 Q Correct?

5 A That's correct.

6 Q The first time you speak with Mr. Gregory was 4:0; is

7 that correct?

8 A That's correct.

9 Q Are you sure about that?

10 A Yes, sir, because when I called -- these were like

11 one-minute phone calls. I was trying to get hold of -- for

12 them to get hold of Jim Gregory to get ahold of me.

13 Q 4:03, calls to TDSL. And he called you back from his

14 cellphone.

15 A That's right. They made contact with him, and he got

16 ahold.

17 Q Did you speak with anyone from Penske back in

18 October 1997, the day that these two debris went into the

19 landfill?

20 A No, sir.

21 Q Did you speak to the driver, Harry McCain?

22 A No.

23 Q Did you speak to anyone from Zenith?

24 A No, sir.

25 Q Mr. Vallejo, Mr. Donaldson mentioned your deposition.

CAUSE NO. 98-0159

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	*	IN THE DISTRICT COURT
Plaintiff,	*	
VS.	*	OF HAYS COUNTY, TEXAS
PENSKE TRUCK LEASING CO., L.P., PENSKE LOGISTICS, INC., ZENITH ELECTRONICS CORP., ZENITH ELECTRONICS OF TEXAS, INC., and HARRY ERNEST McCAIN,	*	
Defendants.	*	207TH JUDICIAL DISTRICT

****

VIDEOTAPED DEPOSITION OF

BRIAN ACKER

TAKEN OCTOBER 10, 2002

****

VIDEOTAPED DEPOSITION of BRIAN ACKER, produced as a witness at the instance of the Plaintiff and duly sworn, was taken in the above-styled and numbered cause on the 10th day of October, 2002, from 11:17 a.m. to 3:16 p.m., before Janet L. Hamm, CSR in and for the State of Texas, reported by machine shorthand, at the Welcome Home Inn of San Marcos, 1635 Aquarena Springs Drive, San Marcos, Texas, pursuant to the Texas Rules of Civil Procedure and the provisions stated on the record or attached hereto.

1 A P P E A R A N C E S

2 FOR THE PLAINTIFF:

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5 Austin, Texas 78701

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FOR DEFENDANTS PENSKE TRUCK LEASING CO., L.P., PENSKE
7 LOGISTICS, INC., and HARRY ERNEST McCAIN:

8 Mr. Douglas Y. Christian
REED SMITH, LLP
9 2500 One Liberty Place
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10 Philadelphia, Pennsylvania 19103

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FOR DEFENDANTS ZENITH ELECTRONICS CORP. AND ZENITH
12 ELECTRONICS OF TEXAS, INC.:

13 Mr. Philip L. Comella
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14 55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
15

16 ALSO PRESENT:

17 Mr. Bobby Gregory
Mr. Steve Sargologos, Videographer
18

19

20

21

22

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25

44:39 1 incident or his standard operating practice? You said
11:44:43 2 "are you involved."
11:44:43 3 MR. DONALDSON: Oh, okay. All right.
11:44:45 4 Well, let me try -- start over again.
11:44:48 5 Q (By Mr. Donaldson) In this particular instance
11:44:50 6 did you call the wrecker service?
11:44:57 7 A The -- if -- generally speaking, if Hays County
11:45:01 8 has dispatched me to the accident, I'll go through Hays
11:45:03 9 County because they have rotation wreckers, and we had a
11:45:07 10 rotation -- they would have a rotation of wreckers for
11:45:10 11 small cars, which is local, one-ton pickups, and then
11:45:13 12 it's a specialized company to deal with large
11:45:17 13 truck-tractor semi-trailers and to upright them.
11:45:21 14 And some -- depending on the company,
11:45:25 15 depending on how much specialized equipment they have
11:45:28 16 and their ability to use that, they are on rotation
11:45:33 17 until we can -- in case they don't do very well and in
11:45:36 18 which case I won't tell the sheriff's office anyone but
11:45:40 19 them, but in this case I would think that I would have
11:45:42 20 gone through the sheriff's office and let them call
11:45:45 21 whoever was up next on rotation.
11:45:50 22 Q Did -- let's talk a minute about who other --
11:45:58 23 what other units were on the scene. Of course you were
11:46:03 24 there. Was anyone from the Hays County Sheriff's Office
11:46:06 25 there?

14:19:09 1 was that none of us were in immediate health risk or --
14:19:12 2 because of that release.
14:19:14 3 Q Let me try to put it this way. Did you sense
14:19:21 4 that when this form asked you to identify whether the
14:19:27 5 truck is carrying hazardous materials, that that topic
14:19:33 6 is separate than whether these broken tubes might create
14:19:37 7 an environmental risk if broken? Are those two separate
14:19:41 8 topics, in your mind?
14:19:42 9 A For reporting purposes, yes, sir.
14:19:50 10 Q So therefore -- let me scratch that. Is it
14:19:55 11 fair to say that at the scene of the accident you were
14:19:59 12 the on-scene commander? Is that a fair term or --
14:20:03 13 MR. DONALDSON: Object to form.
14:20:04 14 A Kind of lofty, but okay.
14:20:07 15 Q (By Mr. Comella) Is that -- what term would
14:20:08 16 you use?
14:20:08 17 A If somebody wants to do something, then --
14:20:11 18 that's at the scene, they would -- they would -- they
14:20:12 19 would ask me or look to me as, I guess, make the command
14:20:17 20 decision, yea or nay.
14:20:18 21 Q Is there a term that is common in your industry
14:20:24 22 for what they call you at the scene of the accident,
14:20:27 23 other than the --
14:20:29 24 A Other than just being the accident
14:20:32 25 investigator, I mean --

14:20:33 1 Q I use "on-scene commander" because that term is
14:20:36 2 used sometimes in response action. There's an on-scene
14:20:40 3 commander --
14:20:41 4 A Right, when you have multi-agency response.
14:20:42 5 Q Isn't this somewhat similar, because there's a
14:20:45 6 lot of different outfits responding?
14:20:47 7 A Well, anytime you have an accident with injury,
14:20:49 8 I mean, you're going to get multiple agencies in
14:20:52 9 different, you know, levels there. It just depends on
14:20:56 10 how many -- what you've got that determines how many
14:20:59 11 different agencies are going to show.
14:21:01 12 Q But without overstating your role, is it fair
14:21:03 13 to say that you were -- or undertook the role of the
14:21:09 14 single point of contact to organize the activities of
14:21:13 15 the various entities that had responded to this
14:21:15 16 accident?
14:21:15 17 MR. DONALDSON: Object to form.
14:21:17 18 Q (By Mr. Comella) Is that fair to say that?
14:21:19 19 A Safe enough.
14:21:23 20 Q So as the on-scene commander, as of your
14:21:27 21 conversation with the person up north, you knew that
14:21:30 22 these TV sets, if broken, might be hazardous waste; is
14:21:35 23 that true?
14:21:37 24 A Well, I don't know about hazardous waste, but
14:21:39 25 he was -- he was saying "haz-mat," I believe, and that's

. 30:29 1 to dispose of it.

14:30:30 2 Q Did you have any say in the disposal site to

14:30:35 3 which these broken tubes were hauled?

14:30:41 4 A There was no other option.

14:30:44 5 Q And what do you mean by that?

14:30:45 6 A The wrecker driver, once he's called, it's his

14:30:50 7 package to deal with, and when he came up with the

14:30:57 8 landfill that close and the containers that readily

14:31:01 9 available, that was a good deal for me and what I needed

14:31:06 10 to accomplish.

14:31:07 11 Q Does the name Alfred Vallejo, V-a-l-l-e-j-o,

14:31:13 12 ring a bell?

14:31:15 13 A No, sir.

14:31:18 14 Q So is it fair to say that when the wrecker

14:31:23 15 service was called to clean up this debris, you relied

14:31:29 16 upon their knowledge and experience with managing this

14:31:33 17 type of debris to determine what landfill to take the

14:31:38 18 garbage?

14:31:38 19 MR. DONALDSON: Object, form.

14:31:40 20 A One more time?

14:31:42 21 Q (By Mr. Comella) I need to rephrase that

14:31:45 22 question. Bad question. Is it fair to say that you

14:31:47 23 relied upon the wrecker service to determine what

14:31:51 24 disposal site to use to dispose of the broken TVs?

14:31:54 25 A Yes, sir.

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	*	IN THE DISTRICT COURT
3	*	
Plaintiff,	*	
4	*	
VS.	*	OF HAYS COUNTY, TEXAS
5	*	
PENSKE TRUCK LEASING CO.,	*	
6 L.P., PENSKE LOGISTICS,	*	
INC., ZENITH ELECTRONICS	*	
7 CORP., ZENITH ELECTRONICS	*	
OF TEXAS, INC., and HARRY	*	
8 ERNEST McCAIN,	*	
	*	
9 Defendants.	*	207TH JUDICIAL DISTRICT

10

REPORTER'S CERTIFICATION
11 VIDEOTAPED DEPOSITION OF BRIAN ACKER
OCTOBER 10, 2002

12

13 I, Janet L. Hamm, Certified Court Reporter in and
14 for the State of Texas, hereby certify to the following:
15 That the witness, BRIAN ACKER, was duly sworn by the
16 officer and that the transcript of the oral deposition
17 is a true record of the testimony given by the witness;
18 That the deposition transcript was submitted on the
19 21st day of October, 2002, to the witness or to the
20 attorney for the witness for examination, signature and
21 return to me by the 11th day of November, 2002;
22 That the amount of time used by each party at the
23 deposition is as follows:
24 Mr. Donaldson - 1 hour, 21 minutes
Mr. Christian - 24 minutes
25 Mr. Comella - 34 minutes

1 That pursuant to information given to the deposition
2 officer at the time said testimony was taken, the
3 following includes counsel for all parties of record:

4 Mr. David H. Donaldson, Jr., Attorney for Plaintiff
Mr. Douglas Y. Christian, Attorney for Defendants
5 Penske Truck Leasing Co., L.P., Penske Logistics, Inc.,
and Harry Ernest McCain
6 Mr. Philip L. Comella, Attorney for Defendants
Zenith Electronics Corp. and Zenith Electronics of
7 Texas, Inc.

8 I further certify that I am neither counsel for,
9 related to nor employed by any of the parties or
10 attorneys in the action in which this proceeding was
11 taken, and, further, that I am not financially or
12 otherwise interested in the outcome of the action.

13 Further certification requirements pursuant to
14 Rule 203 of TRCP will be certified to after they have
15 occurred.

16 Certified to by me this 21st day of October, 2002.
17
18
19 Janet L. Hamm
JANET L. HAMM, Texas CSR #5029
20 Expiration Date: 12/31/03
805 West 10th, Suite 400
21 Austin, Texas 78701
(512) 478-2762
22
23
24
25

1 **FURTHER CERTIFICATION UNDER RULE 203 TRCP**

2

3 The original deposition was/was not returned to the
4 deposition officer on _____;
5 If returned, the attached Changes and Signature page
6 contains any changes and the reasons therefor;
7 If returned, the original deposition was delivered
8 to Mr. David H. Donaldson, Jr., Custodial Attorney;
9 That $_____ is the deposition officer's
10 charges to the Plaintiff for preparing the original
11 deposition transcript and any copies of exhibits;
12 That the deposition was delivered in accordance with
13 Rule 203.3 and that a copy of this certificate was
14 served on all parties shown herein and filed with the
15 Clerk.
16 Certified to by me this ____ day of _____,
17 2002.
18
19 _____
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1 CAUSE NO. 98-0159
2 2 TEXAS DISPOSAL SYSTEMS) IN THE DISTRICT COURT
LANDFILL, INC.,)
3 3 Plaintiff,)
)
4 4 VS.)
) HAYS COUNTY, TEXAS
5 5 PENSKE TRUCK LEASING CO.,)
L.P., PENSKE LOGISTICS, INC.,)
6 6 ZENITH ELECTRONICS CORP.,)
AND HARRY ERNEST MCCAIN,)
7 7)
Defendants.) 207TH JUDICIAL DISTRICT
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24 Houston, Texas 77002-2731
25

1 THE COURT: Okay. And so I guess we're ready
2 to go on the record.
3 MS. BRAND: If you'll give me one second, Your
4 Honor. I apologize.
5 MR. HEMPHILL: And, Your Honor, if I may
6 approach, I've got a copy of the Wyckoff transcript. Again,

1 injury as opposed to the decision made by the landfill to

2 accept the tubes?

3 A. I -- no, sir. I do not know. I'm sorry, can you do

4 4 that again?

5 Q. I'm not going to do that again. I'm going to

6 withdraw that question and move on, sir.

7 A. Okay.

8 Q. There is a warning label on that television tube; is

9 there not?

10 A. Yes, there is.

11 Q. And it also talks about implosion?

12 A. I believe that -- I was looking at it just a little

13 bit ago, I believe it says something about wearing safety

14 goggles and gloves when you handle it, and don't bang them

15 together. Basically what I said earlier.

16 Q. Mr. Reszke, to the best of your knowledge, did

17 Zenith ever tender to Penske any hazardous materials for

18 shipment by Penske?

19 A. No, sir. I don't.

20 THE REPORTER: No, sir, what?

21 A. No, sir. I know of no such shipments.

22 Q. (By Mr. Christian) You're not aware of a single

23 instance of the tendering of hazardous materials by Zenith to

24 Penske; isn't that true?

25 A. Correct.

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS * IN THE DISTRICT COURT
LANDFILL, INC., *
3 Plaintiff, *
*
4 VS. * OF HAYS COUNTY, TEXAS
*
5 PENSKE TRUCK LEASING CO., *
L.P., PENSKE LOGISTICS, *
6 INC., ZENITH ELECTRONICS *
CORP., ZENITH ELECTRONICS *
7 OF TEXAS, INC., and HARRY *
ERNEST McCAIN, *
8 Defendants. * 207TH JUDICIAL DISTRICT

9

10 **********

11 ORAL DEPOSITION OF

12 GARY NEWTON

13 INDIVIDUALLY AND AS CORPORATE

14 REPRESENTATIVE FOR TDSL

15 TAKEN JULY 24, 2003

16 VOLUME 2

17 **********

18

ORAL DEPOSITION of GARY NEWTON, produced as a
19 witness at the instance of the Defendants Penske Truck
Leasing Co., L.P., Penske Logistics, Inc., and Harry
20 Ernest McCain, and duly sworn, was taken in the
above-styled and numbered cause on the 24th day of July,
21 2003, from 9:55 a.m. to 5:26 p.m., before Janet L. Hamm,
CSR in and for the State of Texas, reported by machine
22 shorthand, at the law offices of George & Donaldson,
L.L.P., 1100 Norwood Tower, 114 West Seventh Street,
23 Austin, Texas, pursuant to the Texas Rules of Civil
Procedure and the provisions stated on the record or
24 attached hereto.

25

1 A P P E A R A N C E S

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14 55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
15

16 ALSO PRESENT:

17 Mr. Bob Gregory

18

19

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24:13 1 between Penske and Mr. Vallejo directly.

11:24:17 2 Q When did you first take the position that

11:24:22 3 Mr. Vallejo was an agent of Penske?

11:24:27 4 MR. DONALDSON: Object to form.

11:24:30 5 A Very quickly after I learned of his -- his

11:24:32 6 involvement.

11:24:34 7 Q (By Mr. Christian) You drafted several letters

11:24:35 8 with regard to this incident, is that correct, letters

11:24:38 9 to Penske and Zenith?

11:24:43 10 A I know of one letter that I drafted. I do know

11:24:48 11 that I reviewed several letters by Tim Herman that

11:24:52 12 Mr. Herman sent.

11:24:55 13 Q Would you agree with me that the TV tubes were

11:25:01 14 brought to your facility by someone other than Penske?

11:25:05 15 A They were carried --

11:25:06 16 MR. DONALDSON: Object to form.

11:25:08 17 Go ahead.

11:25:10 18 A As I understand it, Mr. Vallejo and another

11:25:14 19 company, M & M Trucking, were the ones that carried --

11:25:20 20 or, you know, owned the vehicles that carried the

11:25:22 21 materials that ended up in TDSL.

11:25:24 22 Q (By Mr. Christian) Those entities transported

11:25:27 23 the tubes to your facility. Would you agree with me?

11:25:30 24 A That is my understanding.

11:25:33 25 Q And Mr. Vallejo and his people signed the slips

14:43:08 1 letting them go to the working face so that TDSL could
14:43:13 2 make inquiries of either the State, TNRCC, Penske or
14:43:17 3 Zenith regarding the characteristics of the material?
14:43:20 4 MR. DONALDSON: Object to form.
14:43:21 5 A Well, there was no other requirement that we
14:43:25 6 hold them. We had done all the inquiries, so again,
14:43:29 7 there was no reason to hold them up after that.
14:43:35 8 Q (By Mr. Christian) And there was nothing that
14:43:38 9 prevented you from doing so, correct?
14:43:41 10 A No, there was no requirement -- again, no
14:43:46 11 requirement that would -- kept us from taking it.
14:43:49 12 Q Okay. I'm not asking whether there was a
14:43:51 13 requirement. My question was whether there was anything
14:43:55 14 that prevented TDSL from keeping those trucks there
14:43:59 15 until it made inquiries of either the State, TNRCC,
14:44:04 16 Zenith or Penske?
14:44:05 17 MR. DONALDSON: Object to form.
14:44:07 18 A No, there was nothing that prevented us, nor
14:44:11 19 was there any requirement that we do anything.
14:44:14 20 Q (By Mr. Christian) What prevented Jim Gregory
14:44:18 21 from calling any of the many people at the scene and
14:44:21 22 asking questions regarding the materials?
14:44:28 23 A He had already spoken to somebody who was at
14:44:32 24 the scene and who was an experienced emergency response
14:44:37 25 personnel.

57:14 1 about an hour and a half. Do you want to take a break?
14:57:18 2 MR. CHRISTIAN: Sure.
3 (Recess taken)
15:14:03 4 Q (By Mr. Christian) Is it true, Mr. Newton,
15:14:08 5 that TDSL did not rely on anything Penske said to
15:14:17 6 anybody in accepting these TV tubes into its landfill?
15:14:21 7 MR. DONALDSON: Object to form.
15:14:24 8 A Well, I think that -- I think that we did.
15:14:31 9 Q (By Mr. Christian) Will you explain that,
15:14:33 10 please?
15:14:34 11 A I believe the driver at the scene, when
15:14:40 12 inquired by emergency personnel, made statements such
15:14:44 13 that, you know -- that they were not hazardous --
15:14:47 14 hazardous materials and that "When they're broken on the
15:14:52 15 loading docks, we just throw them in the trash," and
15:14:55 16 those types of statements that, yeah, went into the --
15:14:59 17 into the evaluation by the emergency response personnel
15:15:02 18 that we then relied on. That is -- if your question is,
15:15:17 19 did the driver tell TDSL that directly, no.
15:15:19 20 Q Here's my question. Did TDSL decide to accept
15:15:26 21 the tubes for disposal and put them in the working face
15:15:31 22 of the facility based on anything Penske said directly
15:15:37 23 to TDSL?
15:15:39 24 A No, it was not direct.
15:15:41 25 Q Now, your contention is that Penske made

15:22:44 1 that are trying to locate those -- that facility --
15:22:50 2 trying to establish that facility.
15:22:59 3 Q Does TDSL have a library with volumes regarding
15:23:06 4 issues involving the waste industry, solid waste
15:23:09 5 industry?
15:23:10 6 A We have a file room.
15:23:12 7 Q Does it have books?
15:23:13 8 A Yes, there are books in there.
15:23:17 9 Q Is there an inventory of the books?
15:23:26 10 A I believe our people have a -- you know, like a
15:23:31 11 list of everything in there, you know, a file list, so
15:23:35 12 that they can retrieve -- at least I hope they have it.
15:23:38 13 Q Do you have any landfill operations manuals
15:23:42 14 prepared by any person or organization, I mean, other
15:23:47 15 than one that TDSL put together?
15:23:50 16 A Yeah, I think so.
15:23:51 17 Q Do you know who the author of that is?
15:23:55 18 A Oh, I'm aware of some, you know, manuals and
15:24:01 19 guidance documents put out by the State, by EPA. There
15:24:07 20 might be some other private entities, but I don't know
15:24:13 21 anybody in particular.
15:24:13 22 Q In October of 1997 did you know that color
15:24:18 23 television tubes contained lead?
15:24:21 24 A I was aware that there was lead in some TV
15:24:26 25 tubes. I didn't know which ones.

15:26:25 1 Q Do you know whether Mr. J.D. Porter has ever
15:26:27 2 had any experience with regard to recycling of CRTs or
15:26:32 3 television tubes?
15:26:36 4 A It's -- yeah, it's my belief that he has
15:26:39 5 knowledge about those activities. Whether he's actually
15:26:42 6 done it or not, I don't know.
15:26:43 7 Q Do you know whether he had knowledge of those
15:26:47 8 activities prior to the date of this accident?
15:26:51 9 A I -- I think that he was -- that he did have
15:26:55 10 that knowledge prior to the date of the accident.
15:26:57 11 Q And do you believe Mr. Gregory also had that
15:27:00 12 knowledge prior to the date of the accident?
15:27:01 13 MR. DONALDSON: Object to form.
15:27:02 14 Q (By Mr. Christian) Let me rephrase it. Do you
15:27:05 15 know whether Bob Gregory had knowledge with regard to
15:27:11 16 recycling efforts relating to CRTs or color television
15:27:15 17 tubes as a result of the lead content prior to the date
15:27:21 18 of the accident?
15:27:22 19 MR. DONALDSON: Object to form.
15:27:25 20 A It is my belief that he had a general awareness
15:27:31 21 that -- you know, that there were people out there
15:27:33 22 trying to recycle the CRTs because of the lead.
15:27:38 23 Q (By Mr. Christian) At the time of the accident
15:27:47 24 TDSL allowed televisions to be brought to TDSL for
15:27:51 25 disposal; is that correct?

15:27:55 1 A They -- they would come to us by -- as
15:27:59 2 household waste or, I guess, possibly through a
15:28:06 3 conditionally exempt small-quantity generator.
15:28:10 4 Q But notwithstanding your and Mr. Gregory's
15:28:14 5 knowledge that there was lead in certain TV tubes, they
15:28:17 6 were permitted to be disposed of at TDSL; is that
15:28:22 7 correct?
15:28:22 8 A No.
15:28:27 9 Q They were allowed --
15:28:28 10 A The lead -- I mean, just because they had
15:28:30 11 somewhat of a lead didn't necessarily make them
15:28:33 12 hazardous waste, but for those other two categories
15:28:37 13 where probably TV tubes have come to the landfill, it
15:28:40 14 wouldn't -- it wouldn't matter whether they -- the lead
15:28:46 15 content exceeded anything because, you know, by law we
15:28:51 16 can take it from those sources.
15:28:58 17 Q Did you know as of October 9, 1997 that you
15:29:01 18 could accept certain materials in small quantities but
15:29:05 19 not in large quantities?
15:29:08 20 A If -- if you're asking whether I was aware that
15:29:10 21 there was a threshold for the conditionally exempt
15:29:13 22 small-quantity generator, yes.
15:29:16 23 Q And did you know at the time that that related
15:29:19 24 to materials containing lead?
15:29:23 25 A Yes.

15:55:45 1 request of the TNRCC for the material to remain in your
15:55:49 2 landfill?
15:55:50 3 A Yes.
15:55:51 4 Q What is the basis of that statement?
15:55:58 5 A Ben Milford said that he had talked to -- I
15:56:02 6 believe it was Mark Althen, and they had asked what the
15:56:12 7 Commission felt about the material remaining in the
15:56:16 8 landfill, and he had told them that -- you know,
15:56:24 9 basically that the Commission didn't have any problem
15:56:26 10 with that.
15:56:30 11 Q Any other basis for your testimony that you
15:56:34 12 have reason to believe that Penske asked the TNRCC for
15:56:40 13 the material to remain in the landfill?
15:56:42 14 A Yes.
15:56:43 15 Q What is that?
15:56:47 16 A In a telephone conversation with Penske
15:56:53 17 personnel, Mark Althen, Rob Traub, and I think Zenith
15:56:59 18 people were on the line too, Wayne Koprowski, Suzanne
15:57:04 19 Marcel, they told us that they had made that inquiry
15:57:07 20 and, you know, used that as leverage to get us to cease
15:57:16 21 our demand to them to remove the material.
15:57:19 22 Q Well, did you -- strike that. Do you have any
15:57:20 23 notes in which there is a reference to that statement
15:57:25 24 made allegedly by someone at Penske?
15:57:36 25 A I don't -- I don't know that I have any notes,

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS LANDFILL, INC., * IN THE DISTRICT COURT
3 *
*
4 Plaintiff, *
*
5 VS. * OF HAYS COUNTY, TEXAS
*
6 PENSKE TRUCK LEASING CO., L.P., PENSKE LOGISTICS, INC., ZENITH ELECTRONICS CORP., ZENITH ELECTRONICS OF TEXAS, INC., and HARRY ERNEST McCAIN, *
7 *
8 *
*
9 Defendants. * 207TH JUDICIAL DISTRICT
10

11 REPORTER'S CERTIFICATION
ORAL DEPOSITION OF GARY NEWTON
12 INDIVIDUALLY AND AS CORPORATE
REPRESENTATIVE OF TDSL
13 JULY 24, 2003
VOLUME 2

14 I, Janet L. Hamm, Certified Court Reporter in and
15 for the State of Texas, hereby certify to the following:
16 That the witness, GARY NEWTON, was duly sworn by the
17 officer and that the transcript of the oral deposition
18 is a true record of the testimony given by the witness;
19 That the deposition transcript was submitted on the
20 1st day of August, 2003, to the witness or to the
21 attorney for the witness for examination, signature and
22 return to me by the 21st day of August, 2003;
23 That the amount of time used by each party at the
24 deposition is as follows:
25 Mr. Christian - 4 hours, 51 minutes

1 That pursuant to information given to the deposition
2 officer at the time said testimony was taken, the
3 following includes counsel for all parties of record:
4 Mr. David H. Donaldson, Jr., Attorney for Plaintiff
Mr. Douglas Y. Christian, Attorney for Defendants
5 Penske Truck Leasing Co., L.P., Penske Logistics, Inc.,
and Harry Ernest McCain
6 Mr. Philip L. Comella, Attorney for Defendants
Zenith Electronics Corp. and Zenith Electronics of
7 Texas, Inc.
8 I further certify that I am neither counsel for,
9 related to nor employed by any of the parties or
10 attorneys in the action in which this proceeding was
11 taken, and, further, that I am not financially or
12 otherwise interested in the outcome of the action.
13 Further certification requirements pursuant to
14 Rule 203 of TRCP will be certified to after they have
15 occurred.
16 Certified to by me this 1st day of August, 2003.
17
18
19 Janet L. Hamm
20 JANET L. HAMM, Texas CSR #5029
Expiration Date: 12/31/03
21 805 West 10th, Suite 400
Austin, Texas 78701
22 (512) 478-2762
23
24
25

1 FURTHER CERTIFICATION UNDER RULE 203 TRCP

2

3 The original deposition was/was not returned to the
4 deposition officer.
5 If returned, the attached Changes and Signature page
6 contains any changes and the reasons therefor;
7 If returned, the original deposition was delivered
8 to Mr. Douglas Y. Christian, Custodial Attorney;
9 That $ 1460.80 is the deposition officer's
10 charges to the Defendants Penske Truck Leasing Co.,
11 L.P., Penske Logistics, Inc., and Harry Ernest McCain
12 for preparing the original deposition transcript and any
13 copies of exhibits;
14 That the deposition was delivered in accordance with
15 Rule 203.3 and that a copy of this certificate was
16 served on all parties shown herein and filed with the
17 Clerk.
18 Certified to by me this 2nd day of September,
19 2003.
20
21 Janet L. Hamm
JANET L. HAMM, Texas CSR #5029
22 Expiration Date: 12/31/03
805 West 10th, Suite 400
23 Austin, Texas 78701
(512) 478-2762
24
25

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	*	IN THE DISTRICT COURT
3	*	
Plaintiff,	*	
4	*	
VS.	*	OF HAYS COUNTY, TEXAS
5	*	
PENSKE TRUCK LEASING CO.,	*	
6 L.P., PENSKE LOGISTICS,	*	
INC., ZENITH ELECTRONICS	*	
7 CORP., ZENITH ELECTRONICS	*	
OF TEXAS, INC., and HARRY	*	
8 ERNEST McCAIN,	*	
	*	
9 Defendants.	*	207TH JUDICIAL DISTRICT

10

REPORTER'S CERTIFICATION
11 ORAL DEPOSITION OF GARY NEWTON
INDIVIDUALLY AND AS CORPORATE
12 REPRESENTATIVE OF TDSL
JULY 25, 2003
13 VOLUME 3

14 I, Janet L. Hamm, Certified Court Reporter in and
15 for the State of Texas, hereby certify to the following:
16 That the witness, GARY NEWTON, was duly sworn by the
17 officer and that the transcript of the oral deposition
18 is a true record of the testimony given by the witness;
19 That the deposition transcript was submitted on the
20 1st day of August, 2003, to the witness or to the
21 attorney for the witness for examination, signature and
22 return to me by the 21st day of August, 2003;
23 That the amount of time used by each party at the
24 deposition is as follows:
25 Mr. Comella - 2 hours, 49 minutes
Mr. Christian - 28 minutes

1 That pursuant to information given to the deposition
2 officer at the time said testimony was taken, the
3 following includes counsel for all parties of record:
4 Mr. David H. Donaldson, Jr., Attorney for Plaintiff
Mr. Douglas Y. Christian, Attorney for Defendants
5 Penske Truck Leasing Co., L.P., Penske Logistics, Inc.,
and Harry Ernest McCain
6 Mr. Philip L. Comella, Attorney for Defendants
Zenith Electronics Corp. and Zenith Electronics of
7 Texas, Inc.
8 I further certify that I am neither counsel for,
9 related to nor employed by any of the parties or
10 attorneys in the action in which this proceeding was
11 taken, and, further, that I am not financially or
12 otherwise interested in the outcome of the action.
13 Further certification requirements pursuant to
14 Rule 203 of TRCP will be certified to after they have
15 occurred.
16 Certified to by me this 1st day of August, 2003.
17
18
19 Janet L. Hamm
JANET L. HAMM, Texas CSR #5029
20 Expiration Date: 12/31/03
805 West 10th, Suite 400
21 Austin, Texas 78701
(512) 478-2762
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23
24
25

1 FURTHER CERTIFICATION UNDER RULE 203 TRCP

2

3 The original deposition was/was not returned to the
4 deposition officer,

5 If returned, the attached Changes and Signature page
6 contains any changes and the reasons therefor;

7 If returned, the original deposition was delivered
8 to Mr. Douglas Y. Christian, Custodial Attorney;

9 That $ 816.95 is the deposition officer's
10 charges to the Defendants Penske Truck Leasing Co.,
11 L.P., Penske Logistics, Inc., and Harry Ernest McCain
12 for preparing the original deposition transcript and any
13 copies of exhibits;

14 That the deposition was delivered in accordance with
15 Rule 203.3 and that a copy of this certificate was
16 served on all parties shown herein and filed with the
17 Clerk.

18 Certified to by me this 2nd day of September,
19 2003.

20

21 Janet L. Hamm
JANET L. HAMM, Texas CSR #5029
22 Expiration Date: 12/31/03
805 West 10th, Suite 400
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24

25

MW&A
MONICA WEIDMANN & ASSOCIATES
Certified Shorthand Reporters Videographers

RECEIVED
SEP - 5 2003

September 2, 2003

Ms. Cecelia Adair
Hays County District Clerk
123 Justice Center
110 E. Martin Luther King, Jr. Drive
San Marcos, Texas 78666

Re: Reporter's Certificate of Filing for Deposition(s)

Dear Clerk,

Pursuant to Texas Rules of Civil Procedure, attached please find the Reporter's Certificate of Filing. The status of the Original Oral Deposition(s) is stated below:

____ The Original Oral Deposition was **returned** to our office and has been forwarded to the custodial attorney asking the first question appearing in the deposition. Copies of the Errata page and Signature page are also attached hereto.

✓ The Original Oral Deposition **was not returned** to our office.

____ Only the Original Errata page and/or Signature page returned to our office. Copies of same are also attached hereto.

____ The Original Oral Deposition was routed directly to the custodial attorney asking the first question appearing in the deposition, signature having been **waived** by the witness.

____ The Original Oral Deposition returned by Postal Service marked "**Unclaimed**".

✓ See status of Original Depositions as stated on multiple certificates attached.

Counsel of Record listed on the Appearance page in the deposition have also been copied with same.

Sincerely,

Lisa Preister, CSR
Office Manager

Austin • Dallas • Houston • San Antonio

Corporate Offices: (512) 478-2762 • FAX (512) 478-2782 • 1-800-969-2752
305 W. 10th St. Suite 400 • Austin, Texas 78701

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	*	IN THE DISTRICT COURT
3 Plaintiff,	*	
4 VS.	*	OF HAYS COUNTY, TEXAS
5 PENSKE TRUCK LEASING CO., L.P., PENSKE LOGISTICS,	*	
6 INC., ZENITH ELECTRONICS CORP., ZENITH ELECTRONICS	*	
7 OF TEXAS, INC., and HARRY ERNEST McCAIN,	*	
8 Defendants.	*	207TH JUDICIAL DISTRICT

9

10 **********

11 ORAL DEPOSITION OF

12 GARY NEWTON

13 INDIVIDUALLY AND AS CORPORATE

14 REPRESENTATIVE OF TDSL

15 TAKEN JULY 25, 2003

16 VOLUME 3

17 **********

18

19 ORAL DEPOSITION of GARY NEWTON, produced as a witness at the instance of the Defendants Penske Truck Leasing Co., L.P., Penske Logistics, Inc., and Harry
20 Ernest McCain, and duly sworn, was taken in the above-styled and numbered cause on the 25th day of July,
21 2003, from 8:38 a.m. to 12:20 p.m., before Janet L. Hamm, CSR in and for the State of Texas, reported by
22 machine shorthand, at the law offices of George & Donaldson, L.L.P., 1100 Norwood Tower, 114 West Seventh
23 Street, Austin, Texas, pursuant to the Texas Rules of Civil Procedure and the provisions stated on the record
24 or attached hereto.

25

1 A P P E A R A N C E S

2 FOR THE PLAINTIFF:

3 Mr. David H. Donaldson, Jr.
GEORGE & DONALDSON, L.L.P.
4 1100 Norwood Tower
114 West Seventh Street
5 Austin, Texas 78701

6

FOR DEFENDANTS PENSKE TRUCK LEASING CO., L.P., PENSKE
7 LOGISTICS, INC., and HARRY ERNEST McCAIN:

8 Mr. Douglas Y. Christian
REED SMITH, LLP
9 2500 One Liberty Place
1650 Market Street
10 Philadelphia, Pennsylvania 19103

11

FOR DEFENDANTS ZENITH ELECTRONICS CORP. AND ZENITH
12 ELECTRONICS OF TEXAS, INC.:

13 Mr. Philip L. Comella
SEYFARTH SHAW
14 55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
15

16 ALSO PRESENT:

17 Mr. Bob Gregory

18

19

20

21

22

23

24

25

:13:05 1 TDSL is aware of no communications between TDSL and a
09:13:13 2 Zenith representative before TDSL disposed of the broken
09:13:16 3 tubes in its landfill?
09:13:19 4 MR. DONALDSON: Object to form.
09:13:21 5 A There were communications that filtered through
09:13:25 6 the emergency response personnel, from Zenith, that TDSL
09:13:29 7 was relying on. There was no direct communication from
09:13:34 8 a TDSL employee to a Zenith employee.
09:13:35 9 Q (By Mr. Comella) So it's true, isn't it, as
09:13:37 10 you sit here today that TDSL is aware of no direct
09:13:43 11 communication between TDSL and a Zenith representative
09:13:47 12 before TDSL disposed of the broken tubes in its landfill
09:13:51 13 on October 9, 1997?
:13:53 14 MR. DONALDSON: Object to form.
09:13:55 15 A There was no direct communication between a
09:13:59 16 TDSL employee and a Zenith employee.
09:14:01 17 Q (By Mr. Comella) And with regard to these
09:14:02 18 other communications that you refer to, what, if any,
09:14:09 19 indirect communications is TDSL aware of involving a
09:14:12 20 Zenith representative and anyone at the accident scene
09:14:18 21 prior to TDSL's disposing of these broken tubes into its
09:14:23 22 landfill on October 9, 1997?
09:14:25 23 A It is my understanding that there was a
09:14:29 24 shipping manifest prepared by Zenith that did not
09:14:34 25 include any warnings or statements to the effect that if

:14:40 1 these TV tubes were broken they should be considered
09:14:43 2 hazardous waste.
09:14:47 3 Q Do you know the difference between a manifest
09:14:48 4 and a bill of lading?
09:14:54 5 A Well, I believe that the bill of lading is the
09:14:59 6 shipping document, and it's sometimes referred to as a
09:15:02 7 manifest, but in the environmental sense a manifest is,
09:15:05 8 you know, a document that, you know, traces the disposal
09:15:09 9 of hazardous waste.
09:15:11 10 Q So in the environmental area a manifest is
09:15:15 11 really a term of art, isn't it?
09:15:17 12 A Yes.
09:15:17 13 Q It's a term of art that reflects -- in fact,
:15:22 14 it's mentioned specifically in the regulations as the
09:15:25 15 document that accompanies the off-site shipment of a
09:15:28 16 hazardous waste, correct?
09:15:31 17 A That is right.
09:15:32 18 Q And when Zenith manufactured these television
09:15:35 19 tubes in Illinois, they weren't a hazardous waste in
09:15:40 20 Illinois, correct?
09:15:41 21 A That is my understanding, when it's product,
09:15:44 22 yes.
09:15:45 23 Q And a product does not require a manifest,
09:15:47 24 correct?
09:15:48 25 A That's correct.

:20:11 1 October 9, 1997?

09:20:20 2 A We did learn who the manufacturer was on

09:20:22 3 October 9, 1997.

09:20:25 4 Q In fact, Zenith's name was on the bill of

09:20:30 5 lading; isn't that correct?

09:20:32 6 A That is correct.

09:20:38 7 Q And it's true, isn't it, that TDSL knew that

09:20:44 8 Zenith was the manufacturer of these TV tubes before

09:20:49 9 TDSL disposed of the tubes in its landfill? Isn't that

09:20:52 10 correct?

09:20:52 11 MR. DONALDSON: Object to form.

09:20:54 12 A I'm not aware that we knew that at that -- at

09:20:57 13 that moment on October 9, 1997.

:21:01 14 Q (By Mr. Comella) So as you sit here today you

09:21:03 15 don't know whether TDSL knew that Zenith was the

09:21:07 16 manufacturer of these TV tubes prior to the placement of

09:21:11 17 the tubes in its landfill; is that right?

09:21:13 18 A I do not know.

09:21:21 19 Q Are you aware of any effort TDSL made to

09:21:25 20 contact Zenith directly to find out the characteristics

09:21:30 21 of these broken tubes prior to TDSL's disposing of the

09:21:36 22 tubes into its landfill?

09:21:40 23 A There was no reason to, nor any requirement to,

09:21:44 24 so no, we did not undertake that effort. We were

09:21:48 25 helping emergency response personnel get the accident

:21:55 1 scene cleared up as quickly as possible.

09:22:02 2 Q Yesterday -- and just to sort of put you on

09:22:08 3 notice, I'm doing a segue because we're on a related

09:22:12 4 topic. Whether this is a corporate rep question or not,

09:22:15 5 I don't know, but I'm just going to go here, and if

09:22:18 6 Mr. Donaldson has a problem, I'm sure he'll say

09:22:21 7 something.

09:22:21 8 MR. DONALDSON: If it's not on the topic,

09:22:25 9 it's an individual question. Go ahead.

09:22:27 10 Q (By Mr. Comella) Yesterday you testified that

09:22:28 11 part of the reason why events were moving quickly on

09:22:33 12 October 9 was because there was an emergency on

09:22:37 13 Highway 35; is that accurate?

:22:39 14 A Yes, I would call the accident an emergency.

09:22:42 15 Q And there was an interest on the part of the

09:22:49 16 authorities on the scene to get this accident scene

09:22:53 17 cleaned up quickly. Is that a fair statement?

09:22:56 18 A That was -- that was my understanding, yes.

09:23:01 19 Q Now, does TDSL -- or did TDSL in October 1997

09:23:10 20 have roll-off bins on-site?

09:23:20 21 A On-site?

09:23:21 22 Q On-site.

09:23:23 23 A Of --

09:23:24 24 Q Empty roll-off bins.

09:23:26 25 A On our site?

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS LANDFILL, INC., * IN THE DISTRICT COURT
3 Plaintiff, *
4 *
VS. * OF HAYS COUNTY, TEXAS
5 *
PENSKE TRUCK LEASING CO.,
6 L.P., PENSKE LOGISTICS,
INC., ZENITH ELECTRONICS
7 CORP., ZENITH ELECTRONICS
OF TEXAS, INC., and HARRY
8 ERNEST McCAIN, *
9 Defendants. * 207TH JUDICIAL DISTRICT

10

11 REPORTER'S CERTIFICATION
ORAL DEPOSITION OF GARY NEWTON
INDIVIDUALLY AND AS CORPORATE
12 REPRESENTATIVE OF TDSL
JULY 25, 2003
13 VOLUME 3

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15 for the State of Texas, hereby certify to the following:
16 That the witness, GARY NEWTON, was duly sworn by the
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23 That the amount of time used by each party at the
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25 Mr. Comella - 2 hours, 49 minutes
Mr. Christian - 28 minutes

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3 following includes counsel for all parties of record:
4 Mr. David H. Donaldson, Jr., Attorney for Plaintiff
Mr. Douglas Y. Christian, Attorney for Defendants
5 Penske Truck Leasing Co., L.P., Penske Logistics, Inc.,
and Harry Ernest McCain
6 Mr. Philip L. Comella, Attorney for Defendants
Zenith Electronics Corp. and Zenith Electronics of
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15 occurred.
16 Certified to by me this 1st day of August, 2003.
17
18
19 Janet L. Hamm
JANET L. HAMM, Texas CSR #5029
20 Expiration Date: 12/31/03
805 West 10th, Suite 400
21 Austin, Texas 78701
(512) 478-2762
22
23
24
25

1 **FURTHER CERTIFICATION UNDER RULE 203 TRCP**

2

3 The original deposition was/was not returned to the
4 deposition officer on _____;
5 If returned, the attached Changes and Signature page
6 contains any changes and the reasons therefor;
7 If returned, the original deposition was delivered
8 to Mr. Douglas Y. Christian, Custodial Attorney;
9 That $_____ is the deposition officer's
10 charges to the Defendants Penske Truck Leasing Co.,
11 L.P., Penske Logistics, Inc., and Harry Ernest McCain
12 for preparing the original deposition transcript and any
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17 Clerk.
18 Certified to by me this ____ day of _____,
19 2003.
20
21 _____
JANET L. HAMM, Texas CSR #5029
Expiration Date: 12/31/03
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25

1 NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS) IN THE 207TH
LANDFILL, INC.,)
3 Plaintiff,)
)
4 vs.) DISTRICT COURT OF
)
5 PENSKE TRUCK LEASING CO.)
L.P. AND PENSKE)
6 LOGISTICS, INC. AND)
ZENITH ELECTRONICS CORP.)
7 AND ZENITH ELECTRONICS OF)
TEXAS, INC. AND HARRY)
8 ERNEST MCCAIN AND)
DAX DAVID TAYLOR,)
9 Defendants.) HAYS COUNTY, TEXAS

10 ----------

11 ORAL DEPOSITION OF
JIM W. GREGORY
MAY 28, 2003

12 ----------

13 ORAL DEPOSITION OF JIM W. GREGORY, produced as
14 a witness at the instance of the Defendants, and
15 duly sworn, was taken in the above-styled and
16 numbered cause on May 28, 2003, from 9:21 a.m. to
17 5:48 p.m., before Renee DeYoung, CSR in and for the
18 State of Texas, reported by method of machine
19 shorthand, at the law offices of George &
20 Donaldson, 1100 Norwood Tower, 114 West Seventh
21 Street, Austin, Texas, pursuant to the Texas Rules
22 of Civil Procedure and the provisions stated on the
23 record or attached hereto.
24
25

COPY

1 APPEARANCES

2 FOR THE PLAINTIFF:
MR. DAVID H. DONALDSON, JR.
3 GEORGE & DONALDSON, L.L.P.
1100 Norwood Tower
4 114 West Seventh Street
Austin, Texas 78701
5

6
FOR THE DEFENDANTS PENSKE TRUCK LEASING CO., L.P,
7 PENSKE LOGISTICS, INC., AND HARRY ERNEST MCCAIN:
MR. DOUGLAS Y. CHRISTIAN
8 REED SMITH, L.L.P.
2500 One Liberty Place
9 1650 Market Street
Philadelphia, PA 19103
10

11
FOR THE DEFENDANT ZENITH ELECTRONICS CORP. AND
12 ZENITH ELECTRONICS OF TEXAS, INC. AND DAX DAVID
TAYLOR:
13 Mr. PHILIP L. COMELLA
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
14 55 East Monroe Street, Suite 4200
Chicago, IL 60603-5803
15

16
ALSO PRESENT:
17 MR. BOB GREGORY
18
19
20
21
22
23
24
25

1 MR. CHRISTIAN: Usual stipulations?
2 MR. DONALDSON: Yeah. It's taken
3 according to the Texas Rules of Civil Procedure.
4 **JIM W. GREGORY,**
5 having been first duly sworn, testified as follows:
6 **EXAMINATION**
7 BY MR. CHRISTIAN:
8 Q. Mr. Gregory, my name is Doug Christian,
9 and I represent the two Penske companies that your
10 company has sued, as well as the driver, Harry
11 McCain, that was also sued by your company. And
12 we're here to ask you some questions.
13 I know you've given a deposition --
14 at least one deposition before and you know what to
15 expect generally. But let me ask you to ask me to
16 repeat a question you don't hear or to rephrase a
17 question you don't understand. Fair enough?
18 A. Yes, sir.
19 Q. If you need to take a break for any
20 reason at any time, please let me know and we'll do
21 so.
22 A. Thank you.
23 Q. Will you state your name for the record,
24 please.
25 A. Jim W. Gregory.

1 Q. And are you an officer of the plaintiff
2 in this action?
3 A. Yes, sir.
4 Q. Are you a vice-president?
5 A. Yes, sir.
6 Q. Are you the vice-president?
7 A. Actually right now I am the
8 vice-president. I believe that's right.
9 Q. And your brother, Bob, is in the room
10 here. He's the CEO of the plaintiff. Is that
11 correct?
12 A. Yes, sir.
13 Q. Who is Eddie Dick?
14 A. Eddie Dick is the president of our
15 companies.
16 Q. Is he one of the plaintiffs, Texas
17 Disposal Systems Landfill?
18 A. Yes, sir.
19 Q. Your an owner of TDSL. Is that correct?
20 A. Yes, sir, that's correct.
21 Q. You own 20 percent of the shares?
22 A. Yes, sir, that's correct.
23 Q. And Bob owns 80 percent?
24 A. Yes, sir, that's correct.
25 Q. Are you involved with your brother in all

1 of the major decisions that affect the landfill?
2 A. Pretty much so, yes, sir.
3 Q. You are not legally, but you are, in
4 essence, a partnership, correct?
5 MR. DONALDSON: Object to form.
6 A. Yes, sir.
7 Q. (BY MR. CHRISTIAN) You're the landfill
8 manager at TDSL?
9 A. Yes, sir, that's correct.
10 Q. Since when?
11 A. Actually since we opened in 1991.
12 Q. And as the landfill manager, are you in
13 charge of the daily operation of the landfill?
14 A. Yes, sir. And actually I'm one of the
15 folks that's in charge of that daily operation.
16 Q. Who else?
17 A. There are a number of folks that work
18 under me that help me carry out those charges.
19 Q. Will you identify those people, please?
20 A. That would be Ms. Lisa Lerma.
21 Q. We've met her?
22 A. You've met her.
23 Q. Yes.
24 A. And there would be Gary Newton, who is
25 our in-house counsel, who helps me from time to

1 concerned.
2 Q. And is it your position that by that
3 time, this had been -- some of these tubes had been
4 deposited in the facility?
5 A. Yes, sir.
6 Q. Do you know that for a fact, by the way?
7 A. Yes -- that the materials had been
8 deposited in our --
9 Q. Yes.
10 A. Yes, sir.
11 Q. How do you know that?
12 A. Well, I saw the material come in.
13 Q. Did you see the material being deposited?
14 A. I don't recall if I saw it actually being
15 dumped. I saw it come through the gate.
16 Q. And it came through the gate and it sat
17 somewhere for a while. Is that correct?
18 A. Actually, the first load that came
19 through the gate actually pulled over to the side
20 and waited on me to come up to the front to see the
21 load.
22 Q. Okay. We're going to get back to that in
23 a second, but let me just finish up with that.
24 A. Okay.
25 Q. You had a concern that day, and because

1 of the concern, you asked Mr. Vallejo was it all
2 right with the TNRCC -- whatever your testimony
3 was, did you make any inquiry that day with regard
4 to whether this material was appropriate for
5 disposal in your facility?
6 A. Well, you said that I had a concern. I
7 was concerned about what the product would be.
8 That's why I asked Mr. Vallejo what it would be.
9 Q. And your concern was that you cannot
10 accept hazardous waste into your facility.
11 Correct?
12 A. Well, we cannot accept hazardous waste in
13 our facility.
14 Q. Correct. And that was your concern.
15 Correct?
16 A. No. No, sir. My concern was what was in
17 the vehicle that turned over and is it okay to come
18 to our facility.
19 Q. Yes. Meaning is it appropriate to be
20 deposited in your facility, pursuant to your
21 permit. Correct?
22 A. Okay. Yes, sir.
23 Q. Is that right?
24 A. Yes, sir.
25 Q. So we know you had an inquiry of

1 Mr. Vallejo, at least that's your testimony. What
2 other inquiries did you make that day with regard
3 to whether this was appropriate material to be
4 deposited into your landfill?
5 A. I didn't make any further inquiries that
6 day.
7 Q. So would it be fair to say that you
8 relied on what you heard from Mr. Vallejo in
9 deciding to let this material into your facility?
10 MR. DONALDSON: Object to form.
11 A. Please ask that one more time.
12 Q. (BY MR. CHRISTIAN) Would it be fair to
13 say that you relied on what you heard from
14 Mr. Vallejo in deciding to allow this material to
15 be deposited into your facility?
16 MR. DONALDSON: Object to form.
17 A. Yes, sir.
18 Q. (BY MR. CHRISTIAN) But before it was
19 deposited, as you just testified, you went up to
20 that truck. Correct?
21 A. Before the load was dumped in our
22 landfill?
23 Q. Yes, yes.
24 A. Yes, sir.
25 Q. Okay. Tell me what you did.

1 A. I remember climbing up on the truck. I
2 remember getting up on the truck to look inside the
3 vehicle.
4 Q. And you saw what?
5 A. Well, I -- I wanted to see if there was
6 anything that was recyclable.
7 We're in the recycling business, and
8 I wanted to see if there was anything in that load
9 that could be recycled.
10 Q. And what was your conclusion? That there
11 was not any recyclable materials there?
12 A. No.
13 Q. Is that the only reason you went to that
14 truck to look at it?
15 A. Yes, sir.
16 Q. Did you see TV tubes in that truck?
17 A. Actually, I don't recall. I just recall
18 that I didn't see anything that was recyclable that
19 we would put in a different area that we might
20 could recycle.
21 Q. Do you remember who was driving the
22 truck?
23 A. No, sir, I don't.
24 Q. Do you remember whose truck it was?
25 A. No, sir, I don't. I just assumed it was

1 Q. Well, you weren't actually absolutely
2 sure about that, were you?
3 A. I was not absolutely sure.
4 Q. And you knew that a lot of TV tubes were
5 heading your way. Correct?
6 A. I knew some TV tubes were coming, yes,
7 sir.
8 Q. And you knew at some point there were
9 many dump trucks full of TV tubes heading your way.
10 Correct?
11 A. I assumed that, yes, sir.
12 Q. And you knew that Mr. Vallejo was not an
13 expert in determining whether something is
14 hazardous. Correct?
15 A. No, sir. I did not know that.
16 Q. Did you believe he was an expert in
17 determining whether a material is hazardous?
18 A. Well, I know that he's had all types of
19 training being in the position that he was in, as a
20 captain of the fire department.
21 Q. But you've had more training than he has
22 with regard to something being hazardous waste or
23 not. Is that correct?
24 MR. DONALDSON: Object to form.
25 A. I couldn't -- I'm sorry, I -- I don't

1 won't say a regular customer of ours, but he is
2 actively involved in the fire department for that
3 area. So it was customary to see and hear him on
4 other accident scenes, things like that, things of
5 that nature.
6 Q. Did you have any specific knowledge of
7 his background with regard to hazardous materials
8 or hazardous waste?
9 A. No, sir.
10 Q. And you say this telephone call at 4:04
11 lasted how long?
12 A. I'm going to say two minutes, maybe.
13 That's been a long time ago, but I'm going to say
14 maybe two minutes; two, three minutes at the most,
15 I would think.
16 Q. And he called you from the accident
17 scene. Is that correct?
18 A. I'm not sure about that. I assume that,
19 but I'm not sure about that.
20 Q. And you did not make any inquiries of
21 Penske prior to approving the disposal of these TV
22 tubes. Is that correct?
23 A. That's correct.
24 Q. You did not make any inquiries of the
25 TNRCC prior to the disposal. Is that correct?

1 A. Not prior to, that's right.
2 Q. You did not make any inquiries of the
3 driver, Harry McCain, prior to the disposal.
4 Correct?
5 A. That's correct.
6 Q. You made one inquiry during a two-minute
7 telephone call with Mr. Vallejo. Correct?
8 A. That's correct.
9 Q. And do you believe you satisfied your
10 obligation under your permit and the regulations,
11 to ensure that hazardous waste does not enter your
12 facility?
13 A. Yes, sir, I do.
14 Q. Did you call your brother, Bob, before
15 deciding whether it should go into the facility?
16 A. No, sir, I didn't.
17 Q. Did you think about it?
18 A. No, sir, I didn't.
19 Q. Where was he that day?
20 A. Actually I found out later he was
21 downtown at a meeting that day. I found that out
22 later in the day.
23 Q. Did you call Gary Newton to ask him
24 whether it was appropriate?
25 A. No, sir.

1 Q. Why didn't you park the dump trucks and
2 not let them into your facility until you had made
3 proper inquiries with regard to whether this is
4 hazardous waste?
5 MR. DONALDSON: Object to form.
6 A. Because it was my understanding that the
7 material was okay to come in the landfill. We were
8 permitted to take TV tubes. And I didn't see that
9 there was a problem with that.
10 Q. (BY MR. CHRISTIAN) As you sit here
11 today, do you believe you should have made
12 inquiries of Penske or Zenith before allowing it
13 into the landfill?
14 MR. DONALDSON: Object to form.
15 A. No, sir, I don't believe so.
16 Q. (BY MR. CHRISTIAN) All right,
17 Mr. Gregory, you've fully described this initial
18 phone call with Mr. Vallejo. Is that correct?
19 A. I think so, yes, sir.
20 Q. And then tell me what happened in the
21 chronology related to this incident after that
22 phone call.
23 A. After that phone call, I remember in just
24 a few minutes the first truck came in. And I was
25 called and I came up and briefly stood up on it and

1 A. Yes, sir.
2 Q. I asked you earlier if you had any
3 conversations with the Penske -- strike that. I'm
4 sorry.
5 Did you have any other conversations
6 with the Penske driver that day?
7 A. No, sir, other than he came to me in a
8 minute and said, "Hey, this fellow would like to
9 talk to you."
10 Q. And who was that?
11 A. I believe that was Charlie Smith. Is it
12 Charlie Smith, the environmental -- is that the
13 correct name?
14 Q. I'm just asking what you recall, sir.
15 A. I remember the fellow that was -- I'm
16 assuming he was from Penske, that was on the phone.
17 Q. All right. So this call that began at
18 4:33 was for 34 minutes. Correct?
19 A. Yes, sir.
20 Q. And toward the end of that call is when
21 you got on the line with this other person?
22 A. No. It was towards the front of the
23 call.
24 Q. Okay. So towards the front of the call
25 that began at 4:33, you had a conversation with --

1 you think it was Mr. Smith?
2 A. Yes.
3 Q. Okay. And what did he tell you?
4 A. When he handed me the phone, Mr. Smith
5 right immediately said, "You cannot be dumping
6 these in a landfill. It's hazardous waste."
7 Q. What did you do immediately upon hearing
8 that?
9 A. I said, "Would you hang on one second,
10 please. I'd like for you to talk" -- to the fellow
11 that I had -- at the time had assumed was in charge
12 of the accident scene.
13 Q. And do you remember who that was?
14 A. I'm sorry, I don't.
15 Q. Okay. What else did you do immediately
16 upon hearing Mr. Smith's statement near the
17 beginning of this 4:33 p.m. call?
18 A. I walked over to that fellow and I said,
19 "Here is a fellow that would like to visit with
20 you," and I handed him my phone.
21 Q. What else did you do immediately upon
22 hearing that news?
23 A. I handed him the phone and then I just
24 stepped back for a minute. And then I noticed that
25 that man ceased operations. He started waving his

1 the executive notification of the TNRCC. Do you
2 see that?
3 A. Yes, sir.
4 Q. And then it says Bill Milford, 10/9/97,
5 by, I think it says Jim Gregory. Do you see that?
6 A. Yes, sir.
7 Q. Do you know whose handwriting that is?
8 A. No, sir, I don't.
9 Q. Do you know if it's Gary Newton's?
10 A. It looks somewhat like Gary's, but I'm
11 not sure.
12 Q. Is it true that you immediately notified
13 Mr. Milford of the disposal of regulated hazardous
14 waste on 10/9/79?
15 A. Yes, sir.
16 Q. And that was during the telephone
17 conversation you had with him. Is that correct?
18 A. Yes, sir.
19 Q. All right. Mr. Gregory, do you remember
20 what time Mr. Milford arrived at the scene of the
21 accident?
22 A. No, sir, I don't. I was back at the
23 scene, so I was back at the landfill and back. But
24 I'm sorry, I don't remember.
25 Q. You were at the landfill, then you went

1 MR. DONALDSON: Object to form.
2 Q. (BY MR. CHRISTIAN) That's what you've
3 said.
4 A. Yes, sir.
5 Q. All right. And you think that was
6 sufficient to not only discharge your obligations
7 under the permit, but to go that extra mile as an
8 environmentally conscious officer of TDSL to ensure
9 that nothing goes in your landfill. Is that
10 correct?
11 MR. DONALDSON: Object to form.
12 A. Knowing what the product was, I think,
13 asking him went above and beyond, yes, sir; went
14 the extra mile, as you say.
15 Q. Okay. Okay. Let's get back to what I've
16 marked as Exhibit 41 about an hour and a half ago.
17 A. Okay. We don't need to do it right now,
18 but sometime in the next ten minutes we're going to
19 need to take a break. You don't have to go on the
20 record...
21 MR. CHRISTIAN: Let's go off the
22 record now.
23 (OFF THE RECORD.)
24 Q. (BY MR. CHRISTIAN) Mr. Gregory, we're
25 going to take a break now, but before we do so, is

1 A. Just so we would have all the facts
2 straight. We try to be very thorough.
3 Q. Do you remember discussing issues of the
4 time the material came to the facility, trying to
5 establish that?
6 A. I don't specifically remember it, but I'm
7 sure we did.
8 Q. And you see there's a reference here to
9 4:08 p.m., on the second page of Exhibit 42?
10 A. Okay. Yes, sir.
11 Q. "Waste begins to arrive at TDSL per Jim
12 Gregory." That's you. Correct?
13 A. Yes, sir.
14 Q. Did you tell someone as early as the day
15 after the incident that the waste arrived at about
16 4:08?
17 A. I could have, yes, sir.
18 Q. Do you have any --
19 A. I don't specifically remember it, but I
20 certainly could have.
21 Q. Was there any discussion that day, the
22 day after the incident, about looking at the video
23 to confirm when the waste arrived?
24 A. No, sir.
25 Q. But everybody knew that there was a video

1 MR. DONALDSON: Object to form.
2 Q. (BY MR. CHRISTIAN) What did he do wrong?
3 A. I think that he should have known that he
4 was hauling hazardous material and he should have
5 told us at the scene that he was hauling hazardous
6 material.
7 Q. But he wasn't hauling hazardous material,
8 was he?
9 A. Well, what he was hauling, Penske and
10 Zenith are now saying it's hazardous.
11 Q. The tubes in an intact state are not
12 hazardous materials. Would you agree with that?
13 MR. DONALDSON: Object to form.
14 Q. (BY MR. CHRISTIAN) It's only when
15 they're broken?
16 A. I think that's correct, yes, sir.
17 Q. So he was not --
18 A. Let me back up.
19 Q. Sure.
20 A. I don't think a broken TV tube is
21 hazardous. I think these TV tubes that we're
22 talking about have been placed into that category
23 by Zenith and Penske.
24 Q. Let me stop you right there, then, and
25 ask you, what is your position, as an officer and

1 co-owner of TDSL, that these 226 tubes are
2 hazardous waste?
3 MR. DONALDSON: Object to form.
4 A. Yes, sir, I believe they're hazardous
5 waste.
6 Q. (BY MR. CHRISTIAN) You actually believe
7 they're hazardous waste. Is that right?
8 MR. DONALDSON: Object to form.
9 A. Yes, sir.
10 Q. (BY MR. CHRISTIAN) And is it simply
11 because they have been designated as such by Penske
12 or Zenith?
13 A. Yes, sir.
14 Q. If there had not been a designation,
15 would you still consider them to be hazardous
16 waste?
17 A. No, sir.
18 Q. Now, what if Penske and Zenith today
19 said, we don't consider them to be hazardous waste.
20 Would you accept that?
21 MR. DONALDSON: Object to form.
22 A. No, sir, I personal would not.
23 Q. (BY MR. CHRISTIAN) Mr. Gregory, do you
24 know that TDSL took every precaution possible to
25 ensure that hazardous waste did not enter its

1 facility that day?
2 A. Yes, sir.
3 Q. It was possible for TDSL to contact
4 Zenith before it allowed the material in. Correct?
5 MR. DONALDSON: Object to form.
6 A. That was possible, for us to call Zenith,
7 yes.
8 Q. (BY MR. CHRISTIAN) That was a precaution
9 that was possible. Correct?
10 MR. DONALDSON: Object to form.
11 A. Yes, sir. It was possible for us to call
12 Zenith.
13 Q. (BY MR. CHRISTIAN) But you did not do
14 that. Correct?
15 A. That's correct.
16 Q. And it was possible for you to call
17 Penske before it was deposited. Correct?
18 MR. DONALDSON: Object to form.
19 A. We, sir, it was possible.
20 Q. (BY MR. CHRISTIAN) But that's a
21 precaution that you did not undertake. Correct?
22 A. That's correct.
23 Q. And it was a possible precaution for you
24 to hold this material until you determined with
25 certainty whether this was hazardous waste.

1 Correct?

2 MR. DONALDSON: Form.

3 A. Yes, sir, it was possible for us to hold

4 that material.

5 Q. (BY MR. CHRISTIAN) That was a possible

6 precaution. Correct?

7 A. Yes, sir.

8 Q. So you could have called Penske, you

9 could have called Zenith, and you could have held

10 the material until you were sure. Those are three

11 possible precautions you could have undertaken.

12 Correct?

13 MR. DONALDSON: Object to form.

14 A. Yes, sir.

15 Q. (BY MR. CHRISTIAN) But you didn't do any

16 of those three. Correct?

17 A. Yes, sir, that's correct.

18 Q. So you did not take all precautions with

19 this material coming into the landfill. Correct?

20 MR. DONALDSON: Object to form.

21 A. Yes, sir, I think we did.

22 Q. (BY MR. CHRISTIAN) You did not ask any

23 emergency personnel at the scene with regard to

24 whether this material was hazardous. Correct?

25 A. Well, I asked Mr. Vallejo -- when he

1 Zenith was very inept, not to let their driver of
2 their product know that it could become a hazardous
3 waste.
4 Q. What is the company's position, as you
5 understand it, with regard to whether Mr. McCain
6 knew that a Breen picture tube was hazardous waste?
7 MR. DONALDSON: Objection; form.
8 A. I'm just assuming that.
9 Q. (BY MR. CHRISTIAN) Do you have any other
10 facts that would support a finding of liability
11 against the driver, Mr. McCain?
12 MR. DONALDSON: Object to form.
13 A. No, sir. Not facts, no, sir.
14 Q. (BY MR. CHRISTIAN) Were you involved in
15 the decision to sue the driver?
16 A. Actually I was not involved in the actual
17 decision.
18 Q. Will you look at Exhibit 7, please.
19 A. Exhibit 7. Get these straight.
20 Q. You have seen these before, haven't you?
21 These are the copies --
22 A. The tickets? Yes, sir.
23 Q. The tickets?
24 A. Yes, sir.
25 Q. And we've asked to see the originals

1 today, and we're going to get those?
2 A. Yes, sir.
3 Q. Have you ever trained anyone before, with
4 regard to how to fill these out?
5 A. I haven't, myself, no.
6 Q. Is it important, at the very least, to
7 indicate the customer's name in the customer name
8 line?
9 A. Yes, sir, I would think. I would think
10 so.
11 Q. You want to go back and see who your
12 customers were. Correct?
13 A. Usually, yes, sir.
14 Q. And you see that each of these appears to
15 have a name in the customer name space?
16 A. Yes, sir.
17 Q. And Alfred Vallejo is named in the
18 majority of these. Is that correct?
19 A. Yes, sir.
20 Q. But then there's one reference to Special
21 Wrecker -- do you see that -- in the third picket?
22 A. Yes, sir.
23 Q. Was that special automotive -- strike
24 that.
25 Who was Special Wrecker; do you

1 know?
2 A. I believe that was the company that was
3 out trying to stand the truck up and move the truck
4 off the scene.
5 Q. And you don't see Penske's name indicated
6 here anywhere as the customer. Correct?
7 A. No, sir.
8 Q. And you don't see Zenith's name anywhere.
9 Correct?
10 A. No, sir.
11 Q. Penske had no contractual relationship
12 with TDSL. Is that correct?
13 A. That's correct.
14 Q. Nor did Zenith?
15 A. Nor did Zenith. No, wait, let me back
16 up. I'm sorry. The Penske -- we could have some
17 type of a contract with Penske because, in fact,
18 that reminds me of something that I thought of
19 during lunch. There is a local Penske dealership
20 here that we have rented stuff from.
21 Q. That's an auto dealership?
22 A. No. It's a -- or it was at the time.
23 I'm not sure it's even still here.
24 Q. You mean a truck rental --
25 A. Yes, sir.

1 Q. And you're positive it was someone from
2 the local Penske --
3 A. Yes, sir.
4 Q. -- you are --
5 A. Yes, sir.
6 Q. Is it someone with whom you had dealt in
7 the past?
8 A. No, sir. I just remember him being from
9 Penske because I remember thinking it's strange
10 that another Penske employee was here.
11 And he said, "Well, I'm with the
12 local Penske store." In fact, he knew nothing
13 about it. He said, "I was called and told to come
14 out here and look at the scene and get some
15 pictures."
16 Q. And did you have any conversation with
17 him other than relating to the pictures?
18 A. No. That's all.
19 Q. So you didn't rely on anything he said
20 with regard to the disposal of this hazardous
21 waste. Is that correct?
22 A. That's correct.
23 Q. Now, you did not have a contract, a
24 disposal contract with Penske. Correct?
25 A. No. That's correct.

1 Q. Penske was not the transporter of this
2 material from the scene to TDSL. Is that correct?
3 MR. DONALDSON: Object to form.
4 A. I think that's correct.
5 Q. (BY MR. CHRISTIAN) Mr. Vallejo was. Is
6 that correct?
7 MR. DONALDSON: Object to form.
8 A. I think that's correct.
9 Q. (BY MR. CHRISTIAN) Is there anything
10 else about your testimony from this morning you'd
11 like to change?
12 A. Yes, sir. One second.
13 Earlier this morning we talked about
14 the fact that TNRCC had allowed us to put the
15 material in our landfill. I know what you meant
16 and what I took it to mean, but I just think we
17 ought to make sure the record is clear.
18 TNRCC allowed us to keep the
19 material in our landfill. They didn't necessarily
20 allow us to bring it in; they allowed us to store
21 it there.
22 Q. They allowed you to dispose of it there.
23 Correct?
24 A. They allowed us to store it there, where
25 it is stored now.

1 Q. Did you look at this document on the
2 scene?
3 A. I have never seen this document before,
4 no, sir.
5 Q. And you didn't ask to look at the bill of
6 lading at the scene. Is that correct?
7 A. No, sir.
8 Q. Did you know, back in 1997, that you can
9 take certain items in small quantities that you
10 cannot take in larger quantities?
11 A. Yes, sir.
12 Q. Did you train your employees in that
13 regard?
14 A. Yes, sir.
15 Q. What did you tell them generally about
16 that?
17 A. Well, you're taxing my memory again here
18 now.
19 Q. That's okay.
20 A. But they're called small quantity
21 generators. And I believe that that threshold or
22 that number is -- under 220 pounds, you're
23 considered a small quantity generator. And once it
24 gets over that amount, then it falls into a
25 different category.

1 Q. Including, possibly, hazardous waste?
2 A. Yes, sir, I believe that's correct.
3 Q. So you were fully aware of that issue
4 back in October of 1997. Correct?
5 A. Yes, sir, I think so.
6 Q. What are some of the items that you can
7 take in small quantities but not in these larger
8 quantities? Just give me some examples, please.
9 A. Just examples would be like paints,
10 batteries.
11 Q. Florescent tubes?
12 A. Fluorescent tubes would fall into that
13 category.
14 Q. Computer monitors?
15 A. I'm not exactly sure if computer monitors
16 fall into that category. I would think that they
17 would, but I'm not exactly sure. Televisions would
18 fall under that category, I would think.
19 Q. And you knew that back in 1997?
20 A. Yes, sir.
21 Q. Tell me, sir, why that did not raise a
22 red flag in your mind, when more than a thousand TV
23 tubes were heading in your direction?
24 MR. DONALDSON: Object to form.
25 A. Because I knew that we had accepted TV

1 the site operating plan at your facility?
2 A. I don't believe they are part of the
3 plan. It just says that we will have training
4 records. I believe that's correct.
5 Q. Do you have, at your facility, one or
6 more intact television tubes from this incident?
7 A. I know we have one.
8 Q. How did that come into your -- strike
9 that.
10 Did you have anything to do with
11 getting that tube?
12 A. I'm sorry, but I don't remember. I
13 probably -- that's been a long time ago. I
14 probably did, but I don't remember.
15 Q. Do you -- was it a tube that was taken
16 out of the landfill phase?
17 A. It was -- I believe it was taken -- I'm
18 not exactly sure whether it was taken from the
19 phase or whether it was taken from one of the
20 containers that they loaded.
21 Q. Have you discussed with Bob or anybody
22 else the issue of whether to test that tube?
23 A. No, sir, I don't believe so. If we have,
24 I don't recall.
25 Q. Is it true that about 98 cubic yards of

1 the debris, including the tubes and the packing
2 materials, were disposed of in your landfill?
3 A. I think that's correct. If I remember,
4 it was 97, I believe.
5 Q. Okay. Take a look at Exhibit 7, the last
6 page, please.
7 A. Exhibit 7.
8 Q. Yes. TDS 01346.
9 A. Give me just a second. Exhibit 7. I
10 have 7. Now, what?
11 Q. Okay. Sir, the very last page.
12 MR. DONALDSON: Are you looking for
13 the tape that adds everything up?
14 MR. CHRISTIAN: Yes.
15 MR. DONALDSON: I don't think it's
16 in that order.
17 A. There we are. Yes, sir.
18 Q. (BY MR. CHRISTIAN) Okay. Maybe I have
19 them out of order. But it's TDS 01346.
20 A. It is. It was the last page.
21 Q. All right. Is that something that was
22 prepared by someone at Texas Disposal Systems?
23 A. I believe so, yes, sir.
24 Q. And that 98 figure, what does that
25 represent? Is that cubic yards?

1 NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS) IN THE 207TH
LANDFILL, INC.)
3 Plaintiff,)
)
4 vs.) DISTRICT COURT OF
)
5 PENSKE TRUCK LEASING CO.)
L.P. AND PENSKE)
6 LOGISTICS, INC. AND)
ZENITH ELECTRONICS CORP.)
7 AND ZENITH ELECTRONICS OF)
TEXAS, INC. AND HARRY)
8 ERNEST McCAIN AND)
DAX DAVID TAYLOR)
9 Defendants.) HAYS COUNTY, TEXAS

10 REPORTER'S CERTIFICATION
DEPOSITION OF JIM W. GREGORY
11 MAY 28, 2003

12 I, Renee DeYoung, Certified Shorthand Reporter
13 in and for the State of Texas, hereby certify to
14 the following:
15 That the witness, JIM W. GREGORY, was duly
16 sworn by the officer and that the transcript of the
17 oral deposition is a true record of the testimony
18 given by the witness;
19 That the foregoing is a secondary transcript
20 of the oral deposition, intended to replace and
21 obliterate all other instances of any previous
22 transcript submitted of the proceedings held on
23 stated date;
24 That the deposition transcript was again
25 submitted on _____ to the witness or to the

1 attorney for the witness for examination, signature
2 and return to me by _____;
3 That pursuant to information given to the
4 deposition officer at the time said testimony was
5 taken, the following includes counsel for all
6 parties of record:
7
8 MR. DAVID H. DONALDSON, Attorney for Plaintiff;
MR. DOUGLAS Y. CHRISTIAN, Attorney for
9 Defendants Penske Truck Leasing Co., L.P, Penske
Logistics, Inc., and Harry Ernest McCain;
10 MR. PHILIP. L. COMELLA, Attorney for Defendants
Zenith Electronics Corp., and Zenith Electronics of
11 Texas, Inc., and Dax David Taylor.
12 I further certify that I am neither counsel
13 for, related to, nor employed by any of the parties
14 or attorneys in the action in which this proceeding
15 was taken, and further that I am not financially or
16 otherwise interested in the outcome of the action.
17 Further certification requirements pursuant to
18 Rule 203 of TRCP will be certified to after they
19 have occurred.
20 Certified to by me this _____ day of
21 Septmeber, 2003.
22 Renee DeYoung
23 Renee DeYoung, Texas CSR 3236
Expiration Date: 12/31/04
24 13945 Research Boulevard
Suite D-110
25 Austin, Texas 78717
(512) 482-0828

1 FURTHER CERTIFICATION UNDER RULES 203 TRCP

2 The original deposition was/was not

3 returned to the deposition officer on

4 _____;

5 If returned, the attached Changes

6 and Signature page contains any changes and the

7 reasons therefor;

8 If returned, the original deposition

9 was delivered to Mr. Douglas Y. Christian,

10 Custodial Attorney;

11 That $_____ is the deposition

12 officer's charges to the Plaintiff for preparing

13 the original deposition transcript and any copies

14 of copy of exhibits;

15 That the deposition was delivered in

16 accordance with Rule 203.3, and that a copy of this

17 certificate was served on all parties shown herein

18 on and filed with the Clerk.

19 Certified to by me this _____ day of

20 _____, 2003.

21

22

23 _____

Renee DeYoung, Texas CSR 3236

Expiration Date: 12/31/04

24 13945 Research Boulevard

, Suite D-110

25 Austin, Texas 78717

(512) 482-0828

CAUSE NO. 98-0159

TEXAS DISPOSAL SYSTEMS LANDFILL, INC., Plaintiff,	)	IN THE DISTRICT COURT
VS.	)	HAYS COUNTY, TEXAS
PENSKE TRUCK LEASING CO., L.P., PENSKE LOGISTICS, INC., ZENITH ELECTRONICS CORP., ZENITH ELECTRONICS OF TEXAS, INC., and HARRY ERNEST McCAIN, Defendants.	)	207TH JUDICIAL DISTRICT

****

ORAL DEPOSITION OF

ROGER C. ALLEN

OCTOBER 24, 2003

****

ORAL DEPOSITION OF ROGER C. ALLEN, produced as a witness at the instance of Defendants Zenith Electronics Corp. and Zenith Electronics of Texas, Inc., and duly sworn, was taken in the above-styled and numbered cause on the 24th day of October, 2003, from 9:40 a.m. to 5:18 p.m., before Shelly D. Meyer, CSR in and for the State of Texas, reported by machine shorthand, at the offices of George & Donaldson, L.L.P, 1100 Norwood Tower, 114 West Seventh Street, Austin, Texas, pursuant to the Texas Rules of Civil Procedure and the provisions stated on the record or attached hereto.

1 A P P E A R A N C E S

2

3 FOR THE PLAINTIFF:
Mr. David H. Donaldson, Jr.
4 GEORGE & DONALDSON, L.L.P.
1100 Norwood Tower
5 114 West Seventh Street
Austin, Texas 78701
6

7 FOR THE DEFENDANTS PENSKE TRUCK LEASING CO., L.P.,
8 PENSKE LOGISTICS, INC., AND HARRY ERNEST McCAIN:
Mr. Douglas Y. Christian
9 REED SMITH, L.L.P
2500 One Liberty Place
10 1650 Market Street
Philadelphia, Pennsylvania 19103
11

12 FOR THE DEFENDANTS ZENITH ELECTRONICS CORP. AND ZENITH
13 ELECTRONICS OF TEXAS, INC.:
Mr. Philip L. Comella
14 SEYFARTH SHAW
55 East Monroe Street, Suite 4200
15 Chicago, Illinois 60603-5803

16

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14:06 1 Q. Now, you -- one of those questions was not whether
14:06 2 he was asked if what he was hauling, if broken, was hazardous
14:06 3 waste. Would you agree with that?
14:06 4 A. I'm sorry. Say it again.
14:06 5 Q. You know what? I don't blame you. That's one of
14:06 6 these half-hour-after-lunch questions.
14:06 7 Did you suggest to Mr. Donaldson that he ask
14:06 8 the following question or anything close to the following
14:06 9 question: "Mr. McCain, did anyone ask you whether broken
14:06 10 picture tubes were hazardous waste or hazardous materials?"
14:06 11 A. I don't remember that, sir.
14:06 12 Q. Are you aware of any document, including deposition
14:07 13 transcript, that indicates that anyone asked this driver
14:07 14 whether broken picture tubes were hazardous?
14:07 15 MR. DONALDSON: Object to form.
14:07 16 A. To the best of my knowledge, I don't think them
14:07 17 particular words were ever asked, because that's not what
14:07 18 would normally be asked. Only be asked "Are you hauling
14:07 19 anything that's hazardous?"
14:07 20 Q. (By Mr. Christian) Okay. And he was not hauling
14:07 21 anything that was hazardous. Would you agree with me?
14:07 22 MR. DONALDSON: Object to form.
14:07 23 A. Up to the time of the accident, I agree with that.
14:07 24 Q. (By Mr. Christian) And at the time the accident
14:07 25 occurred, he wasn't hauling anything anywhere. Would you

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	)	IN THE DISTRICT COURT
3 Plaintiff,	)	
4 VS.	)	HAYS COUNTY, TEXAS
5 PENSKE TRUCK LEASING CO., L.P., PENSKE LOGISTICS,	)	
6 INC., ZENITH ELECTRONICS CORP., ZENITH ELECTRONICS	)	
7 OF TEXAS, INC., and HARRY ERNEST McCAIN,	)	
8 Defendants.	)	207TH JUDICIAL DISTRICT

9

REPORTER'S CERTIFICATION
10 ORAL DEPOSITION OF ROGER C. ALLEN
OCTOBER 24, 2003
11

12 I, Shelly D. Meyer, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:
13 That the witness, ROGER C. ALLEN, was duly sworn by the officer and that the transcript of the oral deposition is
14 a true record of the testimony given by the witness;
That the deposition transcript was submitted on
15 October 30th, 2003, to the witness or to the attorney for the witness for examination, signature and return to me by
16 November 20th, 2003.
That the amount of time used by each party at the
17 deposition is as follows:

18 Mr. Comella: 2 hours, 37 minutes
Mr. Christian: 3 hours, 12 minutes
19

That pursuant to information given to the deposition
20 officer at the time said testimony was taken, the following includes counsel for all parties of record:
21

Mr. David H. Donaldson, Jr., Attorney for Plaintiff
22 Mr. Douglas Y. Christian, Attorney for Defendants Penske Truck Leasing Co., L.P., Penske Logistics, Inc., and
23 Harry Ernest McCain
Mr. Philip L. Comella, Attorney for Defendants
24 Zenith Electronics Corp. and Zenith Electronics of Texas, Inc.
25

1 I further certify that I am neither counsel for,
related to, nor employed by any of the parties or attorneys
2 in the action in which this proceeding was taken, and further
that I am not financially or otherwise interested in the
3 outcome of the action.
Further certification requirements pursuant to
4 Rule 203 of TRCP will be certified to after they have
occurred.
5 Certified to by me this 30th day of October, 2003.
6
7 SHELLY D. MEYER, Texas CSR 4419
Expires 12/31/04
8 Ross-Weidmann, Inc.
Firm Registration #17
9 805 West 10th Street, Suite 400
Austin, Texas 78701
10 FAX (512) 478-2782
11
12 FURTHER CERTIFICATION PURSUANT TO RULE 203
13 The original deposition was/was not returned to the
14 deposition officer on _____;
15 If returned, the attached Changes and Signature page
16 contains any changes and the reasons therefor;
17 If returned, the original deposition was delivered
18 to Mr. Philip L. Comella, Custodial Attorney;
19 That $_____ is the deposition officer's
20 charges to Defendants Zenith Electronics Corp. and Zenith
21 Electronics of Texas, Inc. For preparing the original
22 deposition transcript and any copies of exhibits;
23 That the deposition was delivered in accordance with
24 Rule 203.3, and that a copy of this certificate was served on
25 all parties shown herein and filed with the Clerk.

1

2 Certified to by me this _____ day of _____,

3 2003.

4

5

6 SHELLY D. MEYER, Texas CSR 4419
Expires 12/31/04
7 Ross-Weidmann, Inc.
Firm Registration #17
8 805 West 10th Street, Suite 400
Austin, Texas 78701
9 FAX (512) 478-2782

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1 NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS,) IN THE DISTRICT COURT
LANDFILL, INC.,)
3 Plaintiff,)
)
4 VS.)
) HAYS COUNTY, TEXAS
5 PENSKE TRUCK LEASING CO.,)
L.P., PENSKE LOGISTICS,)
6 INC., ZENITH ELECTRONICS)
CORP., ZENITH ELECTRONICS)
7 OF TEXAS, INC., AND HARRY)
ERNEST McCAIN,)
8 Defendants.) 207TH JUDICIAL DISTRICT

9 * * * * * * * * * * * * * * * * *

10 **ORAL DEPOSITION OF**

11 **PIERCE L. CHANDLER, JR., PE**

12 **SEPTEMBER 30, 2003**

13 * * * * * * * * * * * * * * * * *

14 **ORAL DEPOSITION of PIERCE L. CHANDLER,**
15 **JR., PE**, produced as a witness at the instance of the
16 Defendants Penske Truck Leasing Co., L.P., Penske
17 Logistics, Inc., and Harry Ernest McCain, and duly
18 sworn, was taken in the above-styled and -numbered
19 cause on the 30th of September, 2003, from 9:08 a.m.
20 to 6:14 p.m., before MARY SCOPAS, RPR, CSR in and for
21 the State of Texas, reported by machine shorthand, at
22 the Law Offices of George & Donaldson, L.L.P., 1100
23 Norwood Tower, 114 West Seventh Street, Austin, Texas,
24 pursuant to the Texas Rules of Civil Procedure and the
25 provisions stated on the record or attached hereto.

1 **APPEARANCES**

2

3 FOR THE PLAINTIFF:

4 **Mr. David H. Donaldson, Jr.**
GEORGE & DONALDSON, L.L.P.
5 **1100 Norwood Tower**
114 West Seventh Street
6 **Austin, Texas 78701**

7

FOR THE DEFENDANTS PENSKE TRUCK LEASING CO., L.P.,
8 PENSKE LOGISTICS, INC., AND HARRY ERNEST McCAIN:

9 **Mr. Douglas Y. Christian**
REED SMITH, L.L.P.
10 **2500 One Liberty Place**
1650 Market Street
11 **Philadelphia, Pennsylvania 19103**

12

FOR THE DEFENDANT ZENITH ELECTRONICS CORP. AND ZENITH
13 ELECTRONICS OF TEXAS, INC.:

14 **Mr. Philip L. Comella (via telephone)**
SEYFARTH SHAW
15 **55 East Monroe Street, Suite 4200**
Chicago, Illinois 60603-5803

16

17 ALSO PRESENT:

18 **Mr. Bob Gregory**
TEXAS DISPOSAL SYSTEMS

19

Mr. Gary Newton
20 **TEXAS DISPOSAL SYSTEMS**

21

22

23

24

25

11:30 AM 1 Q. Penske wasn't transporting hazardous waste.
11:30 AM 2 Would you agree with that?
11:30 AM 3 A. Well, they were transporting the materials.
11:30 AM 4 Q. They were transporting a nonhazardous waste.
11:30 AM 5 Would you agree with that?
11:30 AM 6 MR. DONALDSON: Object to form.
11:30 AM 7 A. If undamaged --
11:30 AM 8 Q. (By Mr. Christian) Strike that. Let me ask
11:30 AM 9 it differently.
11:30 AM 10 A. Okay.
11:30 AM 11 Q. Penske was transporting undamaged TV tubes.
11:30 AM 12 Would you agree with that?
11:30 AM 13 A. That is correct.
11:30 AM 14 Q. And undamaged TV tubes do not constitute
11:30 AM 15 hazardous waste. Do you agree with that?
11:30 AM 16 A. I would agree with that.
11:30 AM 17 Q. And manifests are not required for the
11:30 AM 18 transportation of undamaged TV tubes. Would you agree
11:30 AM 19 with that?
11:30 AM 20 A. I do not know that for a fact.
11:31 AM 21 Q. Well, Mr. Chandler, I'm going to move on to
11:31 AM 22 the damages issues, because it's my understanding that
11:31 AM 23 that's what you've been designated to testify with
11:31 AM 24 regard to --
11:31 AM 25 MR. CHRISTIAN: I'm going to reiterate

1 NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS,) IN THE DISTRICT COURT
LANDFILL, INC.,)
3 Plaintiff,)
VS.)
4 PENSKE TRUCK LEASING CO.,)
L.P., PENSKE LOGISTICS,) HAYS COUNTY, TEXAS
5 INC., ZENITH ELECTRONICS)
CORP., ZENITH ELECTRONICS)
6 OF TEXAS, INC., AND HARRY)
ERNEST McCAIN,)
7 Defendants.) 207TH JUDICIAL DISTRICT
* * * * * * * * * * * * * * * * *

8 **REPORTER'S CERTIFICATION**
ORAL DEPOSITION OF
9 **PIERCE L. CHANDLER, JR., PE**
SEPTEMBER 30, 2003
10 * * * * * * * * * * * * * * * * *

11 I, MARY SCOPAS, Certified Shorthand Reporter in
12 and for the State of Texas, hereby certify to the
13 following:
14 That the witness, PIERCE L. CHANDLER, JR., PE,
15 was duly sworn by the officer and that the transcript
16 of the oral deposition is a true record of the
17 testimony given by the witness;
18 That the deposition transcript was submitted on
19 October 6th, 2003 to the witness or to the attorney
20 for the witness for examination, signature and return
21 to Mr. Douglas Y. Christian by October 27th, 2003;
22 That the amount of time used by each party at
23 the deposition is as follows:
24 **Mr. Christian - 5 HR. 22 MIN.**
Mr. Comella - 0 HR. 46 MIN.
25 **Mr. Donaldson - 0 HR. 1 MIN.**

1 That pursuant to information given to the
2 deposition officer at the time said testimony was
3 taken, the following includes all parties of record:
4 FOR THE PLAINTIFF:
5 **Mr. David H. Donaldson, Jr.**
GEORGE & DONALDSON, L.L.P.
6 **1100 Norwood Tower**
114 West Seventh Street
7 **Austin, Texas 78701**
8 FOR THE DEFENDANTS PENSKE TRUCK LEASING CO., L.P., PENSKE LOGISTICS, INC., AND HARRY ERNEST McCAIN:
9
Mr. Douglas Y. Christian
10 **REED SMITH, L.L.P.**
2500 One Liberty Place
11 **1650 Market Street**
Philadelphia, Pennsylvania 19103
12
13 FOR THE DEFENDANT ZENITH ELECTRONICS CORP. AND ZENITH ELECTRONICS OF TEXAS, INC.:
14
Mr. Philip L. Comella
15 **SEYFARTH SHAW**
55 East Monroe Street, Suite 4200
16 **Chicago, Illinois 60603-5803**
17
18 I further certify that I am neither counsel
19 for, related to, nor employed by any of the parties or
20 attorneys in the action in which this proceeding was
21 taken, and further that I am not financially or
22 otherwise interested in the outcome of the action.
23 Further certification requirements pursuant to
24 Rule 203 of TRCP will be certified to after they have
25 occurred.

1 Certified to by me this day of October 6, 2003.
2
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25

MARY SCOPAS, RPR, CSR #5313
Expiration Date: 12-31-04
Firm Registration No. 17
Ross-Weidmann, Inc.
Fax (512) 478-2782

1 **FURTHER CERTIFICATION UNDER RULE 203 TRCP**

2 The original deposition was/was not returned to
3 the deposition officer;

4 If returned, the attached Changes and Signature
5 page contains any changes and the reasons therefore;

6 If returned, the original deposition was
7 delivered to Mr. Douglas Y. Christian, Custodial
8 Attorney;

9 That $ 1998.40 is the deposition
10 officer's charges to the Defendants Penske Truck
11 Leasing Co., L.P., Penske Logistics, Inc., and Harry
12 Ernest McCain for preparing the original deposition
13 transcript and any copies of exhibits;

14 That a copy of this certificate was served on
15 all parties shown herein and filed with the Clerk.

16 Certified to by me this 20th day of
17 October, 2003.

18
19
20
21
22 Mary Scopas
23 MARY SCOPAS, RPR, CSR #5313
Expiration Date: 12-31-04
24 Firm Registration No. 17
Ross-Weidmann, Inc.
25 Fax (512) 478-2782

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS * IN THE DISTRICT COURT
LANDFILL, INC., *
3 Plaintiff, *
*
4 VS. * OF HAYS COUNTY, TEXAS
*
5 PENSKE TRUCK LEASING CO., *
L.P., PENSKE LOGISTICS, *
6 INC., ZENITH ELECTRONICS *
CORP., ZENITH ELECTRONICS *
7 OF TEXAS, INC., and HARRY *
ERNEST McCAIN, *
8 Defendants. * 207TH JUDICIAL DISTRICT

9 **********

10 VIDEOTAPED DEPOSITION OF

11 LEE MACHEN

12 TAKEN JUNE 10, 2003

13 **********

14

15 VIDEOTAPED DEPOSITION of LEE MACHEN, produced as a
16 witness at the instance of the Plaintiff, and duly
17 sworn, was taken in the above-styled and numbered cause
18 on the 10th day of June, 2003, from 9:15 a.m. to
19 11:23 a.m., before Janet L. Hamm, CSR in and for the
20 State of Texas, reported by machine shorthand, at the
21 offices of George & Donaldson, L.L.P., 1100 Norwood
22 Tower, 114 West Seventh Street, Austin Texas, pursuant
23 to the Texas Rules of Civil Procedure and the provisions
24 stated on the record or attached hereto.
25

1 APPEARANCES

2 FOR THE PLAINTIFF:

3 Mr. David H. Donaldson, Jr.
GEORGE & DONALDSON, L.L.P.
4 1100 Norwood Tower
114 West Seventh Street
5 Austin, Texas 78701

6
FOR DEFENDANTS PENSKE TRUCK LEASING CO., L.P., PENSKE
7 LOGISTICS, INC., and HARRY ERNEST McCAIN:

8 Mr. Douglas Y. Christian
REED SMITH, LLP
9 2500 One Liberty Place
1650 Market Street
10 Philadelphia, Pennsylvania 19103

11
FOR DEFENDANTS ZENITH ELECTRONICS CORP. AND ZENITH
12 ELECTRONICS OF TEXAS, INC.:

13 Mr. Philip L. Comella
SEYFARTH SHAW
14 55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
15

16 ALSO PRESENT:

17 Mr. Jim Gregory
Mr. Tim Bishop, Videographer
18

19

20

21

22

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24

25

1 It was off the main part of 35.
2 Q Did the loader break any of the television
3 tubes when it was loading them and scooping them and
4 putting them in the dump trucks?
5 MR. CHRISTIAN: Object to the form.
6 A Well, I'm sure it probably did, but the
7 majority of them were broke anyway.
8 Q (By Mr. Donaldson) All right. And let me ask
9 it a little different way. What was the state of the
10 load, as far as you could tell? Were the picture tubes
11 intact or were they broken?
12 MR. CHRISTIAN: Object to form.
13 A A large number of them were broken. Now, I'm
14 sure it was a few in there that wasn't broken. Now, I
15 don't know.
16 Q (By Mr. Donaldson) Okay. Did you personally
17 get involved in getting some of that material out of the
18 trailer?
19 A Yes, sir.
20 Q How did you get involved in that?
21 A When -- when they were loading it with the --
22 with the loader, we were scooping with the big scoops
23 that we have that clean up the highway -- we were
24 scooping the broken glass and stuff out. I think some
25 of it went into the bucket, some of it went on the

1 loaders?
2 A I don't know. You know, I don't know.
3 Q But you just recall TxDOT being in charge --
4 A TxDOT had one of their employees on the loader.
5 Q And do you recall seeing the TxDOT front-end
6 loader operator driving over these tubes in order to
7 remove them from the highway or the other road?
8 A Yes, sir, he had to run over some of them.
9 Q And was Special Automotive equipment used to
10 shovel up this debris?
11 A Equipment? No, sir. Might have used a shovel
12 or two to help them throw something in that loader,
13 regular hand-type shovel.
14 Q Now, tell me about what TxDOT first wanted to
15 do with this debris. You testified earlier --
16 A They wanted to scoop it up and pile it in a
17 pile on the side of the highway.
18 Q And do you know why they wanted to do that?
19 A Wanted to get the road open.
20 Q So their first suggestion was to move the
21 debris off to the side of the road, right?
22 A Yes, sir. They wanted to --
23 Q To clear the road?
24 A -- put it in a pile off the side of the road.
25 Q And then what did you do?

1 A My suggestion was get the dump trucks and you
2 wouldn't have to move it but one time.
3 Q So rather than moving it to a pile and then
4 later bring the dump trucks and dispose of it, your
5 suggestion was, "Let's just take it off the road right
6 into the dump trucks," correct?
7 A Yes, sir.
8 Q Now, do you know -- let's talk about Alfred
9 Vallejo. Do you know how Mr. Vallejo got involved in
10 this accident scene cleanup?
11 A No, sir, I couldn't really tell you.
12 Q Do you know who called Mr. Vallejo?
13 A No, sir, I don't.
14 Q Do you recall Mr. Vallejo arriving at the scene
15 of this accident?
16 A I'm sure he was there. I couldn't say actually
17 what time he got there or anything like that. I don't
18 know.
19 Q Do you know whether Mr. Vallejo's dump trucks
20 were used to haul away some of this debris?
21 A I don't know. I don't know if Alfred has any
22 dump trucks.
23 Q Do you know whether -- let me scratch it. Can
24 you describe the type of trucks that were first used to
25 haul away this debris? Were they pickups, dump

1 about the wrecker log?

2 A Yes, sir, but I said if it was that far back, I

3 don't know whether we've still got it or not. I haven't

4 looked for it, no, sir.

5 Q And that was my question, have you looked for

6 it?

7 A No, sir.

8 Q And no one has ever asked you to do that; is

9 that correct?

10 A Not to my knowledge.

11 Q Back in October of 1997 did you fax Exhibit 70

12 to TDSL?

13 A I didn't. I don't know. Somebody at the shop

14 could have. I didn't. What is this?

15 Q It's that cell phone record.

16 A I don't know anything about that cell phone,

17 sir.

18 MR. DONALDSON: Is there an exhibit

19 number?

20 MR. CHRISTIAN: 70.

21 MR. DONALDSON: 70?

22 MR. CHRISTIAN: Yes.

23 Q (By Mr. Christian) Is it true that the reason

24 you decided not to simply pile the tubes by the road was

25 because you wanted to save the effort of having to move

1 them twice, and therefore you recommended that they go
2 to the landfill?
3 A Well, they were broken, and why move them twice
4 when you -- they got to go to the landfill anyway? And
5 they could wait five minutes, ten minutes, whatever it
6 was, to get the dump trucks there.
7 Q So rather than piling them up, you recommended
8 that they be put in trucks and sent to the landfill; is
9 that correct?
10 A I -- after they decided they was going to push
11 them in a pile, I said, "Why do this? Put them in the
12 dump trucks and take them to the landfill."
13 Q Okay. We have so far one picture of the truck
14 on its side, and that's the picture that's in
15 Exhibit 69. Have you seen any other photographs of the
16 truck on its side?
17 A I saw whatever you got laying up here. I saw
18 those, but I don't know --
19 Q I think they're all taken --
20 A Are any of them on the side? No. They're all
21 uprighted?
22 Q Yes. Now, I know it's not the best picture,
23 but I'm going to -- I'm going to try this anyway. If
24 you look at this photograph on Exhibit 69, you see a
25 fellow with a broom. Do you know who that was?

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS * IN THE DISTRICT COURT
LANDFILL, INC., *
3 *
Plaintiff, *
4 *
VS. * OF HAYS COUNTY, TEXAS
5 *
PENSKE TRUCK LEASING CO., *
6 L.P., PENSKE LOGISTICS, *
INC., ZENITH ELECTRONICS *
7 CORP., ZENITH ELECTRONICS *
OF TEXAS, INC., and HARRY *
8 ERNEST McCAIN, *
*
9 Defendants. * 207TH JUDICIAL DISTRICT

10

REPORTER'S CERTIFICATION
11 VIDEOTAPED DEPOSITION OF LEE MACHEN
JUNE 10, 2003
12

13 I, Janet L. Hamm, Certified Court Reporter in and
14 for the State of Texas, hereby certify to the following:
15 That the witness, LEE MACHEN, was duly sworn by the
16 officer and that the transcript of the oral deposition
17 is a true record of the testimony given by the witness;
18 That the deposition transcript was submitted on the
19 ____ day of June, 2003, to the witness or to the
20 attorney for the witness for examination, signature and
21 return to me by the ____ day of July, 2003;
22 That the amount of time used by each party at the
23 deposition is as follows:
24 Mr. Donaldson - 27 minutes
Mr. Comella - 56 minutes
25 Mr. Christian - 53 minutes

1 That pursuant to information given to the deposition

2 officer at the time said testimony was taken, the

3 following includes counsel for all parties of record:

4 Mr. David H. Donaldson, Jr., Attorney for Plaintiff
Mr. Douglas Y. Christian, Attorney for Defendants
5 Penske Truck Leasing Co., L.P., Penske Logistics, Inc.,
and Harry Ernest McCain
6 Mr. Philip L. Comella, Attorney for Defendants
Zenith Electronics Corp. and Zenith Electronics of
7 Texas, Inc.

8 I further certify that I am neither counsel for,

9 related to nor employed by any of the parties or

10 attorneys in the action in which this proceeding was

11 taken, and, further, that I am not financially or

12 otherwise interested in the outcome of the action.

13 Further certification requirements pursuant to

14 Rule 203 of TRCP will be certified to after they have

15 occurred.

16 Certified to by me this ____ day of June, 2003.

17

18

19 _____
JANET L. HAMM, Texas CSR #5029
20 Expiration Date: 12/31/03
805 West 10th, Suite 400
21 Austin, Texas 78701
(512) 478-2762

22

23

24

25

1 FURTHER CERTIFICATION UNDER RULE 203 TRCP

2

3 The original deposition was/was not returned to the

4 deposition officer on _____;

5 If returned, the attached Changes and Signature page

6 contains any changes and the reasons therefor;

7 If returned, the original deposition was delivered

8 to Mr. David H. Donaldson, Jr., Custodial Attorney;

9 That $_____ is the deposition officer's

10 charges to the Plaintiff for preparing the original

11 deposition transcript and any copies of exhibits;

12 That the deposition was delivered in accordance with

13 Rule 203.3 and that a copy of this certificate was

14 served on all parties shown herein and filed with the

15 Clerk.

16 Certified to by me this ____ day of _____,

17 2003.

18

19 _____
JANET L. HAMM, Texas CSR #5029
Expiration Date: 12/31/03

20 805 West 10th, Suite 400
Austin, Texas 78701

21 (512) 478-2762

22

23

24

25

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS * IN THE DISTRICT COURT
LANDFILL, INC., *
3 Plaintiff, *
*
4 VS. * OF HAYS COUNTY, TEXAS
*
5 PENSKE TRUCK LEASING CO., *
L.P., PENSKE LOGISTICS, *
6 INC., ZENITH ELECTRONICS *
CORP., ZENITH ELECTRONICS *
7 OF TEXAS, INC., and HARRY *
ERNEST McCAIN, *
8 Defendants. * 207TH JUDICIAL DISTRICT

9 **********

10 VIDEOTAPED DEPOSITION OF

11 JUDY MACHEN

12 TAKEN JUNE 10, 2003

13 **********

14

15 VIDEOTAPED DEPOSITION of JUDY MACHEN, produced as a

16 witness at the instance of the Plaintiff, and duly

17 sworn, was taken in the above-styled and numbered cause

18 on the 10th day of June, 2003, from 11:37 a.m. to

19 12:32 p.m., before Janet L. Hamm, CSR in and for the

20 State of Texas, reported by machine shorthand, at the

21 offices of George & Donaldson, L.L.P., 1100 Norwood

22 Tower, 114 West Seventh Street, Austin Texas, pursuant

23 to the Texas Rules of Civil Procedure and the provisions

24 stated on the record or attached hereto.

25

1 APPEARANCES

2 FOR THE PLAINTIFF:

3 Mr. David H. Donaldson, Jr.
GEORGE & DONALDSON, L.L.P.
4 1100 Norwood Tower
114 West Seventh Street
5 Austin, Texas 78701

6
FOR DEFENDANTS PENSKE TRUCK LEASING CO., L.P., PENSKE
7 LOGISTICS, INC., and HARRY ERNEST McCAIN:

8 Mr. Douglas Y. Christian
REED SMITH, LLP
9 2500 One Liberty Place
1650 Market Street
10 Philadelphia, Pennsylvania 19103

11
FOR DEFENDANTS ZENITH ELECTRONICS CORP. AND ZENITH
12 ELECTRONICS OF TEXAS, INC.:

13 Mr. Philip L. Comella
SEYFARTH SHAW
14 55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
15

16 ALSO PRESENT:

17 Mr. Jim Gregory
Mr. Tim Bishop, Videographer
18

19

20

21

22

23

24

25

1 approximately when that was?

2 A No, I couldn't. I'm sorry, I can't remember

3 the times.

4 Q And the second call, when it came in, do you

5 know what the --

6 A It was about 30, 45 minutes, at the most.

7 Q In that first phone call with the gentleman

8 from Pennsylvania, did he say anything or mention

9 anything about hazardous materials in that call?

10 A Not the first time he called.

11 Q And so it was only in the second call that came

12 up?

13 A Uh-huh, second call.

14 Q Now, did you provide the wrecker driver's cell

15 phone number to this fellow from Pennsylvania?

16 A I don't know if I gave him that phone number or

17 I gave Ronnie his phone number. I really can't remember

18 which way it went, but yes, they did get in touch with

19 each other.

20 Q Did you have any other phone calls that day

21 with anyone from either Penske or Zenith?

22 A No. Zenith never called me.

23 Q Any calls from -- from the scene?

24 A Yes, back and forth. They -- I asked them what

25 they were doing, how long it was taking and why were

1 they still there? And they would call me and let me
2 know what they were doing. They called and told me that
3 DPS had contacted the Highway Department that was
4 working a little ways down the road and asked them to
5 come clean it up, and they had to get back to their job,
6 so they needed me to find someone with a front-end
7 loader and some dump trucks, which I dispatched Alfred
8 Vallejo and M&M Trucking.
9 Q How did you decide to use Alfred Vallejo and
10 M&M?
11 A They're customers of ours. We do their towing,
12 so I know how to get in touch with them.
13 Q And did all those conversations back and forth
14 at the scene about how to get the load taken care of --
15 did those take place before this first call from the guy
16 from Pennsylvania?
17 A I'd lie to you if I told you I knew exactly the
18 time sequence, but it seemed like it was before the
19 second phone call.
20 Q And -- so did you call Alfred Vallejo?
21 A Yes.
22 Q How do you -- how did you get in touch with
23 him?
24 A He has a cell phone.
25 Q And do you know whether Mr. Vallejo himself has

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS * IN THE DISTRICT COURT
LANDFILL, INC., *
3 *
Plaintiff, *
4 *
VS. * OF HAYS COUNTY, TEXAS
5 *
PENSKE TRUCK LEASING CO., *
6 L.P., PENSKE LOGISTICS, *
INC., ZENITH ELECTRONICS *
7 CORP., ZENITH ELECTRONICS *
OF TEXAS, INC., and HARRY *
8 ERNEST McCAIN, *
*
9 Defendants. * 207TH JUDICIAL DISTRICT

10

REPORTER'S CERTIFICATION
11 VIDEOTAPED DEPOSITION OF JUDY MACHEN
JUNE 10, 2003
12

13 I, Janet L. Hamm, Certified Court Reporter in and

14 for the State of Texas, hereby certify to the following:

15 That the witness, JUDY MACHEN, was duly sworn by the

16 officer and that the transcript of the oral deposition

17 is a true record of the testimony given by the witness;

18 That the deposition transcript was submitted on the

19 ____ day of June, 2003, to the witness or to the

20 attorney for the witness for examination, signature and

21 return to me by the ____ day of July, 2003;

22 That the amount of time used by each party at the

23 deposition is as follows:

24 Mr. Donaldson - 21 minutes
Mr. Christian - 28 minutes
25 Mr. Comella - 6 minutes

1 That pursuant to information given to the deposition

2 officer at the time said testimony was taken, the

3 following includes counsel for all parties of record:

4 Mr. David H. Donaldson, Jr., Attorney for Plaintiff
Mr. Douglas Y. Christian, Attorney for Defendants
5 Penske Truck Leasing Co., L.P., Penske Logistics, Inc.,
and Harry Ernest McCain
6 Mr. Philip L. Comella, Attorney for Defendants
Zenith Electronics Corp. and Zenith Electronics of
7 Texas, Inc.

8 I further certify that I am neither counsel for,

9 related to nor employed by any of the parties or

10 attorneys in the action in which this proceeding was

11 taken, and, further, that I am not financially or

12 otherwise interested in the outcome of the action.

13 Further certification requirements pursuant to

14 Rule 203 of TRCP will be certified to after they have

15 occurred.

16 Certified to by me this ____ day of June, 2003.

17

18

19

_____
JANET L. HAMM, Texas CSR #5029
20 Expiration Date: 12/31/03
805 West 10th, Suite 400
21 Austin, Texas 78701
(512) 478-2762

22

23

24

25

1 FURTHER CERTIFICATION UNDER RULE 203 TRCP

2

3 The original deposition was/was not returned to the

4 deposition officer on _____;

5 If returned, the attached Changes and Signature page

6 contains any changes and the reasons therefor;

7 If returned, the original deposition was delivered

8 to Mr. David H. Donaldson, Jr., Custodial Attorney;

9 That $_____ is the deposition officer's

10 charges to the Plaintiff for preparing the original

11 deposition transcript and any copies of exhibits;

12 That the deposition was delivered in accordance with

13 Rule 203.3 and that a copy of this certificate was

14 served on all parties shown herein and filed with the

15 Clerk.

16 Certified to by me this ____ day of _____,

17 2003.

18

19 _____
JANET L. HAMM, Texas CSR #5029
Expiration Date: 12/31/03

20 805 West 10th, Suite 400
Austin, Texas 78701

21 (512) 478-2762

22

23

24

25

From: Tony Marinello
To: PA.GRNHILLS.PAUL-P
Date: 10/16/97 2:06pm
Subject: VEHICLE ACCIDENT AT ZENITH DATED 09 OCT 97

PAUL,
I apologize for not getting back to you. I called you last night after you left your voice mail message. I would like to go over two points.

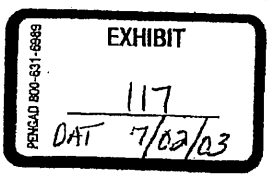
1) Risk Management- After getting the call from the driver, I called Risk Management. I spoke with Rick Permisi and relayed the information. After getting the accident report filled out, I had one of my clerical staff fax the report to you and Fast Tracks. I also faxed a copy to Dean Stamey. After investigating, the number to Fast Tracks was busy and my clerk forgot to refax the claim. It's my fault for not following up.

2) SOS - After the accident, I also called Dean Stamey. He reminded me to call SOS. Alma called SOS around 1:30 P.M. central time, while I called Risk Management. After Alma informed SOS that there was no fuel spilled, they informed her that they didn't need to take any action. When I talked to the customer and he informed that the load was hazardous if the cathode ray tubes were damaged, I told Alma to call SOS back and inform them. That was at 3:38 P.M. central time

Today, I have also faxed the MSDS sheet to Steve Elfrick at Brea. The only hazardous material identified is Lead oxide. Call if you have more questions.

Thank You
Tony Marinello

CC: Kameron Smiley, PA.GRNHILLS.STEVE-E



VERBAL SPILL INCIDENT CHECKLIST

OTIFICATION TO:

	FIRE DEPARTMENT:	Buda Fire Department	
	STATE ENVIRONMENTAL AGENCY:	TX NRCC Region (512) 339-2929	
	NATIONAL RESPONSE CENTER:	(800) 424-8802	
1.	Name of Informant:	Mike/SOS	Penske Logistics
2.	Informant's Address:	Alma Martinez Driver: Harry McCain	Zenith Elect Corp. 13700 Eagle Parkway S. Ft. Worth, TX 76178
3.	Telephone Number of Where Informant Can Be Reached:	(800) 310-4929	(817) 491-6900 Tony Marinello 3511
4.	Date of Spill:	10/9/97	
5.	Time Spill Occurred:	13:00 CST	
6.	Location of Spill:	I-35 S. exit 221, Buda, TX approximately 6-7 miles south of Austin	
7.	Brief Description of the Incident, Type, Nature, and Hazards to the Environment:	Truck accident on side trailer. Transporting TV tubes – hazardous waste broken. Lead and phos. per Alma Martinez, Supervisor	
8.	Extent of Injuries:	Driver not injured	
9.	Estimated Quantity Involved:	No fuel spill	
10.	Extent of Contamination:	Highway closed	
11.	State Environmental Contact: (Name or Operator No.)	TX NRCC, Art Norman, 1703 EST	
12.	National Response Center Contact:		
13.	Time of Notification:	17:03 EST by C. J. Smith	

cc: Corporate Environmental Department
(Local) Fire Department
Area Vice President
Senior Vice President
File

(OVER)

DEPOSITION EXHIBIT
23
RL 10/30/02

17:00 Alma Martinez, Supervisor, Penske Logistics, Ft. Worth, TX contacted SOS conference call provided initial information to SOS (Mike) and myself. She advised that lead was in the tubes.

17:15 Conference call with Judy (Special Auto Wrecker) who advised that a front end loader and two dump trucks (leased) were being used for clean up.

17:03 Contacted TX NRCC Austin Region for assistance in hiring emergency response (512) 339-2929, talked with Art Norman. No companies in Austin, TX.

Contacted Brian Acker – on scene with Dept. of Public Safety. I advised that the spill material was a hazardous waste. Also Jim Gregory, Texas Disposal Co. (512) 422-7747, (512) 422-2466 (mobile) who owns a landfill three miles from the scene. Advised him that material is hazardous waste. He advised that two dump truck loads were already dumped in the landfill. I advised him not to allow any more loads to fill roll on/off units.

Hays County Jodi Gonzales (512) 393-1954, (512) 396-0821 (office) on scene. He provided two companies in the San Antonio area that could provide emergency response:

EMTECH – out of business
Code 3 – Don Holding P.O.C. (800) 421-4911, pager (210) 713-1710, mobile (210) 413-6626.

20:10 Hired Don Holding (Code 3) to response - needed front end loader plus 3 men. Fax: (210) 342-3460.

<u>October 10, 1997</u>

08:00 Contacted Alma Martinez who advised that 1,248 tubes on trailer and confirmed that lead was in the tubes.

08:30 Contacted Jodi Gonzales, Hays Co. Emergency Management – left message.

08:40 Contacted Don Holding on his mobile phone. He advised that clean-up was completed around 02:30. Four roll on/off (40 yards each). Mr. Ben Milford, TX NRCC on scene.

09:30 Contacted TX NRCC, Chris Smith, Manager. Neither Art Norman or Ben Milford were available. Provided an overview of the incident – need follow up written report: 1921 Cedar Bend, Suite 150, Austin, TX 78758.

10:00 Contacted Code 3 to talk with the Project Manager (James) – not in until afternoon.

10:05 Contacted Mr. A. D. Carroll, Jodie Gonzales' boss who advised that the Dept. of Public Safety was conducting clean-up. Mr. Carroll was on scene until 21:30. Arrived 14:30. Wants a copy of the TX NRCC report. Hays Co. Emergency Management, P. O. Box 103, San Marco, TX 78667.

10:15 Per Jim Gregory, Texas Disposal Co., four roll on/off at his site. Need one 40 yard and one 30 yard roll on/off.
Fax (512) 243-4123 – He advised that Ben Milford, TX NRCC would give special authorization for them to transport material to hazardous waste landfill in Corpus Christi. I advised that we would get back on disposal.

10:30 Kept Alma advised – Need copy of MSDS.

12:00 Called Alma/Tony Marinello, LCM – conference call with Mr. Morales, Safety Manager (956) 618-6585 Texas plant. Not available, left message.

12:20 Contacted Mr. Edward Villaitando (512) 353-1061, Maintenance Foreman, Hays Co. TX Dept. of Transportation to determine if site is cleaned up to their specifications.

Mr. Villaitando advised that clean up was complete – no further action required – per his boss Gene Stabeno (512) 832-7063 – clean up completed at 02:45 – 6 inch ditch. The Highway Department would do the backfill.

12:35 Notified Code 3, LCM, J. Gregory.

12:50 Jim Gregory advised (512) 243-4100 that now there were seven loads dumped in the landfill and crushed with municipal waste on top (98 cubic yards). I advised that he should talk with my boss, Mr. Marc Althen, V.P.

13:30 Barry Kalder, TX NRCC advised that the company in Corpus Christi was Encycle Texas, 550 Upriver Road, Corpus Christi at (512) 289-0300. Rick Gilbert (X201) advised me that they could only take "clean" tube, not mixed with other (soil/grass, etc.)

16:15 Contacted Edward at the Dept. of Transportation and requested a copy of the incident report. GENE STABENO, FAX (512) 832-7080

16:20 Contacted Chris Smith and requested a copy of the incident report.

16:30 Contacted the Dept. of Public Safety (512) 353-7000 and requested a copy of the incident report – not available for ten days.

16:40 Requested a copy of the Buda Fire Dept. and Hays Co. Emergency Management incident report. Mr. Carroll will provided it by Tuesday, October 14 – (512) 396-082~~4~~1.

~~TRUCKING AUSTIN, TX~~
~~A & M [illegible] - [redacted] [illegible] COMPANY HIRED~~
~~5[illegible] [illegible] PAGED 512-479-4289~~

10/13/97 PER MARC ZENITH IS HANDLING -

10/14/97 17:40 ZENITH'S ENV PERSON, SUSAN 847-391-8466 FINALLY CALLED AND SAID ZENITH WAS GOING TO HOLD PL RESPONSIBLE.

10/13 ZENITH'S ENV. CONSULTANT, JIM LUCCI, 312-726-8556 CALLED FOR SUSAN AND HE WAS GOING TO HANDLE ISSUES FOR ZENITH. I GAVE HIM INFO ON INCIDENT

1 NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	)	IN THE 207TH
3 Plaintiff,	)	
	)	
4 vs.	)	DISTRICT COURT OF
	)	
5 PENSKE TRUCK LEASING CO. L.P. AND PENSKE	)	
6 LOGISTICS, INC. AND ZENITH ELECTRONICS CORP.	)	
7 AND ZENITH ELECTRONICS OF TEXAS, INC. AND HARRY	)	
8 ERNEST MCCAIN AND DAX DAVID TAYLOR,	)	
9 Defendants.	)	HAYS COUNTY, TEXAS

10

---

11 ORAL DEPOSITION OF
BOB GREGORY
12 MAY 29, 2003

13

14 ORAL DEPOSITION OF BOB GREGORY, produced as a
15 witness at the instance of the Defendants, and duly
16 sworn, was taken in the above-styled and numbered
17 cause on May 29, 2003, from 9:17 a.m. to 5:42 p.m.,
18 before Renee DeYoung, CSR in and for the State of
19 Texas, reported by method of machine shorthand, at
20 the Law Offices of George & Donaldson, L.L.P.
21 1100 Norwood Tower, 114 West Seventh Street,
22 Austin, Texas, pursuant to the Texas Rules of Civil
23 Procedure and the provisions stated on the record
24 or attached hereto.

25 COPY

1 APPEARANCES

2 FOR THE PLAINTIFF:
Mr. David H. Donaldson, Jr., Esquire
3 GEORGE & DONALDSON, L.L.P.
1100 Norwood Tower
4 114 West Seventh Street
Austin, Texas 78701
5
6
FOR THE DEFENDANTS PENSKE TRUCK LEASING CO., L.P,
7 PENSKE LOGISTICS, INC., AND HARRY ERNEST MCCAIN:
Mr. Douglas Y. Christian
8 REED SMITH, L.L.P.
2500 One Liberty Place
9 1650 Market Street
Philadelphia, PA 19103
10
11 FOR THE DEFENDANT ZENITH ELECTRONICS CORP. AND
ZENITH ELECTRONICS OF TEXAS, INC. AND DAX DAVID
12 TAYLOR:
Mr. Philip L. Comella
13 SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street, Suite 4200
14 Chicago, IL 60603-5803
15
16
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25

with me that everything on your website is accurate?

A. As far as I know.

Q. Do you review the content of your website for accuracy?

A. I reviewed it when it was put into place. It is updated occasionally. And I don't know that I've had an opportunity to review all of them, but it is certainly our goal that they be accurate.

Q. All right. I'm going to mark, as Exhibit 49, three pages from your website captioned, "How the Landfill is Constructed."

(Deposition Exhibit No. 49 marked for identification.)

Q. (BY MR. CHRISTIAN) Is Exhibit 49 from your website?

A. Yes, appears to be so.

Q. And is that a factually correct description of your landfill or certain aspects of your landfill?

A. Without reading it, I would -- I would say there's no reason to believe that it's not.

Q. Okay. Well, I tell you what, I don't want to slow things down, but I want you to tell me whether there are any inaccuracies in that.

1 Q. How do you spell that last name?
2 A. V-i-t-t-o-r-i, I believe.
3 Q. Okay. Who else?
4 A. J.D. Porter.
5 Q. Uh-huh. Who else?
6 A. Jim -- I'm going to have to rely on a --
7 refer to a list of members of the Solid Waste
8 Advisory Commission to give you more -- there's at
9 least three others on the Solid Waste Advisory
10 Commission, but I don't recall their names. You'll
11 discover through the course of this that I'm better
12 at remembering a lot of things than names.
13 Q. And it's your testimony that each of
14 these people asked you about this hazardous waste?
15 I want to make sure the record is
16 clear because if we have to depose them, we're
17 going to have to depose them. So you state for the
18 record the conversations you had with these people,
19 please.
20 A. The conversations pertained to notifying
21 them in the process of a very, very involved review
22 of issues regarding the reward of a City of Austin
23 contract.
24 Q. What year?
25 A. 1997, 1998 and 1999.

1 Q. Was this a written notification with
2 regard to this?
3 A. No. I think these were all verbal.
4 Q. Okay. And tell me about the
5 notification. What did you say to them?
6 A. I told them of the issue of hazardous
7 waste being dumped in the landfill and our interest
8 and commitment to have it removed if it did prove
9 to be hazardous waste.
10 And this is during the month that it
11 happened in October and over a period of time when
12 we -- when we were assured and became to believe
13 that it certainly would be hazardous waste, unless
14 these tubes were quite different than other TV
15 tubes.
16 Q. What else did you tell them?
17 A. It was just a notification of the event
18 and what our response would be so that one -- if
19 they heard about the issue, they would already have
20 a basis of fact to understand what it was and what
21 TDS was doing.
22 Q. Okay. Did you communicate anything else
23 to them other than what you've just told me?
24 A. A general explanation of what happened
25 and what our response was, is what I recall.

1 Q. Where is he now; do you know? Is he out
2 west somewhere?
3 A. I think he's in Illinois or Indiana.
4 Q. Do you have his address somewhere at the
5 office?
6 A. I think we do. He runs a company that I
7 believe does brokering of accounts. And I think he
8 has accounts that we service in the Austin area.
9 So the answer is, I believe we do know how to get
10 in contact with him.
11 Q. Have you discussed this lawsuit with him
12 since he left the employment of your company?
13 A. I don't recall whether I have or not.
14 I've spoken to him several times since then, and I
15 may have since he was involved. But at this point
16 I don't have a recollection one way or the other.
17 Q. Would you agree with me that the
18 documents we've just looked at have different times
19 for the arrival of the debris at TDSL?
20 A. I wasn't paying close enough attention.
21 Let's go back and look at it, if you don't mind.
22 Q. No, go right ahead and do that.
23 A. How far do we go back, Exhibit 52 does it
24 start?
25 Q. 51. Let's go back one more and see if

1 there's -- yeah, 51. So look at 51 through 54 and
2 42.
3 A. There are different times for loads
4 arriving.
5 Q. All right. What is the current position
6 of TDSL with regard to when the first load arrived?
7 MR. DONALDSON: Object to form.
8 A. I don't know.
9 Q. (BY MR. CHRISTIAN) Did you read the
10 second amended petition before it was filed in this
11 case?
12 A. Yes, I did.
13 Q. And did you approve the accuracy of that
14 position?
15 A. Yes, I did.
16 Q. Okay. And if that position says 4:08,
17 would you agree with that, that that is the
18 position of the company with regard to when the
19 materials first arrived?
20 MR. DONALDSON: Object to form.
21 A. It certainly would have been our position
22 at that time. And I have no reason to believe,
23 from this chair, that anything has changed since
24 then.
25 Q. (BY MR. CHRISTIAN) Would you agree with

1 me, sir, that the videotape is the best evidence,
2 if it's available, of when the first load arrived?
3 MR. DONALDSON: Object to form.
4 A. It would refine and should document where
5 those -- that first load came in. Yes, sir.
6 Q. (BY MR. CHRISTIAN) It would be the best
7 evidence. Correct?
8 MR. DONALDSON: Object to form.
9 A. Should be.
10 Q. (BY MR. CHRISTIAN) Okay. Have you met
11 with any perspective witnesses or other people who
12 have factual knowledge of this incident or its
13 aftermath, other than people employed by your
14 companies?
15 A. You're asking me any witnesses regarding
16 the accident or the aftermath? Well, I've met with
17 my brother, Jimmy.
18 Q. Other than people employed by --
19 A. Other than people employed.
20 Q. Let me rephrase the question. I want to
21 make sure there's no misunderstanding. Okay?
22 A. Sure.
23 Q. Have you met with anyone who you believe
24 has knowledge of this incident or the aftermath of
25 the incident, to discuss any aspect of it, other

1 two-thirds of the way down, the first paragraph,
2 the statement is made, "Now it appears that the
3 TNRCC is willing to allow the tubes to remain in
4 the TDSL landfill without further testing." Do you
5 see that?
6 A. I'm sorry. Point that out again.
7 Q. "Now it appears that the TNRCC is willing
8 to allow the tubes to remain in the TDSL landfill
9 without further testing." Is that a statement that
10 was factually correct as of February 3, 1998?
11 MR. DONALDSON: Object to form.
12 A. I don't recall the exact date that it
13 appeared that were willing to do that.
14 Q. (BY MR. CHRISTIAN) Okay.
15 A. I don't think it happened until May, that
16 they made the determination that we -- they could
17 remain.
18 But I believe, based on Penske
19 and/or Zenith's request to the agency, they
20 received a preliminary position that they would and
21 could allow them to remain if we requested it.
22 Q. If you look at the first enumerated
23 paragraph on page 1 of this Exhibit 59, you see a
24 third line from the bottom, "TDSL has drafted the
25 attached request to send to the TNRCC on Penske

1 that's an industrial generator that's not Class III
2 and not Class I. I mean, it's kind of a dumb
3 definition, but that's what it is. It's anything
4 that's not one or the other, meaning it has to be
5 dealt with generally as just the same as municipal
6 solid waste.
7 Whereas municipal solid waste, your
8 garden variety kind, whether it comes from a small
9 business or from a citizen -- it can be anywhere
10 from cantaloupe rinds to golf balls to fingernail
11 polish remover -- that in large quantities would be
12 hazardous but in small quantities is exempt because
13 it comes from our household.
14 Q. Is TDSL permitted to accept Class I?
15 A. We are permitted to accept it. We do --
16 it does require the preparation of a specific area.
17 And we had not done that at the time. We have not
18 done it at this time. We are permitted to take it
19 in an area. We have not built such an area.
20 However, we can take Class I
21 nonhazardous wasted based on special authorization
22 by the agency. And that's what would have occurred
23 on this other exhibit we talked about earlier, had
24 that settlement negotiation been concluded.
25 Q. Are you aware of a classification that

1 that question.
2 MR. COMELLA: It's not an argument.
3 It's a point.
4 MR. DONALDSON: Yes, it is. I'm
5 sorry, I'm going to instruct you not to answer that
6 question.
7 Q. (BY MR. COMELLA) Did TDSL ever ask
8 Zenith about the classification of broken tubes
9 before TDSL placed the broken tubes in its
10 landfill?
11 A. It is my understanding that we did not.
12 Q. Did TDSL ask Penske about the
13 classification of the broken tubes before placing
14 the broken tubes in its landfill?
15 A. Penske relied -- TDSL. I'm sorry. TDSL
16 relied on Penske and Zenith, as well, to give
17 proper notice of that to classify the waste.
18 The question of did we go physically
19 ask them by telephone or verbally, the answer is
20 no. Did we rely on them to classify it? Yes, we
21 did. Did they -- were they negligent in that
22 representation? Yes, they were.
23 Q. Do you know whether Zenith even knew
24 about this accident at the time TDSL accepted the
25 television sets -- the television tubes?

1 it?
2 A. It says the transporter, yes.
3 Q. Right. And isn't it true -- let me
4 scratch that for a second.
5 Do you know for a fact whether
6 Alfred Vallejo really did talk to the TNRCC on
7 October 9th, 1997?
8 A. I don't know. And I think Jimmy's
9 representation was he asked Albert [sic], "Have you
10 talked to the State?" That could have been the
11 TNRCC, it could have been someone else representing
12 the State with the proper authority to determine
13 what happens on a cleanup site. I don't have a
14 feel for that.
15 Q. Do you think your waste disposal tickets
16 have legal -- let me scratch that.
17 Do you think that your disposal
18 tickets used at TDSL have legal significance, or
19 are they just pieces of paper that you require dump
20 truck drivers to sign just to get them on their
21 way? I mean, are they just pieces of paper,
22 Mr. Gregory, or do you think that those are
23 meaningful pieces of paper?
24 MR. DONALDSON: Object to form.
25 A. I think they're highly meaningful --

1 MR. DONALDSON: I'm sorry. Go
2 ahead.
3 A. I think they're highly meaningful pieces
4 of paper for various reasons.
5 Q. (BY MR. COMELLA) And if you would turn
6 to Deposition Exhibit 7, you will see the copies of
7 the disposal tickets signed by Alfred Vallejo's
8 worker. Correct?
9 A. I assume so, yes.
10 Q. And isn't it correct that that's the only
11 pieces of paper that TDSL has in writing where
12 somebody certifies that the loads we're talking
13 about today did not contain hazardous waste? Isn't
14 that correct?
15 A. I don't know of other documents.
16 Q. And those -- that waste disposal ticket
17 is a meaningful document; it's not just a piece of
18 paper to signify that some waste has been dumped in
19 your landfill. Right?
20 MR. DONALDSON: Object to form.
21 Q. (BY MR. COMELLA) I mean, TDSL relies
22 upon those. Right?
23 A. Yes. You're right.
24 Q. Okay. And at the time -- okay. Scratch
25 that.

1 According to your brother yesterday,
2 TDSL learned from Charles Smith about the hazardous
3 nature of these broken tubes around 4:30 p.m. that
4 afternoon. Correct?
5 A. Somewhere around -- a call came through,
6 and moments after -- 4:35. So I don't know.
7 Q. And based upon some of the letters you
8 were shown this morning and this videotape, the
9 waste first started getting to your landfill about
10 4:08 p.m. that day. Correct?
11 MR. DONALDSON: Object to form.
12 A. As I understand it, right.
13 Q. (BY MR. COMELLA) So Mr. Vallejo's
14 workers had just got done dumping some of these
15 loads by the time TDSL learned about the hazardous
16 nature of the tubes. Correct?
17 A. Yeah. They were -- they had dumped some.
18 They were running back and forth, and they were
19 about to dump more when they were stopped.
20 Q. So why couldn't TDSL implement this
21 section of its permit, Deposition Exhibit 5, and
22 tell Vallejo's workers, "That load you just dumped,
23 put it back in your dump truck and get out of
24 here"? Why wasn't that done?
25 MR. DONALDSON: Object to form.

1 And the regulations do not -- are
2 not applied in a fashion that one regulation
3 requires you to do something that puts you in
4 violation of another regulation.
5 Q. (BY MR. CHRISTIAN) Mr. Gregory, back in
6 1997, before October 9th, did you know that there
7 was lead in television tubes?
8 A. I seem to remember something about there
9 may be lead in television tubes. To the extent
10 that there was anything close to lead that would
11 make them a hazardous waste, I did not know that.
12 Q. But you did know there was lead, to some
13 degree, in television tubes. Correct?
14 A. I had heard that.
15 Q. Okay. Did you pass that information
16 along to any of your employees?
17 A. I don't recall having done so because I
18 had no reason to believe that it would rise to the
19 level of regulated hazardous waste.
20 Q. 1,500 to 2,000 tons a day, is that the
21 average intake at your facility?
22 A. It was then. It's probably 2,000 to
23 3,000 tons at this time.
24 Q. You testified, in response to one of
25 Mr. Comella's questions, that TDSL relied on the

1 NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS LANDFILL, INC.) IN THE 207TH
3 Plaintiff,)
4 vs.) DISTRICT COURT OF
5 PENSKE TRUCK LEASING CO. L.P. AND PENSKE
6 LOGISTICS, INC. AND ZENITH ELECTRONICS CORP.
7 AND ZENITH ELECTRONICS OF TEXAS, INC. AND HARRY
8 ERNEST MCCAIN AND DAX DAVID TAYLOR
9 Defendants.) HAYS COUNTY, TEXAS

10 REPORTER'S CERTIFICATION
DEPOSITION OF BOB GREGORY
11 MAY 29, 2003

12 I, Renee DeYoung, Certified Shorthand Reporter
13 in and for the State of Texas, hereby certify to
14 the following:
15 That the witness, BOB GREGORY, was duly sworn
16 by the officer and that the transcript of the oral
17 deposition is a true record of the testimony given
18 by the witness;
19 That the foregoing is a secondary transcript
20 prepared of the proceedings, to replace and
21 obliterate all other instances of any previous
22 transcript submitted of the proceedings held on
23 stated date;
24 That the deposition transcript was again
25 submitted on _____ to the witness or to the

1 attorney for the witness for examination, signature
2 and return to me by _____;
3 That pursuant to information given to the
4 deposition officer at the time said testimony was
5 taken, the following includes counsel for all
6 parties of record:
7
8 MR. DAVID H. DONALDSON, Attorney for Plaintiff;
MR. DOUGLAS Y. CHRISTIAN, Attorney for
9 Defendants Penske Truck Leasing Co., L.P, Penske
Logistics, Inc., and Harry Ernest McCain;
10 MR. PHILIP. L. COMELLA, Attorney for Defendants
Zenith Electronics Corp., and Zenith Electronics of
Texas, Inc., and Dax David Taylor.
11
12 I further certify that I am neither counsel
13 for, related to, nor employed by any of the parties
14 or attorneys in the action in which this proceeding
15 was taken, and further that I am not financially or
16 otherwise interested in the outcome of the action.
17 Further certification requirements pursuant to
18 Rule 203 of TRCP will be certified to after they
19 have occurred.
20 Certified to by me this 16th day of
21 September, 2003.
22
23 Renee DeYoung
Renee DeYoung, Texas CSR 3226
24 Expiration Date: 12/31/04
13945 Research Boulevard, Suite D-110
25 Austin, Texas 78717
(512) 482-0828

1 FURTHER CERTIFICATION UNDER RULES 203 TRCP
2 The original deposition was/was not
3 returned to the deposition officer on
4 _____;
5 If returned, the attached Changes
6 and Signature page contains any changes and the
7 reasons therefor;
8 If returned, the original deposition
9 was delivered to Mr. Douglas Y. Christian,
10 Custodial Attorney;
11 That $_____ is the deposition
12 officer's charges to the Plaintiff for preparing
13 the original deposition transcript and any copies
14 of copy of exhibits;
15 That the deposition was delivered in
16 accordance with Rule 203.3, and that a copy of this
17 certificate was served on all parties shown herein
18 on and filed with the Clerk.
19 Certified to by me this _____ day of
20 _____, 2003.
21
22
23 _____
Renee DeYoung, Texas CSR 3236
Expiration Date: 12/31/04
24 13945 Research Boulevard, Suite D-110
Austin, Texas 78717
25 (512) 482-0828

00001

1 NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS,) IN THE DISTRICT COURT
LANDFILL, INC.,)
3 Plaintiff,)
)
4 VS.)
)
5 PENSKE TRUCK LEASING CO.,) HAYS COUNTY, TEXAS
L.P., PENSKE LOGISTICS,)
6 INC., ZENITH ELECTRONICS)
CORP., ZENITH ELECTRONICS)
7 OF TEXAS, INC., AND HARRY)
ERNEST McCAIN,)
8 Defendants.) 207TH JUDICIAL DISTRICT

9 * * * * * * * * * * * * * * * * * *

10 ORAL DEPOSITION OF

11 ROBERT GREGORY

12 OCTOBER 13, 2003

13 * * * * * * * * * * * * * * * * * *

14 ORAL DEPOSITION of ROBERT GREGORY,

15 produced as a witness at the instance of the

16 Defendants Penske Truck Leasing Co., L.P., Penske

17 Logistics, Inc., and Harry Ernest McCain, and duly

18 sworn, was taken in the above-styled and -numbered

19 cause on the 13th of October, 2003, from 4:05 p.m. to

20 6:13 p.m., before MARY SCOPAS, RPR, CSR in and for the

21 State of Texas, reported by machine shorthand, at the

22 Law Offices of George & Donaldson, L.L.P., 1100

23 Norwood Tower, 114 West Seventh Street, Austin, Texas,

24 pursuant to the Texas Rules of Civil Procedure and the

25 provisions stated on the record or attached hereto.

1 APPEARANCES

2

3 FOR THE PLAINTIFF:

4 Mr. David H. Donaldson, Jr.
GEORGE & DONALDSON, L.L.P.
5 1100 Norwood Tower
114 West Seventh Street
6 Austin, Texas 78701

7
FOR THE DEFENDANTS PENSKE TRUCK LEASING CO., L.P.,
8 PENSKE LOGISTICS, INC., AND HARRY ERNEST McCAIN:

9 Mr. Douglas Y. Christian
REED SMITH, L.L.P.
10 2500 One Liberty Place
1650 Market Street
11 Philadelphia, Pennsylvania 19103

12
FOR THE DEFENDANT ZENITH ELECTRONICS CORP. AND ZENITH
13 ELECTRONICS OF TEXAS, INC.:

14 Mr. Philip L. Comella
SEYFARTH SHAW
15 55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
16

17 ALSO PRESENT:

18 Mr. Bob Gregory
TEXAS DISPOSAL SYSTEMS
19
Mr. Gary Newton
20 TEXAS DISPOSAL SYSTEMS

21 Mr. Michael A. Duff
PENSKE TRUCK LEASING
22

23

24

25

1 that it happened. I remember that it happened. I do
2 not remember events that I saw it happening. I
3 remember boxes being put in place. I remember boxes
4 being filled. I do not remember them picking the
5 pieces off the working face and putting them in the
6 boxes.
7 Q. Now --
8 A. I may have been there. I just don't recall
9 that.
10 Q. For what purpose was that done, do you know?
11 A. As I stated before the break, Penske had
12 taken control of the accident scene on Interstate
13 I-35. Efforts were taken by Code 3 to isolate all
14 types of -- everything from the load, including pieces
15 of the trailer.
16 We took steps to isolate everything we
17 could from the surface of the working face that was
18 related -- that we could identify as being related to
19 the accident.
20 Q. What was the purpose of doing that?
21 A. To isolate the waste that we could identify,
22 along with that waste that had been shipped to us the
23 night before or the night of from the accident scene.
24 Q. This happened the day after the accident.
25 Is that correct? Either the day of or the day after.

1 Is that correct?
2 A. Carl Dittmar remembers more that he began
3 cleaning it the day of the accident. I seem to
4 remember from things that I had heard then that it was
5 the morning after. It could have been both.
6 Q. And what happened was that Mr. Dittmar used
7 a piece of equipment as he described, and he removed
8 television tube debris and other refuse from the
9 landfill and put it in roll-off -- one or more
10 roll-off containers. Is that correct?
11 A. Yes, that is true. And in addition to that,
12 he remembers getting on the ground, working with a --
13 two or more helpers to pick up items from the working
14 face.
15 Q. He didn't say anything about that in his
16 deposition?
17 A. He did not say anything about that in -- but
18 I -- in asking him questions, he said he remembered
19 picking it up, putting it in the bucket, and the
20 loader dumping it in. And he thought that Pete
21 Lawless was the driver at that time.
22 Q. Now, I'd like to ask you again, and tell me
23 if you don't know, but what was the purpose of TDSL
24 removing that material from its working face and
25 putting it in a roll-off box?

1 Mr. Newton's testimony, whether you had to do it or
2 not, that act of removing any material from your
3 working face made you a generator. Correct?
4 A. Absolutely not.
5 MR. DONALDSON: Object to form.
6 Q. (By Mr. Christian) Why not?
7 A. Because we were doing exactly what the
8 permit required. It was identifiable on the face of
9 the working face and we removed it.
10 Q. And what you removed was not only the
11 television tube debris, but also other refuse that had
12 been commingled with it, according to Mr. Dittmar.
13 Correct?
14 A. The purpose was to remove the debris that
15 had the presence of shards of glass on it.
16 Q. This process involved removal from the
17 working face of television tube debris as well as
18 other refuse with which it had been commingled. Is
19 that correct or not?
20 A. Only commingled to the extent that it had
21 shards of glass mixed with it.
22 Q. But is that -- well, the glass was the
23 television tube debris. Correct?
24 A. Well, the accident debris was other things.
25 It was pallets. It was packing material. It was --

1 I'm not sure. It may have had bands around it.
2 Q. Was the glass -- Mr. Gregory, was the glass
3 that you just talked about television tube debris?
4 A. It was his intent as he testified --
5 Q. Was the glass television tube debris --
6 that's my question.
7 MR. DONALDSON: All right.
8 MR. CHRISTIAN: I'm not asking about
9 Mr. Dittmar's intent, Mr. Davidson -- Mr. Donaldson.
10 MR. DONALDSON: Okay. Stop. If you
11 need a break to cool off, fine. But you're raising
12 your voice to me and the witness. You interrupted the
13 witness when he was trying to give a response. I
14 understand why you did that. Just ask the question
15 again and we'll see if we can get a response that
16 you're -- that will answer the question.
17 MR. CHRISTIAN: Mr. Donaldson, I did
18 not raise my voice. But I -- when I ask a question, I
19 am entitled to an answer to that question.
20 MR. DONALDSON: The witness is entitled
21 to complete whatever response he is going to give you.
22 And then if you don't like that, you can object that
23 it's not responsive and ask the question again. You
24 do not interrupt the witness. You do not raise your
25 voice to the witness --

1 Penske identifying -- I'm sorry. I don't know why I
2 confuse Penske and Code 3.
3 It had a caption under it by Code 3
4 describing it as a box that they were sorting from
5 that had been taken off the working face of the TDS
6 landfill.
7 Q. Do you know who took these photographs dated
8 10-10-97?
9 A. AS I recall, I took some photographs. I
10 think Jim Doersam, who is an employee of ours, took
11 photographs because he had a digital camera. And
12 there may have been others.
13 Q. How many roll-off boxes were ultimately sent
14 from TDSL for disposal?
15 A. Five. It's -- let -- you clarify that. You
16 mean nonhazardous or hazardous boxes?
17 Q. Hazardous.
18 A. Two boxes were sent by Penske to the TECO
19 site declared as hazardous waste or whatever you
20 declare that. And that went to the TECO site, as I
21 understand it. Five boxes of nonhazardous material
22 went from the TDS landfill to the BFI site here in
23 Austin.
24 Did that answer your question?
25 Q. Why -- yes.

1 NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS,) IN THE DISTRICT COURT
LANDFILL, INC.,)
3 Plaintiff,)
VS.)
4 PENSKE TRUCK LEASING CO.,)
L.P., PENSKE LOGISTICS,) HAYS COUNTY, TEXAS
5 INC., ZENITH ELECTRONICS)
CORP., ZENITH ELECTRONICS)
6 OF TEXAS, INC., AND HARRY)
ERNEST McCAIN,)
7 Defendants.) 207TH JUDICIAL DISTRICT
* * * * * * * * * * * * * * * * * *

8 REPORTER'S CERTIFICATION
ORAL DEPOSITION OF
9 ROBERT GREGORY
OCTOBER 13, 2003
10 * * * * * * * * * * * * * * * * * *

11 I, MARY SCOPAS, Certified Shorthand Reporter in
12 and for the State of Texas, hereby certify to the
13 following:
14 That the witness, ROBERT GREGORY, was duly
15 sworn by the officer and that the transcript of the
16 oral deposition is a true record of the testimony
17 given by the witness;
18 That the deposition transcript was submitted on
19 October , 2003 to the witness or to the attorney
20 for the witness for examination, signature and return
21 to Mr. Douglas Y. Christian by November , 2003;
22 That the amount of time used by each party at
23 the deposition is as follows:
24 Mr. Christian - 1 HR. 37 MIN.
Mr. Comella - 0 HR. 19 MIN.
25 Mr. Donaldson - 0 HR. 0 MIN.

1 That pursuant to information given to the
2 deposition officer at the time said testimony was
3 taken, the following includes all parties of record:
4 FOR THE PLAINTIFF:
5 Mr. David H. Donaldson, Jr.
GEORGE & DONALDSON, L.L.P.
6 1100 Norwood Tower
114 West Seventh Street
7 Austin, Texas 78701
8
FOR THE DEFENDANTS PENSKE TRUCK LEASING CO., L.P.,
9 PENSKE LOGISTICS, INC., AND HARRY ERNEST McCAIN:
10 Mr. Douglas Y. Christian
REED SMITH, L.L.P.
11 2500 One Liberty Place
1650 Market Street
12 Philadelphia, Pennsylvania 19103
13
FOR THE DEFENDANT ZENITH ELECTRONICS CORP. AND ZENITH
14 ELECTRONICS OF TEXAS, INC.:
15 Mr. Philip L. Comella
SEYFARTH SHAW
16 55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
17
18 I further certify that I am neither counsel
19 for, related to, nor employed by any of the parties or
20 attorneys in the action in which this proceeding was
21 taken, and further that I am not financially or
22 otherwise interested in the outcome of the action.
23 Further certification requirements pursuant to
24 Rule 203 of TRCP will be certified to after they have
25 occurred.

1 Certified to by me this 19th day of October,

2 2003.

3

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9

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11

12

MARY SCOPAS, RPR, CSR #5313
13 Expiration Date: 12-31-04
Firm Registration No. 17
14 Ross-Weidmann, Inc.
Fax (512) 478-2782

15

16

17

18

19

20

21

22

23

24

25

1 FURTHER CERTIFICATION UNDER RULE 203 TRCP

2 The original deposition was/was not returned to

3 the deposition officer;

4 If returned, the attached Changes and Signature

5 page contains any changes and the reasons therefore;

6 If returned, the original deposition was

7 delivered to Mr. Douglas Y. Christian, Custodial

8 Attorney;

9 That $ is the deposition

10 officer's charges to the Defendants Penske Truck

11 Leasing Co., L.P., Penske Logistics, Inc., and Harry

12 Ernest McCain for preparing the original deposition

13 transcript and any copies of exhibits;

14 That a copy of this certificate was served on

15 all parties shown herein and filed with the Clerk.

16 Certified to by me this day of

17 , .

18

19

20

21

22

MARY SCOPAS, RPR, CSR #5313
23 Expiration Date: 12-31-04
Firm Registration No. 17
24 Ross-Weidmann, Inc.
Fax (512) 478-2782

25

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	*	IN THE DISTRICT COURT
3 Plaintiff,	*	
4 VS.	*	OF HAYS COUNTY, TEXAS
5 PENSKE TRUCK LEASING CO., L.P., PENSKE LOGISTICS,	*	
6 INC., ZENITH ELECTRONICS CORP., ZENITH ELECTRONICS	*	
7 OF TEXAS, INC., and HARRY ERNEST McCAIN,	*	
8 Defendants.	*	207TH JUDICIAL DISTRICT

9

10

11 **********

12 VIDEOTAPED DEPOSITION OF

13 BOBBY GREGORY

14 TAKEN FEBRUARY 10, 2004

15 VOLUME 2

16 **********

17

18 VIDEOTAPED DEPOSITION of BOBBY GREGORY, produced as a witness at the instance of the Defendants Penske Truck
19 Leasing Co., L.P., Penske Logistics, Inc., and Harry Ernest McCain, and duly sworn, was taken in the above-styled and
20 numbered cause on the 10th day of February, 2004, from 11:34 a.m. to 4:29 p.m., before Janet L. Hamm, CSR in and
21 for the State of Texas, reported by machine shorthand, at the law offices of Graves, Dougherty, Hearon & Moody, P.C.,
22 515 Congress Avenue, Suite 2100, Austin, Texas, pursuant to the Texas Rules of Civil Procedure and the provisions stated
23 on the record or attached hereto.

24

25

1 A P P E A R A N C E S

2 FOR THE PLAINTIFF:

3 Mr. David H. Donaldson, Jr.
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4 515 Congress Avenue, Suite 2300
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5

6 FOR DEFENDANTS PENSKE TRUCK LEASING CO., L.P., PENSKE
LOGISTICS, INC., and HARRY ERNEST McCAIN:
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Mr. Douglas Y. Christian
8 REED SMITH, LLP
2500 One Liberty Place
9 1650 Market Street
Philadelphia, Pennsylvania 19103
10

11 FOR DEFENDANTS ZENITH ELECTRONICS CORP. AND ZENITH
ELECTRONICS OF TEXAS, INC.:
12
Mr. Philip L. Comella
13 SEYFARTH SHAW
55 East Monroe Street, Suite 4200
14 Chicago, Illinois 60603-5803

15
ALSO PRESENT:
16
Mr. Gary Newton
17 Mr. Duke Weidmann, Videographer

18

19

20

21

22

23

24

25

15:54:54 1 Q Mr. Gregory, it's true, isn't it, that TDSL had no
15:55:01 2 contract with Alfred Vallejo in this case? Is that correct?
15:55:07 3 MR. DONALDSON: Object to form.
15:55:08 4 A TDS had a contract upon his entry, which was the
15:55:10 5 gate ticket that his representative signed that represented
15:55:13 6 the condition of the waste and the agreement to pay for the
15:55:19 7 disposal of the waste. So I would say yes, TDSL did have a
15:55:22 8 contract with Mr. Vallejo.
15:55:26 9 Q (By Mr. Comella) TDSL did not have a contract in
15:55:27 10 the form of Deposition Exhibit 321, which has been
15:55:32 11 represented to us as the Texas Disposal Systems Volume Solid
15:55:41 12 Waste Hauler contract; is that -- isn't that correct?
15:55:46 13 A TDSL has numerous types of contracts with
15:55:48 14 different-size customers that accomplish the function of a
15:55:53 15 contract with haulers --
15:55:54 16 Q It's true, isn't it, Mr. Gregory, that TDSL had no
15:55:58 17 contract in the form of Deposition Exhibit 321 with Alfred
15:56:03 18 Vallejo?
15:56:03 19 A Not in the form of that contract that I'm aware of.
15:56:06 20 Q And isn't it true that TDSL also did not have a
15:56:11 21 contract with either Zenith or Penske in this matter?
15:56:14 22 MR. DONALDSON: Object to form.
15:56:15 23 A Zenith did not have a written contract with
15:56:19 24 Zenith -- I'm sorry, TDS did not have a written contract
15:56:22 25 with Zenith or Penske on October 9, 1997.

15:56:27 1 MR. CHRISTIAN: Did you mean -- did you mean
15:56:29 2 TDSL?
15:56:31 3 A TDSL is what I meant. Would you like me to restate
15:56:35 4 it?
15:56:36 5 Q (By Mr. Comella) Yes.
15:56:37 6 A TDSL did not have a contract in written form with
15:56:39 7 Zenith or Penske on October 9, 1997.
15:56:47 8 Q Does TDSL consider material from conditionally
15:56:51 9 exempt small-quantity generators to be special waste?
15:56:56 10 MR. DONALDSON: Object to form.
15:57:04 11 A Conditionally exempt small-quantity generator waste
15:57:07 12 comes in with material from those -- within the waste stream
15:57:11 13 from those type of customers on a regular basis, so we
15:57:18 14 normally do not consider that as special waste.
15:57:29 15 Q (By Mr. Comella) Are you familiar with the
15:57:30 16 definition of "special waste" in the regulations,
15:57:44 17 Mr. Gregory?
15:57:44 18 A Yes, I am.
15:57:44 19 Q Are you aware that the definition of "special
15:57:44 20 waste" under the regulations includes hazardous waste from
15:57:46 21 conditionally exempt small-quantity generators? Are you
15:57:50 22 aware of that?
15:57:50 23 A Yes, I am.
15:57:51 24 Q In TDSL's permit is waste from conditionally exempt
15:57:56 25 small-quantity generators considered to be special waste?

16:19:59 1 August 31, 1997. If you go back to the rest of -- the early
16:20:04 2 part of this form, we go by their fiscal year, and I believe
16:20:08 3 it's August 31, 1997.
16:20:10 4 Q So the end date is August 31, '97?
16:20:14 5 A I think so.
16:20:14 6 Q I see. Now, you see various tonnages referenced in
16:20:21 7 these categories. How are they determined, sir?
16:20:24 8 A They're estimates in most cases. Like, for
16:20:28 9 instance, a truck comes in from a commercial hauler that has
16:20:36 10 residential waste in it. It may come from a community that
16:20:38 11 that hauler also picks up businesses and commercial waste
16:20:43 12 within that community as part of that load. We have to give
16:20:48 13 an estimate. Very, very few haulers will only pick up, you
16:20:53 14 know, all commercial or all residential. They very often
16:20:57 15 will mix them. So we do our best to estimate the
16:21:05 16 residential, commercial, other types of material coming in.
16:21:09 17 Q You do that because you're required to do that; is
16:21:11 18 that right?
16:21:12 19 A They ask you to do it. They know it's impossible
16:21:15 20 to give an exact breakdown of what the material is.
16:21:19 21 Q Now, take a look at the lead-contaminated
16:21:22 22 construction debris. How many tons of lead-contaminated
16:21:26 23 construction debris did TDSL receive for disposal in fiscal
16:21:30 24 year '97?
16:21:31 25 A 325 tons.

16:21:33 1 Q Is there any paperwork that supports that number?
16:21:36 2 A I would assume so.
16:21:37 3 Q What would you assume to be the paperwork that
16:21:40 4 supports that number?
16:21:42 5 A Probably special-waste requests.
16:21:44 6 Q Do you know what this lead-contaminated
16:21:47 7 construction debris consists of?
16:21:49 8 A I really don't. I could speculate that it's
16:21:52 9 probably lead paint on wood or something like that, but I --
16:21:56 10 but I'm only speculating. I don't --
16:21:58 11 Q Does lead paint on wood leach if it's exposed to
16:22:06 12 rainwater or any other type of water?
16:22:09 13 MR. DONALDSON: Object to form.
16:22:13 14 A I don't know that I can answer that question, "if
16:22:15 15 it's exposed to rainwater." The concern by the agency is
16:22:18 16 that lead can leach from lead-based paint, and that's why if
16:22:23 17 it's over a certain threshold of lead content in the testing
16:22:30 18 of the paint, they require you to deal with it on a
16:22:33 19 special-waste basis. If it's beyond a threshold of
16:22:35 20 hazardous, then obviously it has to be dealt with as
16:22:38 21 hazardous. If it's in between but within the threshold of
16:22:41 22 Class 1 nonhazardous waste, then it has to be dealt with
16:22:43 23 accordingly.
16:22:43 24 Q (By Mr. Christian) How do you know none of this is
16:22:45 25 hazardous waste, regulated hazardous waste?

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	*	IN THE DISTRICT COURT
3	*	
Plaintiff,	*	
4	*	
VS.	*	OF HAYS COUNTY, TEXAS
5	*	
PENSKE TRUCK LEASING CO.,	*	
6 L.P., PENSKE LOGISTICS,	*	
INC., ZENITH ELECTRONICS	*	
7 CORP., ZENITH ELECTRONICS	*	
OF TEXAS, INC., and HARRY	*	
8 ERNEST McCAIN,	*	
	*	
9 Defendants.	*	207TH JUDICIAL DISTRICT

10

REPORTER'S CERTIFICATION
11 VIDEOTAPED DEPOSITION OF BOBBY GREGORY
FEBRUARY 10, 2004
12 VOLUME 2

13 I, Janet L. Hamm, Certified Court Reporter in and for
14 the State of Texas, hereby certify to the following:
15 That the witness, BOBBY GREGORY, was duly sworn by the
16 officer and that the transcript of the oral deposition is a
17 true record of the testimony given by the witness;
18 That the deposition transcript was submitted on the 18th
19 day of February, 2004, to the witness or to the attorney for
20 the witness for examination, signature and return to me by
21 the 9th day of March, 2004;
22 That the amount of time used by each party at the
23 deposition is as follows:
24 Mr. Christian - 2 hours, 30 minute
Mr. Comella - 1 hour, 12 minutes
25

1 That pursuant to information given to the deposition
2 officer at the time said testimony was taken, the following
3 includes counsel for all parties of record:

4 Mr. David H. Donaldson, Jr. Attorney for Plaintiff
Mr. Douglas Y. Christian, Attorney for Defendants Penske
5 Truck Leasing Co., L.P., Penske Logistics, Inc., and Harry
Ernest McCain
6 Mr. Philip L. Comella, Attorney for Defendants Zenith
Electronics Corp. and Zenith Electronics of Texas, Inc.
7

8 I further certify that I am neither counsel for, related
9 to nor employed by any of the parties or attorneys in the
10 action in which this proceeding was taken, and, further,
11 that I am not financially or otherwise interested in the
12 outcome of the action.
13 Further certification requirements pursuant to Rule 203
14 of TRCP will be certified to after they have occurred.
15 Certified to by me this 18th day of February, 2004.
16
17
18 Janet L. Hamm
JANET L. HAMM, Texas CSR #5029
19 Expiration Date: 12/31/05
Ross-Weidmann, Inc.
20 Firm Registration No. 17
DepoTexas@aol.com
21 Fax 512/478-2782
22
23
24
25

1 FURTHER CERTIFICATION UNDER RULE 203 TRCP

2

3 The original deposition was/was not returned to the
4 deposition officer on _____;
5 If returned, the attached Changes and Signature page
6 contains any changes and the reasons therefor;
7 If returned, the original deposition was delivered to
8 Mr. Douglas Y. Christian, Custodial Attorney;
9 That $_____ is the deposition officer's charges to
10 the Defendants Penske Truck Leasing Co., L.P., Penske
11 Logistics, Inc., and Harry Ernest McCain for preparing the
12 original deposition transcript and any copies of exhibits;
13 That the deposition was delivered in accordance with
14 Rule 203.3 and that a copy of this certificate was served on
15 all parties shown herein and filed with the Clerk.
16 Certified to by me this ____ day of _____, 2004.
17

18 _____
JANET L. HAMM, Texas CSR #5029
Expiration Date: 12/31/05
19 Ross-Weidmann, Inc.
Firm Registration No. 17
20 DepoTexas@aol.com
Fax 512/478-2782
21
22
23
24
25

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS) IN THE DISTRICT COURT
LANDFILL, INC.,)
3)
Plaintiff,)
4)
VS.)
5) HAYS COUNTY, TEXAS
PENSKE TRUCK LEASING CO.,)
6 L.P., PENSKE LOGISTICS, INC.,)
ZENITH ELECTRONICS CORP.,)
7)
Defendants.) 207TH JUDICIAL DISTRICT
8

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11
APRIL 20, 2004
12 Volume 6

13 **********

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1 A. Yes.
2 Q. Okay. That each tube weighs 33 pounds. And she
3 also indicates on there that the lead content of the funnel
4 glass, that there's approximately 3.5 pounds of lead in each
5 tube; do you see that?
6 A. Yes.
7 Q. Now, I'm not a great mathematician, pounds of lead,
8 but is it fair to say what percentage of an individual tube
9 was composed of lead?
10 A. 10 percent, roughly.
11 Q. Just a little more than 10 percent?
12 A. A little more.
13 Q. Were you aware in October of 1997, or for that
14 matter, prior to receiving Ms. Marcel's letter in January of
15 1998, that there was more than 10 percent of a tube that was
16 lead?
17 A. No.
18 Q. Were you aware that cathode ray tubes or picture
19 tubes were, if damaged or discarded, should be handled as
20 hazardous waste, if it's in sufficient quantities?
21 A. Was I aware of that?
22 Q. Yes, sir.
23 A. Yes.
24 Q. How did you know that?
25 A. From my own personal industry knowledge. Your

1 phrase insufficient quantities, in sufficient quantities --

2 Q. Okay.

3 A. -- is critical to me.

4 Q. All right. And did you know that prior to

5 October 9th of 1997?

6 A. Yes.

7 Q. And you know the distinctions between certain items

8 that can be taken because there's small quantities and some

9 items that can be taken because they're large quantities?

10 A. Yes.

11 Q. Now, in this instance, have you ever had to address

12 the issue of taking tubes into a landfill prior to having to

13 deal with it in this situation?

14 A. No.

15 Q. And was your involvement with Penske the first

16 opportunity that you had had in dealing specifically with

17 cathode ray tube issues?

18 A. Yes.

19 Q. And it was then during the course of that that you

20 learned that this information -- that cathode ray tubes were

21 hazardous?

22 MR. CHRISTIAN: Objection, Your Honor, that's

23 been asked and answered.

24 MR. COMELLA: Mischaracterizes the testimony.

25 MR. CHRISTIAN: Twice.

1 sometimes TDS was a customer of TDSL; is that correct?

2 A Yes.

3 Q And sometimes TDSL was a customer a TDS; is that

4 correct? Or did it only go that one way?

5 A Yeah, hauling companies take things to landfills,

6 and so a hauling company is a customer of a landfill, but

7 I'm not -- I'm not -- I'd have to think about when -- when

8 the hauling company was a customer of -- when it was the

9 other way around.

10 Q Now, let's talk about the knowledge you had

11 regarding television or television tubes, and I know you --

12 you answered some questions Mr. Donaldson asked in that

13 regard, and I don't intend to go over those, but I want to

14 ask you some very specific questions, sir. Before

15 October 9, the date that TDSL allowed this material into its

16 landfill, you knew there was lead in television tubes,

17 correct?

18 A I knew there was lead in television tubes, yes.

19 Q And that knowledge came from your throwing TVs in

20 the back of a garbage truck as you were working your way up

21 through the ranks; isn't that true?

22 A I don't know that that's where my knowledge came

23 from. Somewhere in the process I learned it. A TV tube

24 doesn't say "lead," so somewhere along the process I learned

25 it. I don't know when it was.

1 Q. In other words, at some point before you went to
2 work for TDSL, correct?
3 A. Yes.
4 Q. Or TDS, I should say?
5 A. Yes.
6 Q. Thank you, sir. And you knew that lead, in
7 sufficient concentrations, was a hazardous waste, true?
8 A. True. But I didn't know the specific --
9 Q. Sir.
10 A. True, true.
11 Q. Thank you. And you knew that the -- strike that,
12 I'm sorry.
13 You knew that the determination of whether
14 something is a hazardous waste often depends on the quantity
15 of that waste; isn't that right?
16 A. Yes.
17 Q. Now, with regard to this knowledge you had, that you
18 told the jury about in response to Mr. Donaldson's questions
19 and you told the jury about just now, did you train anyone at
20 TDS or TDSL in that regard?
21 A. Personally, no.
22 Q. Did you suggest that anyone train anyone at TDSL in
23 that regard, or TDS?
24 A. Did I personally train them?
25 Q. No, sir. You already answered that. I'm sorry.

1 My next question is, did you suggest to anyone

2 that such training take place?

3 A. No.

4 Q. Now, let's talk very briefly about -- generally

5 about your role -- your role in -- once you found out about

6 the events of October 9th, 1997. And correct me if I'm wrong,

7 but as you said yesterday, you were the lead person on this

8 for 4-1/2 months; is that correct?

9 A. As it relates to Penske and Zenith, yes.

10 Q. Well, you didn't qualify that yesterday. Yesterday

11 you simply said you were the lead person on this for

12 4-1/2 months; isn't that true?

13 MR. DONALDSON: Your Honor, he's asking him

14 what he said yesterday. If he wants to ask him again, he can.

15 It seems to me that's improper.

16 THE COURT: Your objection is --

17 MR. DONALDSON: My objection is it's

18 cumulative.

19 THE COURT: Well --

20 MR. DONALDSON: And improper.

21 THE COURT: I don't want to get into a

22 discussion of what did you say yesterday versus today, I just

23 want to know what the answer is. So objection is overruled,

24 but maybe you can rephrase the question, counsel.

25 Q. (By Mr. Christian) Mr. Herman, as you said

1 A I don't know if they took it out or how much -- I don't
2 recall. Again if there's a note that I made somewhere, I
3 would be happy to review it, but I don't recall it.
4 Q Ninety-eight went in on the ninth, but as of the tenth,
5 the figure you had in mind you wanted someone to remove from
6 your landfill was 1666 cubic yards. True?
7 A The question is not true. You have 98 comes in. There
8 was seven pickup truckloads, and each pickup truck was about
9 14 cubic yards. That's where the 98 came from. When it came
10 in the landfill, it was spread across the working face, which
11 is common landfill operation.
12 Q Sir, how much went in?
13 A Ninety-eight yards went in.
14 Q How much did you as of October 10th ask us to pay to
15 take out?
16 A 1666.
17 Q Did Penske have anything at all to do with the
18 commingling that occurred, to whatever extent it occurred, on
19 October 9th?
20 A Yes, in my opinion.
21 Q Was Penske at your landfill?
22 A No.
23 Q Now, 98 went in. I'm going to represent to you that
24 some came out the next day. But you don't have any
25 information about that and you wanted us to pay for 1666.

1 MR. DONALDSON: Your Honor, I'm going to
2 object to that question because I think he's using
3 "disposed" in some sort of legal sense. If he's not, that's
4 fine. I just want to make sure it's clear.
5 MR. COMELLA: I'm not using it in a legal
6 sense, I'm using it in a verbal sense.
7 THE COURT: You may answer the question.
8 A There --
9 Q (By Mr. Comella) We wouldn't be here today if
10 there was not disposal.
11 A Yeah, there were tubes put in the landfill.
12 Q Are you aware of any attempt by a TDSL employee to
13 contact Zenith prior to TDSL's disposing of these tubes in
14 the landfill?
15 A Not that I am aware.
16 Q Are you aware of any attempt by TDSL to contact
17 Penske on October 9, 1997, prior to TDSL's disposal of these
18 TV tubes in its landfill?
19 A Not that I'm aware of.
20 Q And in your investigation you were trying to do the
21 best job you could to find out the facts as they related to
22 Penske and Zenith; isn't that correct, Mr. Herman?
23 A Yes, sir.
24 Q Mr. Herman, is there any action that Zenith took in
25 this entire matter that you believe caused TDSL to dispose

1 A. In the working face of the landfill, that's correct.

2 Q. In the landfill.

3 A. Yes.

4 Q. And TDSL stored the remaining debris that was

5 removed by the response workers into some roll-offs at its

6 facility, correct?

7 A. That's correct.

8 Q. And isn't it correct that as far as we know, as far

9 as you could tell, the material that was in the roll-offs

10 was -- came from the same trailer that the seven dump truck

11 loads came from, correct?

12 MR. DONALDSON: Objection, Your Honor, lack of

13 foundation, speculation.

14 THE COURT: I --

15 MR. COMELLA: I asked as far as he knew.

16 THE COURT: As far as he knows, I'll allow it.

17 A. I wasn't -- I wasn't the person that was there. I

18 was, you know, my letters, my notes, my documents regarding

19 that, you know, where -- what came from the accident scene,

20 what went in the landfill, what went into those roll-off

21 boxes, I wasn't there. I was relying on information given to

22 me.

23 Q. (By Mr. Comella) And based upon the information

24 given to you, isn't it true that TDSL stored some of the

25 accident debris in the roll-offs?

1 A. Yes.

2 Q. Seven dump trucks or so made it into the working

3 face, correct?

4 A. Yes.

5 Q. And then Code 3 came along and segregated what was

6 in the roll-offs into a hazardous roll-off and nonhazardous

7 roll-off; do you remember that?

8 A. Yes.

9 Q. And earlier today you were shown Plaintiff's

10 Exhibit 188, which was the Code 3 famous segregate and

11 inventory televisions. We call it the segregation report.

12 A. Okay.

13 Q. Do you remember this? And have you ever looked at

14 this document, Mr. Herman, other than in this lawsuit?

15 A. I don't recall if I looked at it six or seven years

16 ago.

17 Q. I'd like to turn your attention to the third page of

18 this exhibit. Have you ever looked at a description of what

19 actually was in the roll-offs?

20 A. I've seen information about what was in the

21 roll-offs.

22 Q. And you see here that in the roll-offs, there were

23 things -- there were bands, pallets, parts of trailer, soil,

24 and then there's other boxes that have that same non-haz

25 trash; do you see that there?

1 A. Yes.

2 Q. It's not just broken glass, is it?

3 A. No.

4 Q. It's a collection of material that was in that

5 trailer that's now sitting in the roll-offs, right?

6 A. Yes.

7 Q. And it's true, isn't it, that TDSL, as far as you

8 know, never tested the material that was in the roll-offs,

9 correct?

10 A. As far as I know, that's correct.

11 Q. Now, Mr. Herman, you have testified that your role

12 was to investigate the role of Zenith and Penske in this

13 matter, correct?

14 A. Yes.

15 Q. You did not, as part of your charge, investigate the

16 role of TDSL in allowing these tubes into its landfill on

17 October 9th, 1997, correct?

18 A. That's correct.

19 Q. Nor did you investigate the role of anybody else,

20 whether Mr. Vallejo or the response workers or anybody else,

21 correct?

22 A. There's a -- there's a few -- certainly not to the

23 extent that I did to Penske and Zenith.

24 Q. So during the time period from October 10th through

25 February, 1998, when you were making demands upon Zenith and

THURSDAY 8757479
OCTOBER 9, 1997
APPOINTMENTS & SCHEDULED EVENTS

Wk 41 • Day 282, 83 Left

THURSDAY
OCTOBER 9, 1997
DIARY AND WORK RECORD

31

Jody Gonzales Ast FM
AJ Carrol Fire Marshal
512 3960821
~~326 VTK~~

TO BE DONE TODAY (ACTION LIST)

Charlie Smith 610 7756327
Penski TR Leasing

Pens Logistic
F.W.
800 3104929

EXPENSE & REIMBURSEMENT RECORD:

13700 Independence Pk
F 76178 ~~[illegible]~~

8
9
10
11 A T8 Wheeler Turned Over
On 35 By 1327 We Ended
12 Up Helping Them After
Alfred Valejo Called Me
1 The Load Ended Up Being
Hazardous Penski Truck
2 Leasing Owned The Truck
Zenith Owned The TVs
3 It Stoped Raining At Noon
4 2/10
5

EXHIBIT
Gregory-41
Renee DeYoung
Jun 5/28/03

TDS 02376

FRIDAY
OCTOBER 10, 1997
APPOINTMENTS & SCHEDULED EVENTS

Lee Mackin
Special Automotive

3960821
Jody Gonzales

Bret 4546821

FRIDAY
OCTOBER 10, 1997
31

Wk 41 • Day 283, 82 Left

DIARY AND WORK RECORD

~~It Rained All Day.~~

We Spent The Whole Day Working On The 98 Yds Of Hazardous That Was Dumped Over The Entire Area. We Loaded Up 2 40 Yds With Stuff From The Wreck That The Small Dump Trucks ~~Had~~ Dumped On Our Working Face. It Started Raining At Noon And Rained All Afternoon. I Dumped Out 4/10

TDS 02377

MONDAY
OCTOBER 13, 1997

Columbus Day (USA)
Thanksgiving (Canada)

APPOINTMENTS & SCHEDULED EVENTS

NAME PLACE SUBJECT

TO BE DONE TODAY (ACTION LIST)

EXPENSE & REIMBURSEMENT RECORD:

Wk 42 • Day 286, 79 Left

MONDAY
OCTOBER 13, 1997

31

We Retrieved The 7 Boxes
That Have The Haz

TDS 02378

Penske

Segregate and Inventory Televisions in Buda, TX

Project No. 5563-0198-003

CODE 3, INC.
118 East Turbo Dr.
San Antonio, TX 78216
(210) 342-0911

RECEIVED
FEB 17 1998
MARC E. ALTHEN

CODE 3
ENVIRONMENTAL SERVICES

118 East Turbo
San Antonio, Texas 78216
(210) 342-0911
FAX: (210) 342-3460
24 HOUR EMERGENCY
(800) 421-4911

EMERGENCY RESPONSE

ENVIRONMENTAL REMEDIATION

ENVIRONMENTAL ENGINEERING/ CONSULTING

OSHA/DOT CONSULTING/ TRAINING

ASBESTOS INSPECTION/ ABATEMENT

CONTINGENCY PLANS

PROUDLY SERVING THE SOUTHWESTERN UNITED STATES

January 19, 1998

Mark Althen
Penske Truck Leasing
PO BOX 7635
Reading, PA 19603

Re: Segregate and Inventory Televisions in Buda, TX
Code 3, Inc. Project No. 5563-0198-003

Dear Mark Althen:

The following report summarizes the actions of Code 3, Inc. Environmental Services (Code 3) regarding the segregation and inventory of televisions in Buda, TX.

On January 13, 1998, Code 3 mobilized one supervisor, one heavy equipment operator, and two technicians to the Texas Disposal Systems site in Buda, TX. Code 3 was to go through seven roll off boxes to segregate and inventory televisions that were involved in a motor vehicle collision. Once on site I, Eric Cooper, met with Tim Herman, Vice President of TDS to discuss what was to be done. At this time, Mr. Herman informed me of all of his safety concerns and policies while on his site. Mr. Herman then escorted me to the roll off boxes and area where work was to be performed. An area approximately 60'X60' was isolated so that we would be clear of any other work being done in that area.

At this time, work began with covering an area approximately 30'X50' with poly sheeting to ensure no cross contamination will occur. A roll off box with product from the accident was placed directly in the center. On the outer edge, two boxes were then placed one on each side of the first roll off box. One box was lined with poly sheeting and designated as a hazardous materials (haz) box. The other box would be called non-hazardous materials (non-haz). The box with product mainly contained household trash from TDS. All this was sorted through to separate haz from non-haz. This box took us a full day because of the amount of trash that had to be cleared. After removal of haz/ non-haz, this box was removed from the work area and staged for TDS to dispose of.

On the following day, another roll off box containing trash and product from the accident was placed on the work site. The same segregation and inventory was conducted. This particular box contained "Sharps" syringes with needles, which slowed us down somewhat. Three roll off boxes where completed on this 2nd day.

On the 3rd and final day, all of the boxes were complete. The work area was put back to its original appearance. All poly sheeting was placed into haz boxes and covered with tarps to be staged for disposal.

Please review the following boxes and their contents.

Box # 3134	**Penske Haz-Mat**	270 bands, 19 pallets, parts of trailer, approximately 3 yards of soil
Box # 3077	**Penske Haz-Mat**	201 bands, 25 pallets, 5 yds soil approx.
Box # 3155	Penske Non-Haz	57 bands, 35 pallets, parts of trailer
Box # 3096	Penske Non-Haz	276 bands, 44 pallets
Box # 3210	Penske Non-Haz	4 bands, 72 pallets
Box # 3174	Penske Non-Haz	25 bands, 59 pallets
Box # 3119	Penske Non-Haz	189 bands, 98 pallets

- Box # 4291 TDS Non-Haz Trash
- Box # 4280 TDS Non-Haz Trash
- Box # 4516 TDS Non-Haz Trash
- Box # 4706 empty
- Box # 3218 empty
- Box # 4531 empty
- Box # 4335 empty

- Indicates boxes originally used for the motor vehicle collision.

Since most of the television screens and bulbs were broken, we needed to count something to represent one television. A stainless steel band with four bolt holes was counted. Each one represented one television. All glass was considered "haz." Some bands still contained glass and part of the television, which were put in a haz box. If the band was clean, no glass, it was put in a non-haz box. Since the soil was full of glass, it also was placed in a haz box. Some pallets and trailer parts were covered with mud and these were placed into a haz box. If other parts of the television were clean, they were placed into a non-haz box.

A grand total of 1022 bands were found. 551 bands were clean and placed into non-haz boxes. 471 bands were dirty or had glass attached to them and placed into haz boxes. I was advised that 1200 televisions were on the semi-trailer. So I am led to believe that only approximately 178 televisions are buried at TDS. Another count consisted of 352 pallets. Some of these are in your haz box because of the contaminated soil.

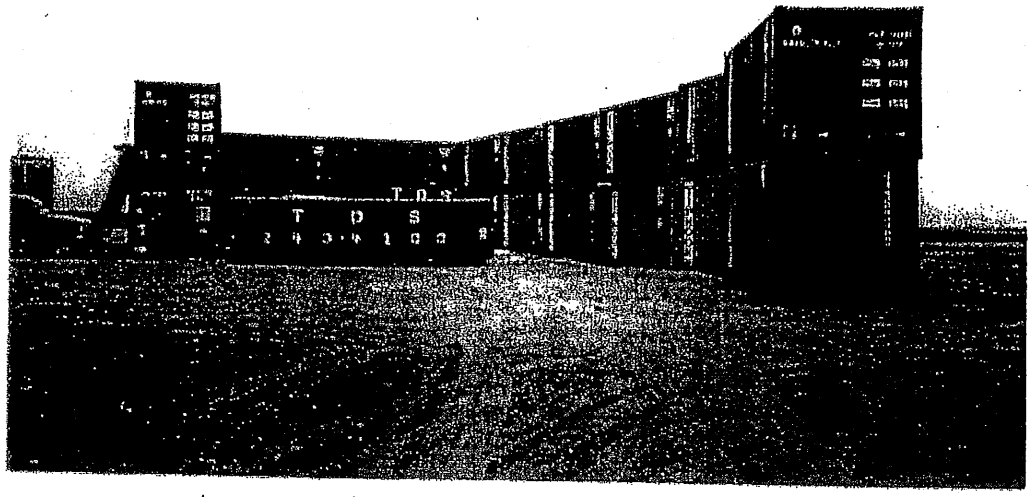
I hope this incident was mitigated to your satisfaction. If you have any questions, please do not hesitate to call.

Sincerely,
Code 3, Inc. Environmental Services

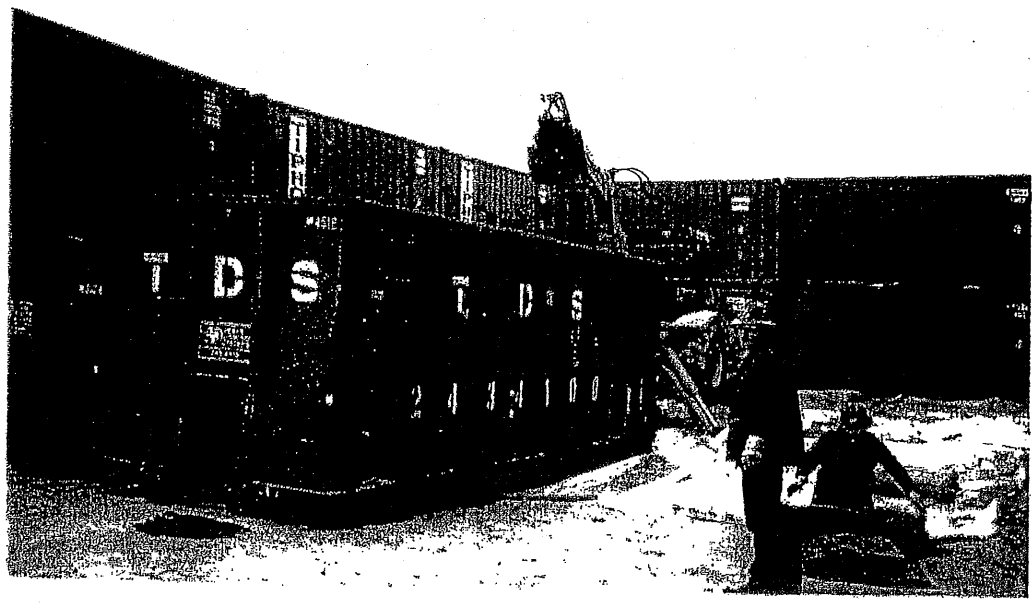
Eric Cooper

Eric Cooper
Project Manager

CODE 3, INC.

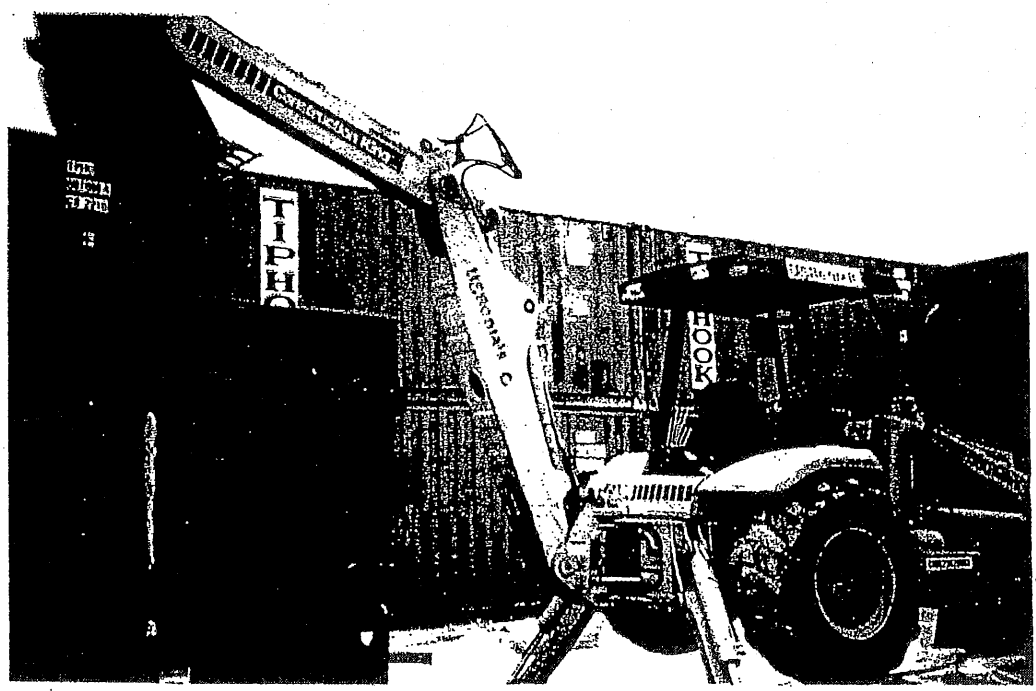


Area set up where segregation and inventory took place

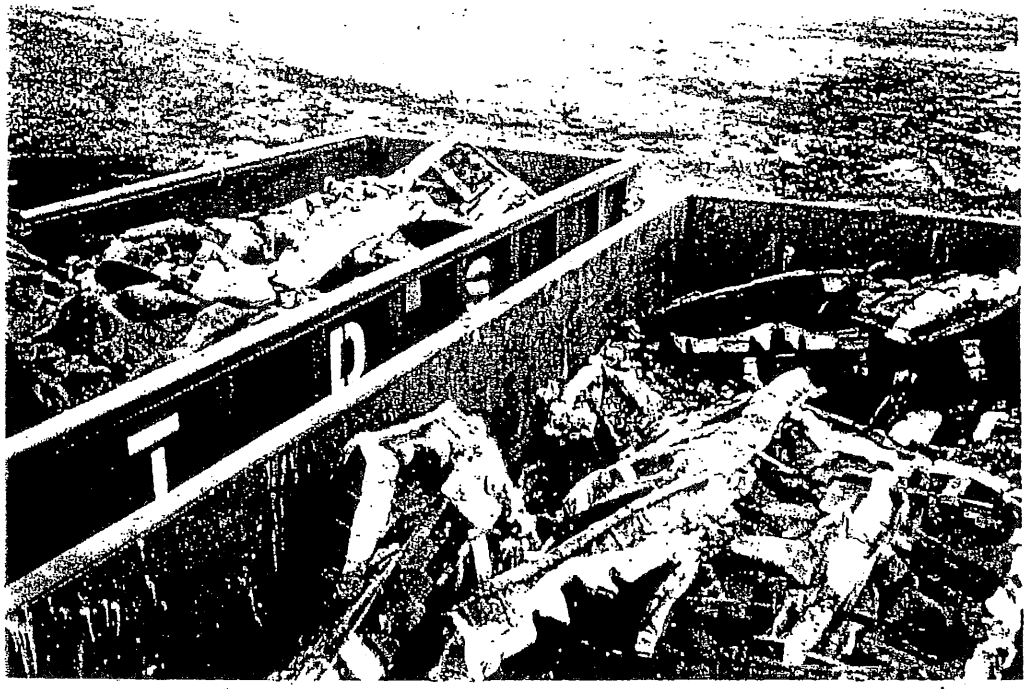


Preparing site- poly sheeting laid down to avoid cross contamination

Continue to prepare site



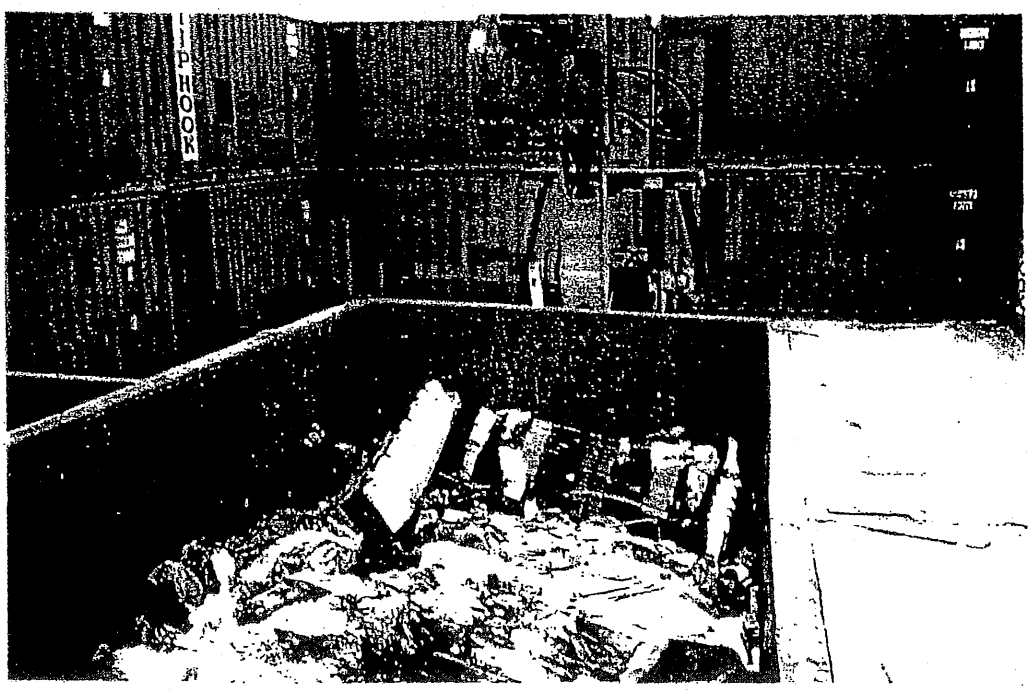
Set up heavy equipment to start segregation and inventory



Box on left shows Penske non-haz box
Box on right is one being inventoried

Technicians in roll off box segregating and inventory, both in full protective gear

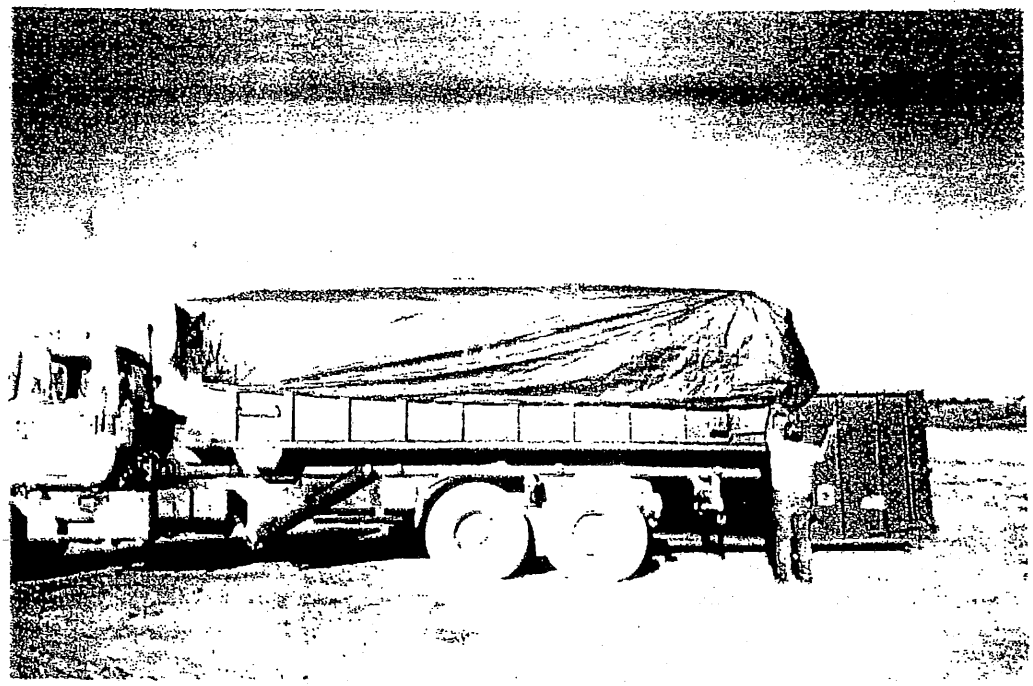
Continue segregation



Segregation of TDS trash and Penske products

Equipment operator utilizing full protective gear while working

Penske Haz-Mat box being loaded



Penske Haz-Mat Box being staged @ TDS site for disposal

Clean up of area- put back to normal condition

Complete; Penske Haz-Mat Box covered, marked "H," staged for disposal

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS) IN THE DISTRICT COURT
LANDFILL, INC.,)
3 Plaintiff,)
)
4 VS.)
) HAYS COUNTY, TEXAS
5 PENSKE TRUCK LEASING CO.,)
L.P., PENSKE LOGISTICS, INC.,)
6 ZENITH ELECTRONICS CORP.,)
)
7 Defendants.) 207TH JUDICIAL DISTRICT

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10 **********

11 APRIL 21, 2004
Volume 7

12 **********

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1 APPEARANCES

2

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-and-
8
Mr. Kerry E. Russell
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18 - and -

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5 - and -

6 Mr. David W. Waddell
Seyfarth Shaw
7 Attorneys at Law
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Houston, Texas 77002-2731
9

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1 Q Can you tell us generally your involvement in that and
2 what sort of discussions were occurring with the defendants
3 in this action.
4 A Over the course of several months after the accident we
5 would have periodic conference calls where Mr. Herman would
6 pull me in to be on the call with the Penske and Zenith
7 representatives where we would discuss ways to remove the
8 waste or have it declared to be a nonhazardous waste at the
9 point that it came into the landfill facility.
10 As Mr. Herman said, either way would solve the issue of
11 our situation of having regulated hazardous waste in a
12 facility that is not authorized to accept it. Those
13 discussions took place over the course of October, November,
14 December and into January.
15 Q Would it be possible for Penske or Zenith to reclassify
16 or declassify this waste so it was not regulated hazardous
17 waste when it came into the landfill?
18 MR. COMELLA: Objection. (unintelligible).
19 (BY MR. DONALDSON)
20 Q In your evaluation as you were dealing with the issue,
21 what was your understanding of what Penske or Zenith could do
22 that might allow you to -- or allow someone to treat this as
23 no longer being regulated hazardous waste?
24 A I discussed the possibility with them of going to the
25 commission and to examine the waste stream from the accident

1 scene as not just the CRT tubes, but look at it as the
2 commingled material from the hazardous -- from the accident
3 scene that included the packaging and metal parts and some
4 soil and things that were scooped up at the accident scene
5 and placed in the landfill.
6 Q Now, at that point in the course of those discussions,
7 did you have any detailed information concerning the levels
8 of lead in the picture tubes?
9 A No, I did not.
10 Q Can you explain to us how, that you understood it, it
11 would be proper for such a declassification or
12 reclassification to occur?
13 MR. CHRISTIAN: Objection. (unintelligible).
14 THE COURT: Sustained.
15 MR. DONALDSON: When you were evaluating the
16 possibility of Penske or Zenith reclassifying this waste,
17 what were you looking at as a way that that could be done?
18 A Again I was trying to convince them that we should go to
19 the commission together to examine the whole waste stream
20 that came from the accident scene, see if there was a way to
21 test it and make a determination that was in fact
22 nonhazardous waste.
23 Q Now, was this testing or evaluation, is this something
24 that had to happen before it came through the gate, or could
25 it happen after it came through the gate?

1 other area for storage.
2 Q Following the events of October 9 of 1997 and
3 following the efforts that you described here of moving the
4 waste -- and by the way, when did that -- when did that take
5 place?
6 A That occurred about February 24, 1998, after we had
7 given up hopes of convincing Penske and Zenith to come
8 remove the material themselves.
9 Q What about the roll-off boxes? What happened with
10 the roll-off boxes?
11 A Well, again, the roll-off boxes that were in place
12 were sorted through earlier, say somewhere in mid-January,
13 and been stored there, and sometime in March Penske shipped
14 two of the boxes that was said to contain the hazardous CRT
15 material to a hazardous waste disposal site, and the
16 remaining five boxes that contained what Code 3 said was
17 non-hazardous waste was hauled to another municipal solid
18 waste landfill for disposal.
19 Q And have you had an opportunity to see the letters
20 from Penske to the TCEQ reporting on the shipment of the two
21 roll-off boxes that had the hazardous waste in it?
22 A Yes, sir, I have.
23 Q Let me show you what's been marked as Plaintiff's
24 Exhibit 145A. It's a letter dated May 20 of 1998. Can you
25 identify this letter?

01311

1 CAUSE NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS) IN THE DISTRICT COURT
LANDFILL, INC.,)
3 Plaintiff,)
)
4 VS.) HAYS COUNTY, TEXAS
)
5 PENSKE TRUCK LEASING CO.,)
L.P., PENSKE LOGISTICS, INC.,)
6 ZENITH ELECTRONICS CORP.,)
)
7 Defendants.) 207TH JUDICIAL DISTRICT

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10 **********

11 APRIL 22, 2004
Volume 8

12 **********

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1 APPEARANCES

2

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16 2500 One Liberty Place
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Houston, Texas 77002-2731
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25 08:2

2 Q. All right. Now, what about the material that was in
3 the storage -- the roll-off boxes that came from the accident
4 scene? And we know, now, that that material was segregated
5 out. We've seen exhibits of the segregation process.
6 When did that material ultimately leave TDSL's
7 facility?
8 A. It was end of March, March 23rd, thereabouts, there
9 were two -- two of the roll-off boxes that were hauled to the
10 hazardous waste landfill near -- outside of Corpus Christi as
11 hazardous waste. And then five other boxes that were hauled
12 to another landfill in Austin.
13 Q. All right. Now, is the waste that we saw that was
14 placed in that storage area, is it still there?
15 A. No, sir. It's not.
16 Q. Why is it -- well, let me ask you first: You
17 mentioned that after it was stored and the area behind it
18 filled in, and the operations moved off to a different
19 location, did the operations ever come back to the area -- to
20 that area?
21 A. Yes, they have.
22 Q. And approximately when did that -- when were you
23 seeing that that was going to be a possibility?
24 A. Well, we -- we knew it was going to happen the day
25 that we moved the waste there because of our landfill fill

CODE 3, INC.
ENVIRONMENTAL SERVICES

118 EAST TURBO
SAN ANTONIO, TX 78216
(210) 342-0911
FAX: (210) 342-3460

24 HOUR EMERGENCY
(800) 421-4911

November 24, 1997

Charles J. Smith, Jr.
Penske Truck Leasing
RT. 10 Green Hills
PO BOX 7635
Reading, PA 19603

Re: Truck Rollover in Buda, TX
Code 3, Inc. Project No. 5392-1097-003

Dear Mr. Smith:

The following report summarizes the actions and observations of Code 3, Inc. Environmental Services (Code 3) regarding a truck rollover on October 9, 1997 in Buda, TX.

EMERGENCY RESPONSE

Penske contacted Code 3 on October 9, 1997 at 7:15 PM regarding an overturned 18-wheeler, which contained a load of picture tubes. The incident occurred on the southbound side of I-35 at Exit 221 in Buda, TX. Code 3 was in route at 8:00 PM and was on site at 8:45 PM.

ENVIRONMENTAL REMEDIATION

A walk through of the site revealed that a clean up was started. However due to the lead contamination associated with the broken picture tubes, clean up was halted. All debris previously loaded into 2 dump trucks and one roll-off box supplied by the Texas Disposal System were off loaded. They were reloaded into line roll-off boxes provided by the Texas Disposal System. The liner used was 6-mil poly. The dump trucks and one roll-off box were thoroughly cleaned out. The dump trucks were then released. The roll-off box was retained as one of the boxes used to load.

OSHA CONSULTING / TRAINING

ASBESTOS INSPECTION / ABATEMENT

The broken tubes covered an area of approximately 100 X 150 square feet on the service road and the exit ramp. There was also an area between the service ramp and main of soil contaminated from the rollover. The area was approximately 20 feet in length and 4 feet to 14 feet in width. This area was excavated a depth of 4 to 6 inches and also loaded into the roll-off box.

CONTINGENCY PLANS

A final sweeping of all contaminated pavement area was conducted and loaded into the last roll-off box. A total of 4 roll-off boxes were used. Code 3 completed work at 2:30 AM and arrived back to our yard at 3:30 AM. Code 3 has not been involved with any of the disposal events at this time.

On October 10, 1997, the Texas Department of Transportation conducted an inspection as well as the Texas Natural Resource Conservation Commission. The agents from their site inspection approved of the clean up; Code 3 was released on this project by Penske.

PROUDLY SERVING THE SOUTHWESTERN UNITED STATES

DEPOSITION EXHIBIT
329

I hope this incident was mitigated to your satisfaction. If I can be of any other service to you, please contact me.

Sincerely,
Code 3, Inc. Environmental Services

Don Holding

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DEC 19 2003

Cause No. 98-0159

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	)	IN THE DISTRICT COURT
Plaintiff	)	
v.	)	
PENSKE TRUCK LEASING CO., L.P., PENSKE LOGISTICS, INC., ZENITH ELECTRONICS CORP., and HARRY ERNEST McCAIN,	)	HAYS COUNTY, TEXAS
Defendants	)	207th JUDICIAL DISTRICT

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

AFFIDAVIT OF DONNA HOWARD

Before me, the undersigned authority, on this day appeared Donna Howard, who being first duly sworn upon her oath deposed and said:

1. My name is Donna Howard. I am over the age of eighteen (18) years, have never been convicted of a felony, and am otherwise competent to give this affidavit. I have personal knowledge of the facts stated in this affidavit, and the facts are true and correct.

2. I am employed by American Ecology Corporation in the Texas Ecologists, Inc. office at Robstown, Texas. In October of 1997 I was Customer Service Representative at Texas Ecologists, Inc. In such capacity I have knowledge of the records of Texas Ecologists, Inc. and am the custodian of those records. Within the scope of my work at Texas Ecologists, Inc., I generated, received, processed and maintained communications and file materials, including communications with Marc Althen, Vice President of Environmental Services for Penske Truck Leasing in connection with

disposal of broken cathode ray tube waste materials resulting from an October 9, 1997 Penske Truck accident near Buda, Texas.

3. Attached to this Affidavit are documents that have been Bates labeled TECO 0001 through TECO 0041. These documents are true and correct copies of documents from the files of Texas Ecologists, Inc. The documents were either generated by Texas Ecologists, Inc. in the regular course of business by an employee of Texas Ecologists, Inc. or were received from Penske and handled and maintained in the files of Texas Ecologists in the ordinary course of business, and the records made at or near the time of the events recorded or reasonably soon thereafter.

4. I have personally examined the documents attached hereto. With the exception of the Bates labels attached thereto, the documents are true and accurate copies of the originals in the files of Texas Ecologists, Inc.

FURTHER AFFIANT SAITH NOT.

Donna Howard
DONNA HOWARD

STATE OF TEXAS)
)
COUNTY OF NUECES)

SWORN AND SUBSCRIBED to before me by Donna Howard on this 5 day of ~~October~~ December, 2003.

Deanna Reyes
NOTARY PUBLIC, STATE OF TEXAS

DEANNA REYES
MY COMMISSION EXPIRES
November 3, 2007

Teco Stabilization Recipe Summary Form

Generator	Penske Logistics	Lab ID #	29590
Waste Name	Lead Cont. Soil	Waste Stream #	0900042535
Manifest #		Work Order #	
Waste Codes	D008	Report Date	04/02/98

Stabilizing Agents	PC=Cement, Fe=Ferrous Sulfate, G=Gypsum,LKD=Lime Kiln Dust

Recipe

100 g	+	1 g	+		+	
Waste	+	LKD	+		+	

Cure Time	<2 hours	Temp.Change, °C	RT		
Untreated Density	pcf	Noxious Gas	Yes	No	
Treated Density	pcf	Emissions		✓	

		All mg/kg or mg/L (ppm)	Untreated		Treated			
		Limit	Total	TCLP	rep1	rep2	rep3	rep4
Lead (Pb)	D008	5.0		<0.10	<0.10	2.34	<0.10	0.31

This information is the property of Texas Ecologists and is for use in profiling waste. Any other use is inappropriate.

Sam Clark Lab Tech	4/2/98 Date

1 NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS) IN THE DISTRICT COURT
LANDFILL, INC.,)
3)
Plaintiff(s),)
4)
VS.) 207TH JUDICIAL DISTRICT
5)
PENSKE TRUCK LEASING CO.,)
6 L.P., PENSKE LOGISTICS,)
INC., ZENITH ELECTRONICS)
7 CORP. AND ZENITH)
ELECTRONICS CORP. OF TEXAS,)
8 AND HARRY ERNEST MCCAIN,)
AND DAX DAVID TAYLOR,)
9)
Defendant(s).) HAYS COUNTY, TEXAS

10 **********

11 VIDEOTAPED ORAL DEPOSITION OF BEN E. MILFORD

12 OCTOBER 9, 2002

13 **********

14 VIDEOTAPED ORAL DEPOSITION OF BEN E. MILFORD,
15 produced as a witness at the instance of the
16 Defendant, Penske Truck Leasing Co., Et Al, and duly
17 sworn, was taken in the above-styled and numbered
18 cause on October 9, 2002 from 9:10 a.m. to 12:50 p.m.,
19 before Dicie Lee Eytcheson, CSR, RPR in and for the
20 State of Texas, reported by method of machine
21 shorthand, at the Office of Baker Botts, 98 San
22 Jacinto Blvd., Suite 1500, Travis County, Austin,
23 Texas, pursuant to the Texas Rules of Civil Procedure
24 and the provisions stated on the record or attached
25 hereto.

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55 East Monroe Street, Suite 4200
12 Chicago, Illinois 60603-5803
312-346-8000
13
ALSO PRESENT:
14 Gary Newton
Bob Gregory
15 David A. Speaker
16 THE VIDEOGRAPHER:
Neal Castile
17
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LEGAL DIVISION

1 A. The regulations just say that you must
2 determine, and it lists those different ways of how
3 you -- you can do so. So I don't believe it lists a
4 preference.
5 Q. (BY MR. COMELLA) If a generator first uses
6 its knowledge to determine that a waste is hazardous
7 and then says, well, maybe it's not, and goes back and
8 tests the waste and it shows that it's not hazardous,
9 would the commission accept that test?
10 MR. DONALDSON: Object to form.
11 A. Yes, they would.
12 Q. (BY MR. COMELLA) Because the analytical test
13 is a scientific examination of the waste
14 characteristics, correct?
15 MR. DONALDSON: Object to form.
16 A. That's correct.
17 Q. (BY MR. COMELLA) As opposed to generator
18 knowledge which, of course, may be subjective; is that
19 correct?
20 MR. DONALDSON: Object to form.
21 A. I guess it could be more subjective,
22 depending on the information used to make that
23 determination.
24 Q. (BY MR. COMELLA) Do you understand the
25 difference between the storage of waste and the

1 disposal of waste?
2 A. Yes, I do.
3 Q. And is it fair to say that "storage" implies
4 a temporary holding as opposed to "disposal" which is
5 a permanent activity?
6 A. Yes.
7 Q. In Deposition Exhibit 1, Counsel referred
8 you -- I'm sorry. Scratch that.
9 In Deposition Exhibit 2, Counsel for
10 Penske referred you to an inspection report dated
11 April 29th, 1998, which you signed on May 21st, 1998;
12 is that correct?
13 A. That's correct.
14 Q. And Counsel referred you to the sentence that
15 says, the TNRCC allowed the spilled waste that was
16 inadvertently deposited in the landfill to remain
17 there, correct?
18 A. That's correct.
19 Q. Are these your typed up comments,
20 Mr. Milford --
21 A. Yes, they are.
22 Q. -- these? When you wrote this sentence, did
23 you mean that TDSL was allowed to leave the broken
24 tubes in the landfill?
25 A. The ones that were already deposited there,

1 yes, sir.
2 Q. And I -- it looks like there were possibly
3 226 in the landfill, that's right in here, correct?
4 A. That's correct.
5 Q. And the rest of them, apparently, had been
6 stored and were taken off site at some point; is that
7 correct?
8 A. I don't believe they were at the time of this
9 report, but later they were.
10 Q. When you said the TNRCC allowed the 226
11 broken tubes to remain in the landfill, did you mean
12 that they could be disposed there or stored there?
13 A. Disposed.
14 Q. The TC -- Let me scratch that. The Texas
15 Commission on Environmental Quality has the authority,
16 does it not, to order a landfill to remove from the
17 landfill waste that it -- it is not permitted to
18 accept; isn't that correct?
19 A. I would believe that's correct, yes.
20 Q. That falls within the TCEQ's authority,
21 correct?
22 A. Yes.
23 Q. And in this case, with the broken tubes,
24 isn't it true that the TCEQ had the authority to order
25 Texas Disposal Systems Landfill to remove the 226 TV

1 A. Part of their requirement is, it says right
2 here, that they have a contract -- they're -- at a
3 minimum they're going to do that and that is part of
4 their permit.
5 Q. So if they did not have a contractual
6 agreement, either written or oral, with Penske and
7 nonetheless accepted this waste, would you consider
8 that to be a noncompliance with this permit condition?
9 A. I would sure look at that a little closer,
10 yes, sir.
11 Q. When did you arrive at the scene of the
12 accident, Mr. Milford?
13 A. Again, we're five years ago, but I would say
14 approximately 6:30.
15 Q. And what did the scene look like when you
16 arrived?
17 A. As I recall, they were still loading roll-off
18 containers with the broken tubes and were in -- about
19 to upright the -- No. Well, man, it's been a long
20 time ago. We might have been waiting on Code 3 to get
21 there, the contractor.
22 Q. Were you involved in any discussions with
23 regard to the classification of the broken TV tubes?
24 A. Yes, sir.
25 Q. And what was the nature of those discussions?

1 A. I got a call from -- again, I'm not sure if
2 they were with Penske or Zenith, but a -- and was told
3 that they had a determination on those broken tubes
4 and they were hazardous.
5 Q. Prior to that call, did you have any
6 discussions with an Alfred Vallejo, a member of the
7 Travis County Volunteer Fire Department?
8 A. I don't recall a conversation.
9 Q. Did you have any discussions before that call
10 with anybody at the scene of the accident with regard
11 to the classification of the broken TV tubes?
12 A. I was informed by the company that they were
13 hazardous before I left the office.
14 Q. By what company?
15 A. I'm thinking it was Zenith.
16 Q. You think Zenith. And who at Zenith?
17 A. Let me see. It might have been Charlie --
18 I -- I'd hate to say for sure. I don't know.
19 Q. Charlie Smith?
20 A. I -- I believe it was. I could be wrong,
21 but --
22 Q. Do you know for a fact whether Charlie Smith
23 works for Penske or Zenith?
24 A. No, sir, I don't.
25 Q. But you have a -- some recollection that

1 before you left your office to go to the scene of the
2 accident --
3 A. Uh-huh.
4 Q. -- you received a call from a Charlie Smith?
5 A. I received a call. I am not definite it was
6 Charlie Smith, though.
7 Q. Okay. You received a call from somebody,
8 either Penske or Zenith?
9 A. Uh-huh.
10 Q. And what do you recall was conveyed to you at
11 the time?
12 A. I was told that when they have glass breakage
13 at their facility it is managed as a hazardous waste.
14 Q. And you remember getting to the accident
15 scene about 6:30 in the morning?
16 A. In the evening.
17 Q. In the evening.
18 A. Yes, sir.
19 Q. And how long did it take you to go from your
20 office to the scene of the accident?
21 A. About forty-five minutes.
22 Q. So you received a call about 5:30 or
23 something like that?
24 A. Uh-huh. Yes, sir.
25 Q. When you got to the scene of the accident,

1 did you come to an understanding whether the people at
2 the scene also knew, at that time, that the broken
3 tubes might be hazardous?
4 A. As I recall, as soon as I got off the phone
5 with the representative, I contacted landfill and they
6 immediately stopped landfilling the picture tubes.
7 Q. So you got the call from somebody about
8 5:30 p.m. in your office, and you put the phone down
9 and called up Texas Disposal; is that correct?
10 A. That's the way I recall.
11 Q. And do you recall who you spoke to? I know
12 this is all unfair, it's five years ago, but --
13 A. I -- I ended up talking with Jim. I don't
14 know if it was actually on the phone then or when I
15 went out to the site.
16 Q. And what, if anything, did the Texas Disposal
17 representative say to you?
18 A. They were going to stop landfilling the
19 tubes, and they were going to stockpile them at the
20 facility, and then they sectioned off the area where
21 they had been disposing of waste at the time the
22 picture tubes came in and moved the working face to a
23 different location of the landfill.
24 Q. Was the call that you received from this
25 individual, was this unsolicited or -- or had you

1 requirement of the clay liners.
2 Q. And compacted clay liners have a very low
3 permeability; isn't that correct?
4 A. Yes, sir.
5 Q. Because the landfill regulations require the
6 liner to have a low permeability; is that correct?
7 A. Yes, sir.
8 Q. And that's to prevent leaks from the landfill
9 from entering the groundwater; isn't that correct?
10 A. That's correct.
11 Q. So you would consider the Texas Disposal
12 System's liner to be a safe liner?
13 A. I believe so, yes, sir. Geologists and
14 groundwater experts have looked at that.
15 Q. And -- and I assume that the State of Texas
16 would not have permitted this landfill unless Texas
17 thought it was a safe place to put a landfill; is that
18 correct?
19 A. That's correct.
20 Q. Is there anything, to your knowledge,
21 preventing Texas Disposal from putting additional
22 waste onto the area where these broken tubes are?
23 A. There's nothing preventing it in our
24 regulations, no, sir.
25 Q. Because Texas Disposal -- I'm sorry. Because

1 the Texas Commission on Environmental Quality has
2 already approved the disposal of those tubes, correct?
3 MR. DONALDSON: Object to form.
4 A. That's correct.
5 Q. (BY MR. COMELLA) So it's just like any other
6 waste, right?
7 A. We've allowed it to stay there just like any
8 other waste, yes.
9 MR. DONALDSON: Object to form.
10 Q. (BY MR. COMELLA) It's just like any other
11 waste. There's nothing that Texas -- there's nothing
12 that the TCEQ is requiring on the part of Texas
13 Disposal Systems Landfill -- Let me scratch that
14 question.
15 The TCEQ is not requiring TDSL to cordon
16 off this area and isolate it, correct?
17 A. No, sir. It's not required by us.
18 Q. There's material in the documents,
19 Mr. Milford, referring to a manifest. And you -- and
20 you understand what a manifest is, correct?
21 A. Yes, sir.
22 Q. Do you know if there was a manifest prepared
23 reflecting the shipment from the scene of the accident
24 to the landfill?
25 A. I'm not aware of a manifest there, no, sir.

1 NO. 98-0159

2 TEXAS DISPOSAL SYSTEMS) IN THE DISTRICT COURT
LANDFILL, INC.,)
3)
Plaintiff(s),)
4)
VS.) 207TH JUDICIAL DISTRICT
5)
PENSKE TRUCK LEASING CO.,)
6 L.P., PENSKE LOGISTICS,)
INC., ZENITH ELECTRONICS)
7 CORP. AND ZENITH)
ELECTRONICS CORP. OF TEXAS,)
8 AND HARRY ERNEST MCCAIN,)
AND DAX DAVID TAYLOR,)
9)
Defendant(s).) HAYS COUNTY, TEXAS

10 REPORTER'S CERTIFICATION
DEPOSITION OF BEN E. MILFORD
11 OCTOBER 9, 2002

12 I, DICIE LEE EYTCHESON, Certified Shorthand
13 Reporter in and for the State of Texas, hereby certify
14 to the following:
15 That the witness, BEN E. MILFORD, was duly sworn
16 by the officer and that the transcript of the oral
17 deposition is a true record of the testimony given by
18 the witness;
19 That the deposition transcript was submitted on
20 10-31-02 to the witness or to the attorney
21 for witness for examination, signature, and return to
22 me by 11-22-02;
23 That the amount of time used by each party at the
24 deposition is as follows:
25 Douglas Y. Christian - 1 Hour, 22 Minutes

1 David H. Donaldson, Jr. - 37 Minutes
2 Philip L. Comella - 1 Hour, 6 Minutes
3 That pursuant to information given to the
4 deposition officer at the time said testimony was
5 taken, the following includes counsel for all parties
6 of record:
7 David H. Donaldson, Jr., Attorney for
Plaintiff(s), Texas Disposal Systems
8
Douglas Y. Christian, Attorney for Defendant(s),
9 Penske Truck Leasing Co.
10 Mr. Philip L. Comella, Attorney for Defendant(s),
Zenith Electronics
11
12 I further certify that I am neither counsel for,
13 related to, nor employed by any of the parties or
14 attorney in the action in which this proceeding was
15 taken, and further that I am not financially or
16 otherwise interested in the outcome of the action.
17 Further certification requirements pursuant to
18 Rule 203 of TRCP will be certified to after they have
19 occurred.
20 Certified to by me this 24th day of
21 October, 2002.
22
23 Dicie Lee Eytcheson
DICIE LEE EYTCHESON, Texas CSR 5392
24 Expiration Date: 12/31/02
7800 IH-10 West, Suite 100
25 San Antonio, Texas 78230
(210) 377-3027

1 FURTHER CERTIFICATION UNDER RULE 203 TRCP

2

3 The original deposition (✓) was ( ) was not

4 returned to the deposition officer on

5 11-15-02;

6 If returned, the attached Changes and Signature

7 page contains any changes and the reasons therefor;

8 If returned, the original deposition was delivered

9 to Douglas Y. Christian, Custodial Attorney;

10 That $ 943.30 is the deposition officer's

11 charges to the Defendant for preparing the original

12 deposition transcript and any copies of exhibits;

13 That the deposition was delivered in accordance

14 with Rule 203.3, and that a copy of the certificate

15 was served on all parties shown herein and filed with

16 the Clerk.

17 Certified to by me this 19th day of

18 Nov., 2002.

19

20 Dicie Lee Eytcheson

DICIE LEE EYTCHESON, Texas CSR 5392

21 Expiration Date: 12/31/02

7800 IH-10 West, Suite 100

22 San Antonio, Texas 78230

(210) 377-3027

23

24

25

Barry R. McBee, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
John M. Baker, *Commissioner*
Dan Pearson, *Executive Director*

TEXAS NATURAL RESOURCE CONSERVATION

Protecting Texas by Reducing and Preventing Pollutic

November 5, 1997

US Postal Service
Receipt for Certified Mail
No Insurance Coverage Provided.
Do not use for International Mail *(See reverse)*

Sent to MARK ALTHEN	
Street & Number PENSKE TRUCK LEASING	
Post Office, State, & ZIP Code P.O. BOX 7635	
Postage READING, PA	$ 19603
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, & Addressee's Address	
TOTAL Postage & Fees	$
Postmark or Date	

PS Form 3800, April 1995

CERTIFIED MAIL
Mark Althen
Penske Truck Leasing
P. O. Box 7635
Reading, PA 19603

Re: Penske Truck Leasing Spill Located at South IH-35 near Buda, Hays County, Texas

Dear Mr. Althen:

On October 9, 1997, it was reported to this office that a Penske Truck accident resulted in a large number of cathode ray tubes being broken and spilled onto the ground. The broken tubes were reported to this office to be a hazardous waste.

Section 26.266 (a) of the Texas Water Code states:

(a) Any owner, operator, demise charterer, or person in charge of a vessel or of any on-shore facility or off-shore facility shall immediately undertake all reasonable actions to abate and remove the discharge or spill subject to applicable federal and state requirements, and subject to the control of the federal on-scene coordinator.

Pursuant to sections 26.264 and 26.266 of the Texas Water Code this office requests the following information:

(1) A description of the incident including the amount and characteristics of the material discharged;

(2) The actions that have been taken to remove the spill and the parties which conducted the actions. Documentation should include information regarding the verification of cleanup as well as proper disposal of any wastes generated.

This information is requested to be submitted to this office in writing by December 7, 1997.

If you have any questions regarding these matters, please contact Ben E. Milford of the Texas Natural Resource Conservation Commission Austin Region Office at (512) 339-2929.

Sincerely,

Chris Smith
Waste Program Manager
Austin Region

BEM:bm

cc: Charlie Smith, Penske Truck Leasing
Bob Gregory, Texas Disposal Systems Landfill

PENSKE
Truck Leasing

MARC E. ALTHEN
VICE PRESIDENT
ENVIRONMENTAL SERVICES

December 2, 1997

Mr. Chris Smith
Waste Program Manager
Texas Natural Resources Conservation Commission
Region 11
1921 Cedar Bend, Suite 150
Austin, TX 78758-5336

RECEIVED
DEC 3 1997
TNRCC Operations
Austin Region 11

Re: Penske Logistics Spill IH-35
Near Buda, Harp County, Texas

Dear Mr. Smith:

This letter shall serve as Penske Logistics' written response to your November 5, 1997 letter.

On October 9, 1997, a Penske Logistics tractor-trailer had an accident in Buda, TX near exit 221 on IH-35 South, Hays County, at approximately 1:00 p.m. In response to the accident, Mr. Brian Acker of the Texas Public Safety Commission, dispatched Automotive Wrecker Service to the accident scene. During Automotive Wrecking Service's attempt to upright the trailer portion of the vehicle, the side of the trailer apparently gave way and some of the contents of the trailer, namely television picture tubes, spilled onto the roadway and the side of the road.

Mr. Acker requested Automotive Wrecking Service pick up and dispose of the boxes and the television picture tubes. M&M Trucking Co. was hired by Automotive Wrecking Services to load and transport the boxes to a local municipal landfill owned by Texas Disposal System.

At approximately 4:50 p.m., the Penske Spill Coordinator was advised of the incident by its branch office.

At approximately 5:05 p.m., the Penske Spill Coordinator contacted TX NRCC's Austin Regional Office and reported the incident to Mr. Art Norman. During this call, Mr. Norman was advised that the trailer contained approximately 1,200 picture tubes which contained lead and phosphorous and, if broken, would be a hazardous waste.

At approximately 5:35 p.m. Penske's Spill Coordinator contacted Mr. Acker and Texas Disposal System's Vice President, Mr. Jim Gregory, and advised them that the waste was hazardous and could not be disposed of in a non-hazardous landfill. During the call, it was decided that the landfill would stockpile the material until proper disposal arrangements could be made. However, Mr. Gregory informed Penske's representative that the landfill had already disposed of two loads of the tubes.

During the same time frame, Jodi Gonzales of Hays County Emergency Management, provided Penske with the names of two potential emergency response companies. Penske immediately contacted one of these companies, Code 3, and hired them to conduct the cleanup.

Code 3 arrived on the scene at approximately 8:00 p.m. and completed the cleanup at 2:30 a.m. on October 10, 1997. The remaining spilled materials (broken cathode ray tubes, fiberboard cartons, and wrapping) were placed into several roll-on/off containers and transported to the Texas Disposal System to await proper disposal.

On October 10, 1997 Edward Villaltando of the Hays County Texas Department of Transportation confirmed that the waste had been properly cleaned up and that no further action was required.

As of today, Penske is attempting to properly dispose of the remaining stockpiled waste at a permitted hazardous waste disposal site.

If you have any questions, please contact me at the letterhead address.

Sincerely,

Marc E. Althen

MEA:csk
L1112597.mea

cc: R. T. Traub

P 255 351 367

US Postal Service

Receipt for Certified Mail

No Insurance Coverage Provided.
Do not use for International Mail *(See reverse)*

Sent to Ben Mulford	
Street & Number TNRCC 1924 Cedar Bend Suite 150	
Post Office, State, & ZIP Code Austin, TX 78758	
Postage	$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, & Addressee's Address	
TOTAL Postage & Fees	$
Postmark or Date	

PS Form 3800, April 1985

PTL 133

Stick postage stamps to article to cover First-Class postage, certified mail fee, and charges for any selected optional services *(See front).*

1. If you want this receipt postmarked, stick the gummed stub to the right of the return address leaving the receipt attached, and present the article at a post office service window or hand it to your rural carrier *(no extra charge).*

2. If you do not want this receipt postmarked, stick the gummed stub to the right of the return address of the article, date, detach, and retain the receipt, and mail the article.

3. If you want a return receipt, write the certified mail number and your name and address on a return receipt card, Form 3811, and attach it to the front of the article by means of the gummed ends if space permits. Otherwise, affix to back of article. Endorse front of article **RETURN RECEIPT REQUESTED** adjacent to the number.

4. If you want delivery restricted to the addressee, or to an authorized agent of the addressee, endorse **RESTRICTED DELIVERY** on the front of the article.

5. Enter fees for the services requested in the appropriate spaces on the front of this receipt. If return receipt is requested, check the applicable blocks in Item 1 of Form 3811.

6. Save this receipt and present it if you make an inquiry.

PS Form **3800**, April 1995 *(Reverse)*

PENSKE
Truck Leasing

MARC E. ALTHEN
VICE PRESIDENT
ENVIRONMENTAL SERVICES

May 20, 1998

Mr. Ben Milford
Texas Natural Resource
Conservation Commission
1921 Cedar Bend, Suite 150
Austin, TX 78758

Dear Mr. Milford:

In regard to the October 9, 1997 incident in Hays County, Texas, enclosed please find a copy of the manifests for the disposal of the Zenith picture tubes by American Ecology Transportation.

Please contact me if you need anything further.

Sincerely yours,

Marc E. Althen
Vice President
Environmental Services

PENSKE TRUCK LEASING CO. / ROUTE 10 GREEN HILLS / P.O. BOX 7635 / READING, PA 19603-7635
TELEPHONE: 610-775-6298 / FAX: 610-775-6442

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION
P.O. Box 13087
Austin, Texas 78711-3087

Please print or type. (Form designed for use on elite (12-pitch) typewriter.)

TR#819
WO#00488

Form approved. OMB No. 2050-0039.

UNIFORM HAZARDOUS WASTE MANIFEST

1. Generator's US EPA ID No.: T X P 4 9 0 2 8 0 0 2 4 | Manifest Document No.: 2 5 7 7 7

2. Page 1 of 1

Information in the shaded areas is not required by Federal law.

3. Generator's Name and Mailing Address
Penske Logistics
P.O. Box 7635 Reading, PA 19603

4. Generator's Phone (610) 665-6268

A. State Manifest Document Number: 01525777

B. State Generator's ID: XXX11

5. Transporter 1 Company Name: American Ecology Transportation

6. US EPA ID Number: T X 0 0 0 0 6 9 4 4 8 9

C. State Transporter's ID: 83050

D. Transporter's Phone: 512-387-6096

7. Transporter 2 Company Name:

8. US EPA ID Number:

E. State Transporter's ID:

F. Transporter's Phone:

9. Designated Facility Name and Site Address
Texas Ecologists, Inc.
3½ miles south Petronila Rd
Robstown, TX 78380

10. US EPA ID Number: T X D 0 6 9 4 5 2 3 4 0

G. State Facility's ID: 500521

H. Facility's Phone: 512-387-3518

11A. HM	11. US DOT Description (including Proper Shipping Name, Hazard Class, ID Number and Packing Group)	12. Containers No.	Type	13. Total Quantity	14. Unit Wt/Vol	Waste No.
	a. Hazardous Waste Solid, NOS, NA3077, III, 9, (D008)	0 0 1	CM	30 yd	Y	ACMN319H
	b.					
	c.					
	d.					

J. Additional Descriptions for Materials Listed Above: TECO W/S#309-004-2253

K. Handling Codes for Wastes: M111, M132

15. Special Handling Instructions and Additional Information

16. GENERATOR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packaged, marked, and labelled/placarded, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations, including applicable state regulations.
If I am a large quantity generator, I certify that I have a program in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment; OR, if I am a small quantity generator, I have made a good faith effort to minimize my waste generation and select the best waste management method that is available to me and that I can afford.

Printed/Typed Name: Jason Spivey | Signature: Jason Spivey | Month Day Year: 03 23 98

17. Transporter 1 Acknowledgement of Receipt of Materials

Printed/Typed Name: Johnny Cisneros | Signature: John R. Cisneros | Date: 03 23 98

18. Transporter 2 Acknowledgement of Receipt of Materials

Printed/Typed Name: | Signature: | Date: Month Day Year

RECEIVED
MAY 19 1998
MARC E. ALTHEN

19. Discrepancy Indication Space: Teco wt = 29120 p

20. Facility Owner or Operator: Certification of receipt of hazardous materials covered by this manifest except as noted in Item 19

Printed/Typed Name: Robert Martinez | Signature: Robert Martinez | Date: 03 23 98

GENERATOR / TRANSPORTER / FACILITY

TNRCC-0311 (Rev. 07/01/97)

White - original Pink-TSD Facility Yellow-Transporter Green-Generator's first copy

PTL 136

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION
P.O. Box 13087
Austin, Texas 78711-3087

Please print or type. (Form designed for use on elite (12-pitch) typewriter.)

Form approved. OMB No. 2050-0039.

UNIFORM HAZARDOUS WASTE MANIFEST	1. Generator's US EPA ID No. T X P 4 9 0 2 8 0 0 2 4	Manifest Document No. 2 5 7 7 7	2. Page 1 of 1	Information in the shaded areas is not required by Federal law.

3. Generator's Name and Mailing Address
Penske Logistics
P.O. Box 7635 Reading, PA 19603

4. Generator's Phone (610) 665-6268

A. State Manifest Document Number: 01525777
B. State Generator's ID: 0011
C. State Transporter's ID: [illegible]
D. Transporter's Phone: 512-387-6096
E. State Transporter's ID:
F. Transporter's Phone:
G. State Facility's ID: [illegible]
H. Facility's Phone: 512-387-[illegible]

5. Transporter 1 Company Name: American Ecology Transportation
6. US EPA ID Number: T X 0 0 0 0 6 9 4 4 8 9

7. Transporter 2 Company Name:
8. US EPA ID Number:

9. Designated Facility Name and Site Address
Texas Ecologists, Inc.
3½ miles south Petronila Rd
Robstown, TX 78380
10. US EPA ID Number: T X D 0 6 9 4 5 2 3 4 0

11A. HM	11. US DOT Description (Including Proper Shipping Name, Hazard Class, ID Number and Packing Group)	12. Containers No.	Type	13. Total Quantity	14. Unit Wt/Vol
	a. Hazardous Waste Solid, NOS, NA3077, III, 9, (D008)	0 0 1	CM	30yd.	P
	b.				
	c.				
	d.				

[illegible]

15. Special Handling Instructions and Additional Information

16. GENERATOR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packaged, marked, and labelled/placarded, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations, including applicable state regulations.
If I am a large quantity generator, I certify that I have a program in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment; OR, if I am a small quantity generator, I have made a good faith effort to minimize my waste generation and select the best waste management method that is available to me and that I can afford.

Printed/Typed Name	Signature	Month	Day	Year
Jason Spivey	[signature]	03	23	98

17. Transporter 1 Acknowledgement of Receipt of Materials

Printed/Typed Name	Signature	Month	Day	Year
Johnny Cisneros	[signature]	03	23	98

18. Transporter 2 Acknowledgement of Receipt of Materials

Printed/Typed Name	Signature	Month	Day	Year

19. Discrepancy Indication Space

20. Facility Owner or Operator: Certification of receipt of hazardous materials covered by this manifest except as noted in Item 19.

Printed/Typed Name	Signature	Month	Day	Year

GENERATOR / TRANSPORTER / FACILITY

TNRCC-0311 (Rev. 07/01/97) White - original Pink-TSD Facility Yellow-Transporter Green-Generator's first copy

PTL 137

American Ec[illegible]y Transportation
131 N. Richey
Pasadena, TX 77506
(713) 473-0047

MANIFEST 01525799

SERVICE ORDER NUMBER 303212

CUSTOMER: Penske Logistics P.O. # RELEASE #

DATE: 3-23-98 TRAILER # 621 TRUCK # 819

OPERATOR OR DRIVER Johnny Cisneros LABOR

GENERATOR Austin, Texas RECEIVER Robstown Texas, Texas

( ) 70 BBL VACUUM ( ) 130 BBL VACUUM (X) FLATBED/DROPDECK

( ) END DUMP ( ) DROP DECK (X) ROLL OFF ( ) VAN ( ) LTL

TIME SCHEDULE

	LOADING MILEAGE	DATE	TIME	CIRCLE ONE		UNLOADING MILEAGE	DATE	TIME	CIRCLE ONE
LEAVE YARD	263,541	3	2:30	AM PM	SCHEDULED ARRIVAL				AM PM
SCHEDULED ARRIVAL			8:30	AM PM	TIME ARRIVED				AM PM
TIME ARRIVED	263,734	23	6:30	AM PM	UNLOAD BEGAN				AM PM
LOADING BEGAN				AM PM	UNLOAD COMPLETE				AM PM
LOADING COMPLETED		94		AM PM	ARRIVED YARD				AM PM

DATE	STATE NAME	ROUTES TRAVELED	MILES IN STATE (E OR L)
3/23/98	Tx	77, 37, 410, 35	

DESCRIPTION OF WORK: Hazardous Waste

COMMENTS:

1/2 Per Trip

BOX # / TRLR# DROP LOCATION

#

BOX # / TRLR# PICKUP LOCATION

TDS 3134 Box Austin, Tx

BOX # / TRLR# RETURNED LOCATION

#

ENDING MILEAGE

BEGINNING MILEAGE 263,541

TOTAL TRIP MILES

SHIPPER'S SIGNATURE-CONFIRMS TIME IN PLANT

CONSIGNEE'S SIGNATURE-CONFIRMS TIME IN PLANT

DRIVER'S SIGNATURE Johnny R Cisneros

REVIEWED BY DISPATCH/DATE

WHITE - OFFICE GREEN - ACCOUNTING YELLOW - DISPATCH/RECEIVER PINK - GENERATOR BLUE - MILEAGE GOLD - DRIVER

American Ecology Transportation
(713)473-0047
ROLL OFF CONTAINER INSPECTION SHEET

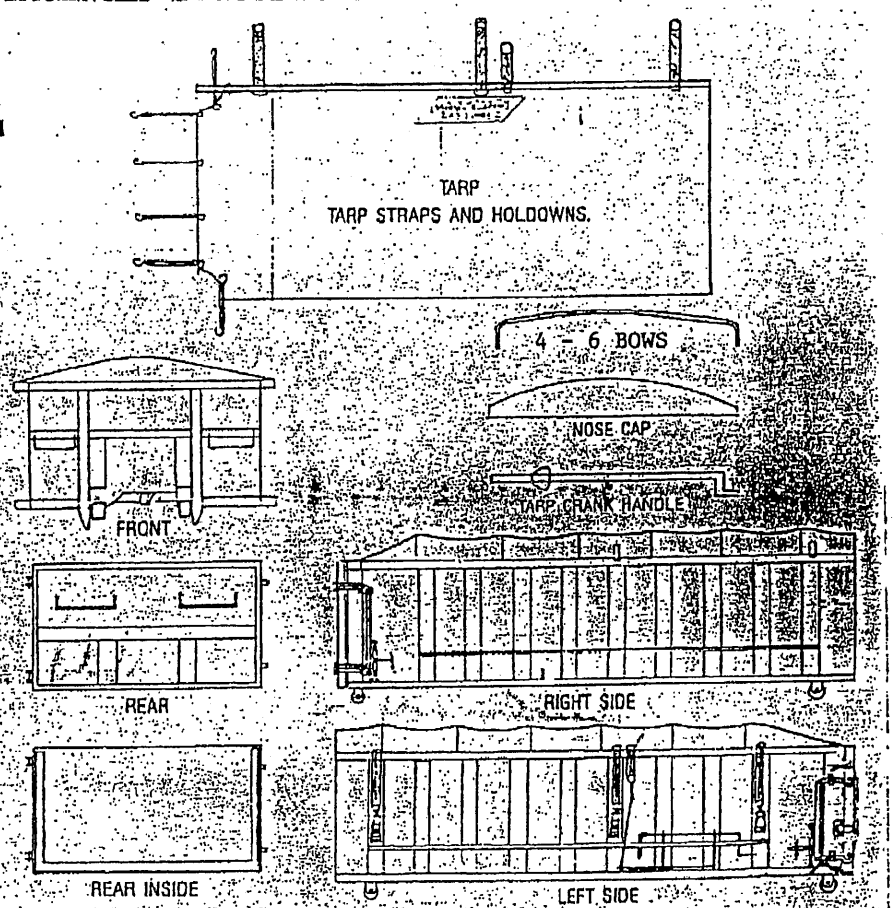
Drop ☐
Pick Up ☑

Customer Name: Pengke Logistics	Drop Location: / Pick Up Location: T.D.S.	City: Austin, TX	
Box #: T.D.S. Box 3134	Serial#:	Type: 25yd	
Condition of Container (CIRCLE ONE): CLEAN DIRTY ACCEPTABLE DAMAGED (if DAMAGED, complete following)			

DEFICIENCIES - IF ANY PLEASE COMMENT

	Acceptable	Damaged
Tarp	☑	☐
Right Side	☑	☐
Rear	☑	☐
Tail Gate Seal	☑	☐
T-Gate Hardware	☑	☐
Left Side	☑	☐
Tarp Hold Downs	☑	☐
Tarp Crank	☐	☐
All Wheels	☑	☐
Front	☑	☐
Nose Cone	☑	☐
Tarp Straps	☐	☐
Bows	☐	☐
Ratchet binders	☑	☐
Door Opens Correctly	☑	☐
Door Hinges	☑	☐
Binders Function Correctly	☑	☐
Door Security Chain	☑	☐
Hook condition	☑	☐
Other Hook-ups condition	☐	☐
Decals, Stickers, Numbers	☐	☐
Other		

LINER(circle one) Yes No



RENTAL CONDITIONS

1. All costs (unless special arrangements are made prior to shipment) for delivery and pickup, cleaning and rental, or any damages which may have occurred during the term of this Lease shall be the sole responsibility of the Lessee.
2. Lessee shall care for, control and be responsible for the container and accessories listed above the full term of Container Lease.
3. Lessee agrees to indemnify American Ecology Transportation against any losses, costs, damages, attorney's fees, or expenses of any kind of nature or other liabilities, resulting from or arising out of the use of above said container by Lessee or in condition with the Container Lease.

Customer Signature: [signature]		DATE: 3-23-98
Driver Signature: Johnny Cisneros	B.O.L# 303212	DATE: 3-23-98

forms/boxinsp.doc

WHITE: Office YELLOW: Accounting PINK: Customer GOLD: Shop

PTL 139

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION
P.O. Box 13087
Austin, Texas 78711-3087

TR# 832
WO# 00488

Please print or type. (Form designed for use on elite (12-pitch) typewriter.)

Form approved. OMB No. 2050-0039.

UNIFORM HAZARDOUS WASTE MANIFEST

1. Generator's US EPA ID No. T X P 4 9 0 2 8 0 0 2 4 | Manifest Document No. 2 5 7 2 6

2. Page 1 of 1

Information in the shaded areas is not required by Federal law.

3. Generator's Name and Mailing Address
Penske Logistics
P.O. Box 7635 Reading, PA 19603

4. Generator's Phone (610) 665-6268

A. State Manifest Document Number 01525726

B. State Generator's ID XXX11

5. Transporter 1 Company Name: American Ecology Transportation

6. US EPA ID Number: T X 0 0 0 0 6 9 4 4 8 9

C. State Transporter's ID 83050

D. Transporter's Phone 512-387-6096

7. Transporter 2 Company Name

8. US EPA ID Number

E. State Transporter's ID

F. Transporter's Phone

9. Designated Facility Name and Site Address
Texas Ecologists, Inc.
3½ miles south Petronila Rd
Robstown, TX 78380

10. US EPA ID Number: T X D 0 6 9 4 5 2 3 4 0

G. State Facility's ID 50052

H. Facility's Phone 512-387-3518

11A HM	11. US DOT Description (Including Proper Shipping Name, Hazard Class, ID Number and Packing Group)	12. Containers No.	Type	13. Total Quantity	14. Unit Wt/Vol	I. Waste No.
	a. Hazardous Waste Solid, NOS, NA3077, 9, III (D008)	001	CM	~~3~~	Y ~~P~~	ACMN319H
	b.					
	c.					
	d.					

J. Additional Descriptions for Materials Listed Above
TECO w/s# ~~09-004-2253~~
09-004-2535

K. Handling Codes for Wastes Listed Above
M111, M132

15. Special Handling Instructions and Additional Information

16. GENERATOR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packaged, marked, and labelled/placarded, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations, including applicable state regulations.
If I am a large quantity generator, I certify that I have a program in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment; OR, if I am a small quantity generator, I have made a good faith effort to minimize my waste generation and select the best waste management method that is available to me and that I can afford.

Printed/Typed Name: JASON SPIVEY | Signature | Month Day Year 03 23 98

17. Transporter 1 Acknowledgement of Receipt of Materials
Printed/Typed Name: JEWARD GONZALEZ | Signature | Date Month Day Year 03 23 98

18. Transporter 2 Acknowledgement of Receipt of Materials
Printed/Typed Name | Signature | Date Month Day Year

RECEIVED
MAY 19 1998
MARC E. ALTHEN

19. Discrepancy Indication Space
Teco wt.= 30340p

20. Facility Owner or Operator: Certification of receipt of hazardous materials covered by this manifest except as noted in Item 19.
Printed/Typed Name: Robert Martinez | Signature | Date Month Day Year 03 23 98

TNRCC-0311 (Rev 07/01/97) White - original Pink-TSD Facility Yellow-Transporter Green-Generator's first copy

PTL 140

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION
P.O. Box 13087
Austin, Texas 78711-3087

Please print or type. (Form designed for use on elite (12-pitch) typewriter.)

Form approved. OMB No. 2050-0039.

UNIFORM HAZARDOUS WASTE MANIFEST

1. Generator's US EPA ID No. | Manifest Document No.

2. Page 1 of 1

Information in the shaded areas is not required by Federal law.

3. Generator's Name and Mailing Address

[illegible]

4. Generator's Phone ([illegible]) [illegible]

A. State Manifest Document Number: 01525726

B. State Generator's ID: XXX11

5. Transporter 1 Company Name: [illegible]

6. US EPA ID Number

C. State Transporter's ID: 53050

D. Transporter's Phone: 512-357-5098

7. Transporter 2 Company Name

8. US EPA ID Number

E. State Transporter's ID

F. Transporter's Phone

9. Designated Facility Name and Site Address

[illegible]

10. US EPA ID Number

G. State Facility's ID: 50052

H. Facility's Phone: 512-387-3518

11A. HM	11. US DOT Description (Including Proper Shipping Name, Hazard Class, ID Number and Packing Group)	12. Containers No.	Type	13. Total Quantity	14. Unit Wt/Vol	I. Waste No.
	a. Hazardous Waste Solid, NOS, [illegible], III (D008)	[illegible]	[illegible]	[illegible]	?	ACMN319H
	b.					
	c.					
	d.					

J. Additional Descriptions for Materials Listed Above

TECO w/s# 09-004-2253

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GENERATOR

Printed/Typed Name | Signature | Month Day Year

TRANSPORTER

17. Transporter 1 Acknowledgement of Receipt of Materials | Date

Printed/Typed Name | Signature | Month Day Year

18. Transporter 2 Acknowledgement of Receipt of Materials | Date

Printed/Typed Name | Signature | Month Day Year

FACILITY

19. Discrepancy Indication Space

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Printed/Typed Name | Signature | Month Day Year

TNRCC-0311 (Rev. 07/01/97)

White - original Pink-TSD Facility Yellow-Transporter Green-Generator's first copy

PTL 141

American Ec[illegible]gy Transportation
131 N. Richey
Pasadena, TX 77506
(713) 473-0047

MANIFEST 01515726

SERVICE ORDER NUMBER

303[illegible]

CUSTOMER: [illegible] P.O. # RELEASE #

DATE: [illegible] TRAILER # [illegible] TRUCK # [illegible]

OPERATOR OR DRIVER [illegible] LABOR

GENERATOR [illegible] RECEIVER [illegible]

( ) 70 BBL VACUUM ( ) 130 BBL VACUUM ( ) FLATBED/DROPDECK

( ) END DUMP ( ) DROP DECK (✓) ROLL OFF ( ) VAN ( ) LTL

TIME SCHEDULE

	LOADING MILEAGE	DATE	TIME	CIRCLE ONE		UNLOADING MILEAGE	DATE	TIME	CIRCLE ONE
LEAVE YARD	[illegible]	[illegible]	[illegible]	AM PM	SCHEDULED ARRIVAL				AM PM
SCHEDULED ARRIVAL				AM PM	TIME ARRIVED				AM PM
TIME ARRIVED	[illegible]	[illegible]	[illegible]	AM PM	UNLOAD BEGAN				AM PM
LOADING BEGAN		[illegible]		AM PM	UNLOAD COMPLETE				AM PM
LOADING COMPLETED		[illegible]		AM PM	ARRIVED YARD				AM PM

DATE	STATE NAME	ROUTES TRAVELED	MILES IN STATE (E OR L)
[illegible]	[illegible]	[illegible]	1[illegible]

DESCRIPTION OF WORK:

COMMENTS:

[illegible]

BOX # / TRLR# DROP LOCATION

#

BOX # / TRLR# PICKUP LOCATION

[illegible]

BOX # / TRLR# RETURNED LOCATION

#

ENDING MILEAGE

BEGINNING MILEAGE [illegible]

TOTAL TRIP MILES

SHIPPER'S SIGNATURE-CONFIRMS TIME IN PLANT

CONSIGNEE'S SIGNATURE-CONFIRMS TIME IN PLANT

DRIVER'S SIGNATURE [illegible]

REVIEWED BY DISPATCH/DATE

WHITE - OFFICE GREEN - ACCOUNTING YELLOW - DISPATCH/RECEIVER PINK - GENERATOR BLUE - MILEAGE GOLD - DRIVER

PTL 142

American Ecology Transportation
(713)473-0047

ROLL OFF CONTAINER INSPECTION SHEET

Drop ☐
Pick Up ☑

Drop Location:

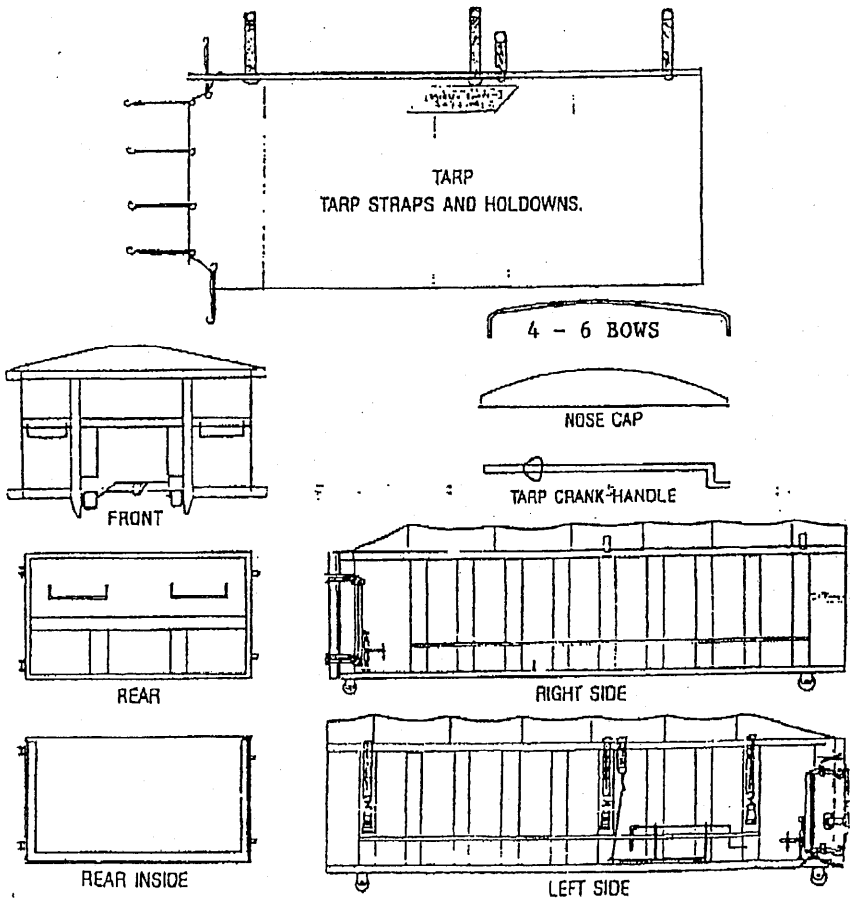
Customer Name: Remke-Logicatte	Pick Up Location: TX. Disposal System	City: Austin Tx.
Box #: 3077	Serial#: 3077	Type: 30[illegible]
Condition of Container (CIRCLE ONE): CLEAN DIRTY (ACCEPTABLE) DAMAGED (if DAMAGED, complete following)		

DEFICIENCIES - IF ANY PLEASE COMMENT

	Acceptable	Damaged
Tarp	☑	☐
Right Side	☑	☐
Rear	☑	☐
Tail Gate Seal	☐	☐
T-Gate Hardware	☐	☐
Left Side	☑	☐
Tarp Hold Downs	☑	☐
Tarp Crank	☐	☐
All Wheels	☐	☐
Front	☑	☐
Nose Cone	☑	☐
Tarp Straps	☑	☐
Bows	☐	☐
Ratchet binders	☐	☐
Door Opens Correctly	☑	☐
Door Hinges	☑	☐
Binders Function Correctly	☐	☐
Door Security Chain	☐	☐
Hook condition	☑	☐
Other Hook-ups condition	☐	☐
Decals, Stickers, Numbers	☑	☐

Other _____

LINER(circle one) (Yes) No



RENTAL CONDITIONS

1. All costs (unless special arrangements are made prior to shipment) for delivery and pickup, cleaning and rental, or any damages which may have occurred during the term of this Lease shall be the sole responsibility of the Lessee.
2. Lessee shall care for, control and be responsible for the container and accessories listed above the full term of Container Lease.
3. Lessee agrees to indemnify American Ecology Transportation against any losses, costs, damages, attorney's fees, or expenses of any kind of nature or other liabilities, resulting from or arising out of the use of above said container by Lessee or in condition with the Container Lease.

Customer Signature: [signature]		DATE: 3.23.98
Driver Signature: [signature]	B.O.L# 303544	DATE: 3-23-98

forms/boxinsp.doc

WHITE: Office YELLOW: Accounting PINK: Customer GOLD: Shop

TNRCC

Texas Natural Resource Conservation Commission
Municipal Solid Waste Division
Inspection Report: Landfill

Inspection Date: *April 29, 1998*	*Time:* *9:00 am*
Pictures Taken? *Yes / No*	*Copy To:* *Ground Water / Permit*

Permit: MSW- 2123	Type: I	Region: 11	County Name: Travis

Permittee/Business Name:	Texas Disposal Systems Landfill, Inc.
Responsible Person:	Bob Gregory
Mailing Address:	P.O. Box 17126, Austin, TX 78760-7126
Operation Description:	Below and Above Ground
Primary Contact(s):	Bob Gregory
Telephone Number(s):	(512) 421-1300
Person(s) Contacted:	Jim Gregory
Person(s) Participating:	Bob Gregory, Jim Gregory, Dennis Hobbs and Lisa Lerma
RCC Representative(s):	Ben E. Milford
Site Address:	3 Mi. East of IH-35 on North Side FM-1327

Purpose of Inspection: Routine Comprehensive

X	Routine		Central Office Follow Up
	Complaint		Court Order
	Pre Closure		Post Closure
	Regional Follow Up		Technical Support/Other

Next Inspection: April 1999

Last Inspection: August 21, 1997

Weather: Clear 85°

INSPECTION RESULTS

No.	ARTICLE	DESCRIPTION	N/A	Yes	No*
1.	330.4	Permit Required		x	
2.	330.5	General Prohibitions		x	
3.	330.7(a)-(c)	Deed Rcrd, Proof, Final		x	
4.	330.8	Notification		x	
5.	330.9	Financial Assurance		x	
6.	330.10(a)-(b)	Closure		x	
7.	330.111	Site Operation & Records		x	
8.	330.113(a)	Record-Keeping Req.		x	

No.	ARTICLE	DESCRIPTION	N/A	Yes	No*
9.	330.114	Site Operating Plan		x	
10.	330.115	Fire Protection		x	
11.	330.116	Access Control		x	
12.	330.117(a)	Internal Control		x	
13.	330.117(b)	Waste in Unauth. Area		x	
14.	330.117(c)	Prohibited Wastes		x	
15.	330.117(e)	Unauth. Waste/BC&D		x	
16.	330.117(f)	Type 4/Written Proced.		x	
17.	330.135	Type 4/Encl. Container		x	

No.	ARTICLE	DESCRIPTION	N/A	Yes	No*
18.	330.117(h)	Type 4/Sign/Rules		x	
19.	330.118	Operation Hours		x	
20.	330.119	Site Sign		x	
21.	330.120	Windblown Material		x	
22.	330.120(2)	Internal Litter Control		x	
23.	330.121(a)	Easements Protected		x	
24.	330.121(b)	Buffer Zone Protected		x	
25.	330.122	Markers/Benchmark		x	
26.	330.123	Litter Along Access Rd.		x	
27.	330.124(a)	Bulky/Large Item Area		x	
28.	330.125(a)	Air Criteria		x	
29.	330.125(b)	Ponded Water Odor		x	
30.	330.126	Vector Control		x	
31.	330.127(a)	All Weather Access Rd.		x	
32.	330.127(b)	Dust Controlled		x	
33.	330.127(c)	Access Roads Maint.		x	
34.	330.128	Salvaging/Scavenging		x	
35.	330.130	Landfill Gas Control		x	
36.	330.131	Abandoned Wells		x	
37.	330.132	Compaction		x	

No.	ARTICLE	DESCRIPTION	N/A	Yes	No*
38.	330.133(a,d)	Daily Cover/ADC		x	
39.	330.133(b)	Intermediate Cover		x	
40.	330.133(e)	Final Cover Construc.		x	
41.	330.133(f)	Erosion Repaired		x	
42.	330.133(g)	Cover Log		x	
43.	330.134	Ponded Water		x	
44.	330.136(a)	Special Wastes/Apprv.		x	
45.	330.136(b)	Special Wste./Handled		x	
46.	330.137	Industrial Waste		x	
47.	330.138	Screening		x	
48.	330.139	TNRCC Discharge		x	
49.	330.206	Liner Approved		x	
50.	330.206(d)	Apprv. Liner Markers		x	
51.	330.206(e)	Protect. Liner Intact		x	
52.	330.231	GW Monit. System		x	
53.	330.234	Detection Monitoring		x	
54.	330.242	Well Construction		x	
55.	26.121(a)	All Discharges		x	
56.	26.121(a)(3)	Other Activities		x	

*No - A check in this column denotes a violation and must have a comment below.

Violation Number	Comments
	No violations were noted during the inspection.

Permittee/Business Name: Texas Disposal Systems Landfill, Inc.

Permit No. MSW- 2123

General Inspection Description:

NOTIFICATION:
On April 22, 1998, I contacted Jim Gregory and informed him of our intent to conduct an inspection at the TDS Landfill. The inspection was scheduled for April 29, 1998, at 9:00 am.

COMMENTS:
Daily volume at the site is approximately 1500 to 1800 tons per day. Approximately 750 tons per day (30 loads) are coming from San Antonio.

The trailer tipper was being used at the time of this inspection. The tractor and trailer backs onto the tipper, the tractor disconnects from the trailer and the tipper lifts the trailer into the air and dumps the waste into or near the working face. Mr. Gregory reported that the tipper is being used to help speed up the unloading of the transport trucks coming from San Antonio.

On October 9, 1997, a Penske Logistics tractor-trailer had an accident in Buda. In the attempt to upright the trailer the side of the trailer gave way and the contents of the trailer, mostly television picture tubes, spilled onto the roadway. After several truck loads of the spill material was taken to TDS for disposal, Penske Spill Coordinator notified the TNRCC Region 11 office that if broken, the picture tubes would be a hazardous waste. (The tubes were considered hazardous for lead.) The regional office notified TDS who immediately stopped disposing of this material in the landfill and started storing the spill waste in roll-off containers. (The tubes that were unloaded in the landfill were commingled with waste from routine operations.) The portion of the landfill where the television tubes were located was sectioned off and the daily fill operations were relocated to another portion of the landfill. On January 13, 1998, TDS hired an contractor to determine how many picture tubes were in the roll-off containers so they could determine how many picture tubes were in the landfill. It was determined that of the 1248 picture tubes originally on the truck, 226 were in the landfill. TDS later pushed and consolidated the waste within the waste cell and had it surveyed to document the exact location. Penske later disposed of the waste stored in the roll-off containers at a hazardous waste facility. The TNRCC allowed the spill waste that was inadvertently deposited in the landfill to remain there.

During the inspection no violations were alleged. See general compliance letter attached.

TNRCC Representative's Signature: Ben E. Maynard Date: 5-21-98

Approved By: Chris Smith Date: 5/21/98

E-mailed to SPOOTOH 6-17-98

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION
Oil or Hazardous Substances Spill or Discharge Report

DISCHARGE OR SPILL:

Start Date:	10/9/97	Time:	13:00
End Date:	10/9/97	Time:	13:30

Reported by: Charlie Smith

Representing: Penske Truck Leasing Co.

Phone No. (610) 775-6327 Ext.

Phone No. Ext.

TNRCC NOTIFICATION:

Date:	10/13/97	Time:	16:30

Region/Aus.(00): 11

Coordinator: Ben E. Milford

MATERIAL SPILLED:

Desc. Cathode Ray Tubes

Material Code

AMOUNT SPILLED:

Amount 250 ○ bbl ○ gal ◉ yd3 ○ lbs

CLASSIFICATION:

- ○ 001 Oil - Major >240B/10,000G
- ○ 002 Oil - Medium >24B/1,000G
- ○ 003 Oil - Minor <24B/1,000G
- ○ 004 Hazmat - Major
- ◉ 005 Hazmat- Minor
- ○ 006 Other Substance
- ○ SARA Title III

LOCATION:

Description: Exit 221 South IH-35 at Buda

Lat. Long. Reg. No. 11 *Austin*

County: Hays Code: 105

Media Effected: L A=Air, L=Land, W=Water

RECEIVING WATER:

Desc. None

Basin Name: Colorado

Segment No. 1427 ☐ Air Release?

Amount in Water: None ○ bbl ○ gal ○ yd3 ○ lbs

RESPONSIBLE PARTY:

Permit/Reg/Acct #: n/a

EPA Number: n/a

Resp. Party: Penske Truck Leasing Co.

Address: P. O. Box 7635

City: Reading State: PA Zip: 19603

Phone No. (610) 775-6442 Ext

Contact Name: Mark Althen

Phone No. (610) 775-6442 Ext

ORIGIN:

- ○ 001 Fixed Site -Inland
- ○ 002 Fixed Site -Marine
- ○ 003 Pipeline
- ○ 004 Marine Vehicle
- ○ 005 Highway Vehicle
- ○ 006 Rail Vehicle
- ○ 007 Other

CAUSE:

- ○ 001 Corrosion
- ○ 002 Equipment Failure
- ◉ 003 Human Error
- ○ 004 Vandalism
- ○ 005 Intentional Discharge
- ○ 006 Act of God
- ○ 007 Other

☐ Interim Report ☒ Final Report

Notes/Description:

A traffic accident caused a tractor and trailer to overturn spilling a load of cathode ray tubes. The broken tubes were reported by Penske to be a hazardous waste. Penske Trucking called Code 3, a haz-mat company, who removed the spilled material from the roadway and ditch, and stored the debris at Texas Disposal Systems Landfill, which is near the spill site. Before the landfill was notified that the picture tubes were a hazardous waste, 226 of the 1248 tubes were land filled. The TNRCC allowed them to remain in the landfill.

Reports/Actions Being Taken:

The waste material which was stored at the landfill has been disposed of at Texas Ecologist Inc. in Robstown, TX. See manifests attached to this report.

CLEANUP:

- (●) 001 Complete
- ( ) 002 Underway
- ( ) 003 Inadequate
- ( ) 004 Letter Req.
- ( ) 005 Referred to Enf.
- ( ) 006 State-funded
- ( ) 007 None

Date of letter/report req: from RP: _____

Date referred to Enforcement: _____

Date of state-funded resp. action: _____

Anticipated Remed Comp. Date: _____

Date letter/report received: 5/26/98

Cleanup Requested

- ( ) RRR Std 1
- ( ) RRR Std 2
- ( ) RRR Std 3

INSPECTED BY (JURISDICTION)/TECHNICAL ASSISTANCE BY:

Agency	Investigator	Date
TNRCC	Milford	10/9/97
Hays Co. Fire M	Gonzalez	10/9/97

OTHERS NOTIFIED:

Agency	Date	Person Notified	Person Making Notification
TxDOT	10/9/97	Gene Stabeno	n/a

Air Program notified? ___

Additional comments, correspondence, photographs, etc. should be attached to the printed form.

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION
P.O. Box 13087
Austin, Texas 78711-3087

RECEIVED
MAY 26 1998
TR#819
WO#00455

Print or type. (Form designed for use on elite (12-pitch) typewriter.) Form approved. OMB No. 2050-0039.

UNIFORM HAZARDOUS WASTE MANIFEST	1. Generator's US EPA ID No. T·X·P·4·9·0·2·8·0·0·2·4	Manifest Document No. 2 5 7 7	2. Page 1 of 1	Information in the shaded areas is not required by Federal law

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Penske Logistics
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4. Generator's Phone (610) 665-6268

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C. State Transporter's ID
D. Transporter's Phone 512-387-6096
E. State Transporter's ID
F. Transporter's Phone
G. State Facility's ID
H. Facility's Phone 512-387-5548

5. Transporter 1 Company Name: American Ecology Transportation
6. US EPA ID Number: T·X·0·0·0·6·9·4·4·8·9
7. Transporter 2 Company Name
8. US EPA ID Number

9. Designated Facility Name and Site Address
Texas Ecologists, Inc.
3½ miles south Petronila Rd
Robstown, TX 78380
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	b.					
	c.					
	d.					

J. Additional Descriptions for Materials Listed Above
TECO WT: 09-004-753

K. Handling Codes for Wastes Listed Above
MEDT - MT8

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Printed/Typed Name: Jason Spivey | Signature | Month Day Year: 05 21 98

17. Transporter 1 Acknowledgement of Receipt of Materials
Printed/Typed Name: Johnny Cisneros | Signature | Month Day Year: 05 21 98

18. Transporter 2 Acknowledgement of Receipt of Materials
Printed/Typed Name | Signature | Month Day Year

19. Discrepancy Indication Space
Teco wt = 29120 p

RECEIVED
MAY 19 1998
HARLEY ALTHEN

20. Facility Owner or Operator: Certification of receipt of hazardous materials covered by this manifest except as noted

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CONSERVATION COMMISSION
P.O. Box 13087
Austin, Texas 78711-3087

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6. US EPA ID Number: T X 0 0 0 0 6 9 4 4 8 9
7. Transporter 2 Company Name
8. US EPA ID Number
E. State Transporter's ID
F. Transporter's Phone

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Robstown, TX 78380
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09-004-2535

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M111, M132

15. Special Handling Instructions and Additional Information

16. GENERATOR'S CERTIFICATION: I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packaged, marked, and labelled/placarded, and are in all respects in proper condition for transport by highway according to applicable international and national government regulations, including applicable state regulations.
If I am a large quantity generator, I certify that I have a program in place to reduce the volume and toxicity of waste generated to the degree I have determined to be economically practicable and that I have selected the practicable method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment; OR, if I am a small quantity generator, I have made a good faith effort to minimize my waste generation and select the best waste management method that is available to me and that I can afford.

Printed/Typed Name: JASON SPIVEY | Signature: [signature] | Month Day Year: 03 23 98

17. Transporter 1 Acknowledgement of Receipt of Materials
Printed/Typed Name: JENARO GONZALEZ | Signature: [signature] | Month Day Year: ~~03 23 98~~ | Date

18. Transporter 2 Acknowledgement of Receipt of Materials
Printed/Typed Name | Signature | Month Day Year | Date

RECEIVED
MAY 19 1998
MARC E. ALTHEN

19. Discrepancy Indication Space
Teco wt. = 30340p

20. Facility Owner or Operator: Certification of receipt of hazardous materials covered by this manifest except as noted in Item 19
Printed/Typed Name | Signature | Month Day Year | Date

TEXAS DISPOSAL SYSTEMS, INC.- - -TEXAS DISPOSAL SYSTEMS LANDFILL, INC.
P.O. Box 17126
Austin, TX 78760-7126
(512) 243-4100 Office
(512) 243-4123 Fax

FACSIMILE
TRANSMISSION MEMORANDUM

DATE: 1/28/98

NUMBER OF PAGES TRANSMITTED: 3 (including cover)

MESSAGE IS FOR: Jerry Bolner

MESSAGE IS FROM: Gary Newton

FAX NO. CALLED: 739-6000

REGARDING: Please call me when you have reviewed the letter.

Thanks,
Gary

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone (collect) and return the original message to us at the above address via the U.S. Postal Service. Thank you.

DEPOSITION EXHIBIT
125
Newton

PENSKE LETTERHEAD

January __, 1998

Mr. Gerald Bolmer
Waste Evaluation Section
MC-129
Texas Natural Resource Conservation Commission
PO Box 13087
Austin, TX 78701

Dear Sir:

One of our trucks was recently, through no fault of our own, involved in an accident on IH-35 near Buda, Texas. The truck was transporting 1,248 new Zenith television picture tubes with attached steel bands, numerous plastic pallets and associated packaging material. The accident closed off traffic on the southbound IH-35 access road. During the cleanup, emergency response personnel sent a portion of the damaged load to the nearby Texas Disposal Systems Landfill, Inc. Type I municipal solid waste landfill. Approximately 226 of these television picture tubes had been placed in the TDSL landfill working face, before TDSL officials were notified by Penske that these picture tubes should be sent to another facility for final disposition. Penske has applied for and received the appropriate waste code for the television picture tubes to be transported. The approximate 226 television picture tubes disposed at TDSL are ordinary television tubes which are substantially the same as most brands of tubes that come to TDSL from households. By this letter, Penske is seeking a one time only approval to leave the television picture tubes in the TDSL working face for final disposition. Penske believes the remaining steel bands, plastic pallets, and packaging material, which has been separated from the television picture tubes, is

also appropriate to dispose at TDSL as a Class 2 or 3 nonhazardous industrial waste. TDSL is authorized to accept this material per Permit MSW-2123, Page 12-39, Section D-7. We are requesting confirmation that this material may be disposed at TDSL as well as the television picture tubes already disposed at the working face. The picture tubes are considered to be a Class I industrial solid waste under 30 TAC 330.2. No special precautionary measures or contingency plans are required for fulfilling this request. I appreciate your urgent consideration of this request.

If you have any questions please contact me at (610) 775-6442.

Sincerely,

Marc E. Althen
Vice President
Environmental Services

cc: Chris Smith, TNRCC Region 11
Wayne Koprowski, Zenith Legal Department
Tim Herman, Texas Disposal Systems Landfill, Inc.

Attachment

TEXAS DISPOSAL SYSTEMS

TEXAS DISPOSAL SYSTEMS, INC. • TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

PO.BOX 17126
AUSTIN, TEXAS 78760-7126
512 243-4100
512 243-4123 (FAX)

February 3, 1998

Mr. Robert T. Traub, Esquire
Penske Truck Leasing Company
P. O. Box 563
Reading, PA 19603

Dear Mr. Traub:

We look forward to resolving the issues surrounding the Zenith television tubes in our facility. As you know our first choice is for Penske to bear the cost to completely excavate the television tubes from the landfill and have them removed from our facility. Since it has been your position that this is not an acceptable option to Penske, Texas Disposal Systems Landfill, Inc. (TDSL) has worked with Penske to satisfy the TNRCC and satisfy ourselves that we are willing to consider leaving the tubes in place in the landfill. Only recently have we learned the exact amount of television tubes placed in the landfill and received copies of Penske's correspondence to governmental agencies related to this accident. Now it appears that the TNRCC is willing to allow the tubes to remain in the TDSL landfill without further testing. As you know, this entire controversy began when Penske self classified the materials as inappropriate for the TDSL landfill *after* it was already disposed in the facility. This act by Penske continues to adversely impact TDSL.

Several action items need to be completed before this matter can be settled. It is imperative that TDSL be allowed to return to normal operations within the next few days. It is becoming much more expensive for TDSL to stay away from the area of the landfill with the disposed Zenith materials. TDSL must know by Friday, February 6, 1998, whether Penske will remove the materials from the landfill or cooperate with TDSL to gain all the proper approval to leave the Zenith material in the landfill and allow TDSL to resume normal site operations. The following description summarizes these action items:

1. Penske must send a written request to the Texas Natural Resource Conservation Commission (TNRCC) for permission to permanently dispose of the television tubes already placed in the landfill along with the packaging and shipping material currently stored in roll-off boxes at the TDSL site. TDSL must receive a copy of a TNRCC written approval letter, responding to the Penske letter, before we can finally accept the materials disposed October 9, 1997, and dispose of remaining materials appropriate for our landfill. TDSL has drafted the attached request to send the TNRCC on Penske letterhead. If Penske wishes to make changes to the draft letter, these changes must be reviewed by TDSL before being sent to the TNRCC by Penske.

EXHIBIT 59
Renee DeYoung

C:\LOTSUITE\WORDPRO\DOCS\TIM\PENSKETR\LTFEB3

2. The remaining television tubes stored in roll-off boxes at TDSL must be manifested and shipped to an authorized facility for final disposal.
3. Penske must settle the attached summary of costs TDSL is demanding from Penske.
4. Acceptable releases of liability in favor of TDSL, Penske and Zenith must be approved by each party.
5. Additionally, other supporting letters or documentation as required during the completion of Items 1 through 4 must be provided by each party.

It is TDSL's position that Items 1 and 2 can be resolved before resolving the remaining issues 3 through 5. However, one way or the other, TDSL must be able to resume normal operations. We continue to encourage you to visit our site and see for yourself the serious ramifications to TDSL, Penske, and Zenith if TDSL operations are not allowed to return to normal operations soon. To further delay Items 1 and 2 simply increases TDSL costs and therefore the claims against Penske and Zenith. If the parties cannot settle the amount of damages then TDSL will pursue its available legal remedies quickly and vigorously. If we are forced to litigate this matter we will seek to recover additional substantial costs which will be incurred under Items 7 and 8 on the attached cost itemizations. These items deal partly with the operations and public relations costs associated with a lengthy, and public, litigation process.

If you have any questions or comments, please call me at (512) 243-4100.

Sincerely,

Tim J. Herman

Tim J. Herman
Executive Vice-President

TJH/ad
Attachments
cc: Marc Althen, Penske Truck Leasing Company
Wayne Koprowski, Zenith Electronics Corporation

PENSKE LETTERHEAD

January __, 1998

Mr. Gerald Bolmer
Waste Evaluation Section
MC-129
Texas Natural Resource Conservation Commission
PO Box 13087
Austin, TX 78701

Dear Sir:

One of our trucks was recently, through no fault of our own, involved in an accident on IH-35 near Buda, Texas. The truck was transporting 1,248 new Zenith television picture tubes with attached steel bands, numerous plastic pallets and associated packaging material. The accident closed off traffic on the southbound IH-35 access road. During the cleanup, emergency response personnel sent a portion of the damaged load to the nearby Texas Disposal Systems Landfill, Inc. Type I municipal solid waste landfill. Approximately 226 of these television picture tubes had been placed in the TDSL landfill working face before TDSL officials were notified by Penske that these picture tubes should be sent to another facility for final disposition. Penske has applied for and received the appropriate waste code for the remaining 1,022 television picture tubes to be transported. The approximate 226 television picture tubes disposed at TDSL are ordinary television tubes which are substantially the same as most brands of tubes that come to TDSL from households. By this letter, Penske is seeking a one time only approval to leave the television picture tubes in the TDSL working face for final disposition. Penske believes the remaining steel bands, plastic pallets, and packaging material, which has been separated from the

television picture tubes, is also appropriate to dispose at TDSL as a Class 2 or 3 nonhazardous industrial waste. TDSL is authorized to accept this material per Permit MSW-2123, Page 12-39, Section D-7. We are requesting confirmation that this material may be disposed at TDSL as well as the television picture tubes already disposed at the working face. The picture tubes are considered to be a Class I industrial solid waste under 30 TAC 330.2. No special precautionary measures or contingency plans are required for fulfilling this request. I appreciate your urgent consideration of this request.

If you have any questions please contact me at (610) 775-6442.

Sincerely,

Marc E. Althen
Vice-President
Environmental Services

cc: Chris Smith, TNRCC Region 11
Wayne Koprowski, Zenith Legal Department
Tim Herman, Texas Disposal Systems Landfill, Inc.

Attachment

January 29, 1998

Itemized TDSL costs and charges related to the October 9, 1997, Penske truck accident which involved the handling and disposal of Zenith television tubes and packing materials at the TDSL landfill:

1. Construction costs and lost landfill capacity related to the placement of approximately 700 feet of landfill toe berms necessary to build up around the area that received the Zenith materials as the landfill has continued operations (See Attached Photos)	$ 64,314.00
2. Additional equipment cost required for six week rental of equipment to push solid waste down the bermed area filled around the area of the landfill with the Zenith materials. The additional distance to push the waste is caused by the buildup of the TDSL landfill over the period of time since the Zenith material was disposed in the area, October 9, 1997. The equipment rental cost will be $8,250 and the equipment operating cost is $9,936.	$ 18,186.00
3. TDSL management and consulting charges at executive and legal hourly rate of $187.50 x 300 hours. Approximately 300 hours have been spent on this project through January 20, 1998.	$ 66,250.00
4. Cost for increased operating expenses of the landfill and use of landfill wet weather area, as a result of limited working area caused by working around the area of the landfill containing the Penske materials	$ 94,210.00
5. Hauling and handling cost of materials from Penske accident:	
a) Disposal charges on loads delivered to TDSL directly from Penske accident site and disposed by third parties 10/9/97	$ 534.00
b) TDS truck and hauling charges related to the cleanup of the accident site 10/9/97 (8.125 hours x 2 trucks)	$ 1,950.00
c) TDS roll off container special handling and storage of materials from Penske accident from 10/9/97 to 1/28/98 (7 roll off boxes since 10/9/97, 3 roll off boxes since 1/20/98 and 5 hours truck time)	$ 2,500.00
d) Plastic and tarps to cover roll off loads of Penske materials (14 tarps)	$ 379.00
e) Construction of wind break and set up of storage area for Code 3	$ 100.00
f) Handling of rolloff boxes, on-site supervision and assistance during Code 3 separation of materials (20 hours TDSL supervisor and 4 hours truck time)	$ 1,017.50
g) TDSL charges for the disposal of nonhazardous materials separated by Code 3 (8 roll off loads and 4 hours truck time)	$ 1,951.50
h) Charges for transporting 2 roll off boxes to Corpus Christi, Texas	$ 1,600.00
SUBTOTAL	$252,992.00

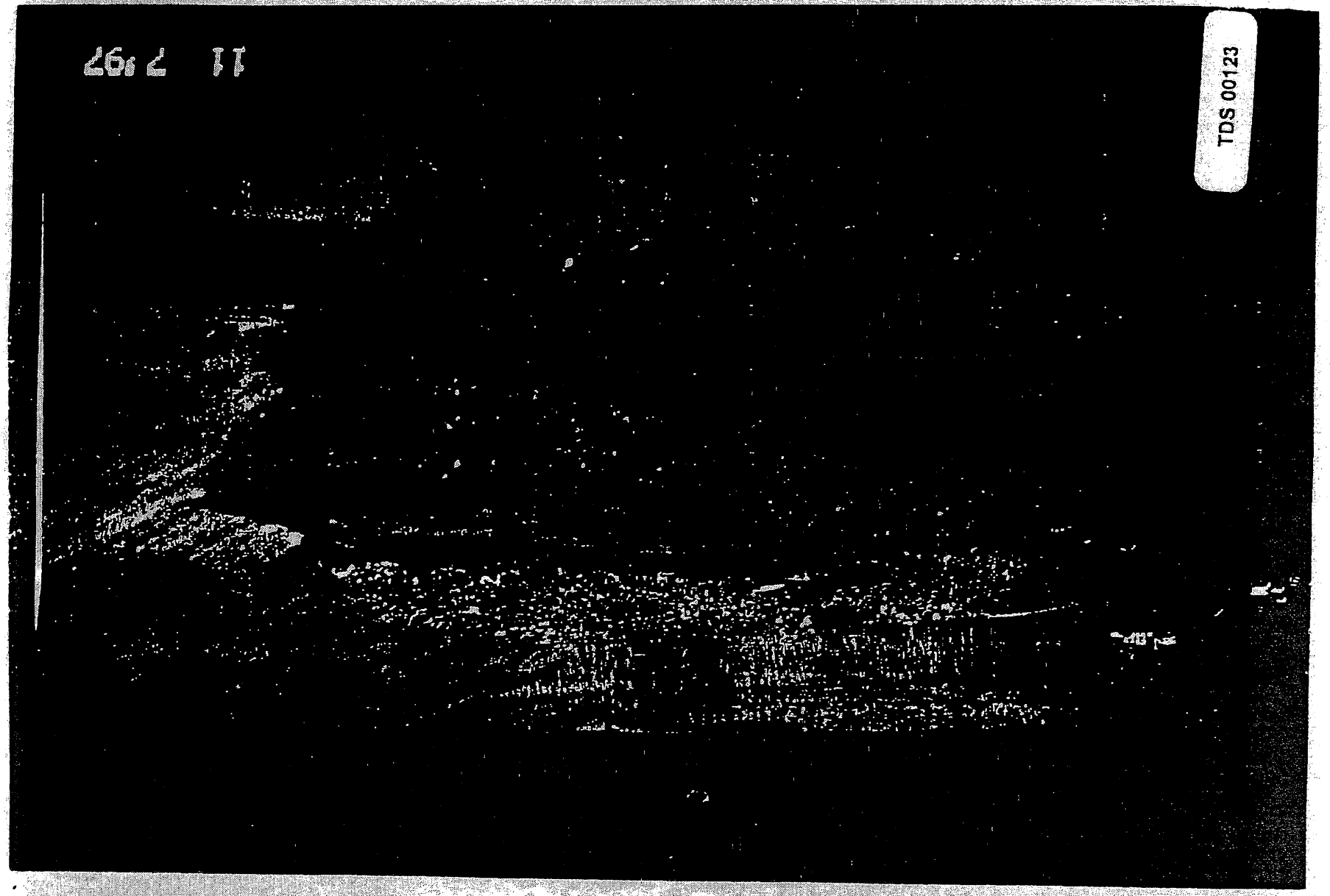
TDS 00119

6.	TDSL anticipates at least an equal amount of management and consulting time to be used as charged in item 3 above to be spent managing this issue and dealing with the certain environmental compliance and landfill integrity issues brought up in landfill environmental reviews and litigation in the future.	$ 66,250.00
	SUBTOTAL	$319,242.00
7.	Costs for future community and customer relations due to incident	$? .00
8.	Daily charge for not being able to utilize the landfill airspace over the Penske material disposed in the landfill on 10/9/97	$? .00
	TOTAL	$? .00

TDS 00120

TDS 00121

Jan 1 '97
TDS 00122



TDS 00123

ROBERT T. TRAUB
COUNSEL

February 6, 1998

VIA FACSIMILE

Tim Herman, Executive Vice-President
Texas Disposal Systems
P.O. Box 17126
Austin, TX 78760-7126

Dear Mr. Herman:

This letter is in response to your letter of February 3, 1998, and is being provided for settlement negotiations only. We continue to be willing to resolve all of the outstanding issues with respect to the picture tubes currently at your landfill. I have reviewed your letter with Marc Althen and the following represent our responses to your numbered paragraphs:

1. Penske agrees to send the written request to the Texas Natural Resource Conservation Commission ("TNRCC") for permission to permanently dispose of the television tubes already in place at the landfill. Attached are our comments and revisions to the proposed letter;

2. The television tubes currently in the roll-off boxes can be shipped to an authorized facility as soon as you allow us to do so;

3. Penske is prepared to pay $80,000.00 to Texas Disposal Systems to resolve our alleged responsibility with respect to the picture tubes at your landfill. Our offer is based upon our desire to pay a reasonable portion of the expenses incurred by you, with the recognition that you must bear a portion of the expenses due to your actions in allowing the material to be sent to your landfill. As we have told you previously, we will not settle for the amounts continually requested by you, and we are prepared to fully litigate this matter if you are unwilling to substantially reduce your demand and agree to accept the reasonable amount we are offering.

DEPOSITION EXHIBIT
110
6-26-03 KR

TDS 00203

PENSKE TRUCK LEASING CO. / ROUTE 10 GREEN HILLS / P.O. BOX 563 / READING, PA 19603
TELEPHONE: 610-775-6293 / FAX: 610-775-6330

If TDS truly desires to resolve this matter short of litigation, then you will need to move substantially from the total amount you are demanding (which is an increase of almost $28,000 over your prior demand). For example, we simply cannot agree to compensate TDS for the alleged costs related to management and consulting time ($132,500.00). These alleged costs relate to work done by officers and employees of TDS. Many individuals at Penske (including Marc Althen and myself) have spent a like amount of time working on this matter. We have not reduced our settlement offer by the cost representing our time, as we believe that demanding compensation for such time is inappropriate.

Lastly, we will not address the arguments regarding "customer relations" and "landfill air space" addressed in your letter since we believe these claims to be tenuous at best.

Please provide us with a response as soon as possible so that we can hopefully begin the process as outlined in Paragraphs 1 and 2 of your letter.

If you have any questions, please feel free to call.

Very truly yours,

Robert T. Traub

Robert T. Traub

RTT/lmb

Attachment

cc: Marc Althen (via fax)
Wayne M. Koprowski, Esquire (via fax)(w/enc.)

PENSKE LETTERHEAD

January __, 1998

Mr. Gerald Bolmer
Waste Evaluation Section
MC-129
Texas Natural Resource Conservation Commission
PO Box 13087
Austin, TX 78701

Dear Sir:

As you may or may not know, one of our vehicles. ~~One of our trucks~~ was recently, through no fault of our own, involved in an accident on IH-35 near Buda, Texas. The truck was transporting 1,248 new Zenith television picture tubes with attached steel bands, numerous plastic pallets and associated packaging material. The accident closed off traffic on the southbound IH-35 access road. During the cleanup, emergency response personnel sent a portion of the damaged load to the nearby Texas Disposal Systems Landfill, Inc. Type I municipal solid waste landfill. Approximately 226 of these television picture tubes had been placed in the TDSL landfill working face before TDSL officials became aware ~~were notified by Penske~~ that these picture tubes should be sent to another facility for final disposition. Penske has applied for and received the appropriate waste code for the remaining 1,022 television picture tubes to be transported. The approximate 226 television picture tubes disposed at TDSL are ordinary television tubes which are substantially the same as most brands of tubes that come to TDSL from households. By this letter, we are ~~Penske is~~ seeking a one time only approval to leave the television picture tubes in the TDSL working face for final disposition. Penske believes the remaining steel bands, plastic pallets, and packaging material, which has been separated from the

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television picture tubes, is also appropriate to dispose at TDSL as a Class 2 or 3 nonhazardous industrial waste. TDSL is authorized to accept this material per Permit MSW-2123, Page 12-39, Section D-7. We are requesting confirmation that this material may be disposed at TDSL as well as the television picture tubes already disposed at the working face. The picture tubes are considered to be a Class I industrial solid waste under 30 TAC 330.2. No special precautionary measures or contingency plans are required for fulfilling this request. I appreciate your urgent consideration of this request.

If you have any questions please contact me at (610) 775-6442.

Sincerely,

Marc E. Althen
Vice-President
Environmental Services

cc: Chris Smith, TNRCC Region 11
Wayne Koprowski, Zenith Legal Department
Tim Herman, Texas Disposal Systems Landfill, Inc.

Attachment

No. 98-0159

TEXAS DISPOSAL SYSTEMS LANDFILL, INC.,	)	IN THE DISTRICT COURT OF
Plaintiff,	)	
vs.	)	HAYS COUNTY, TEXAS
PENSKE TRUCK LEASING CO. L.P., PENSKE LOGISTICS, INC., and ZENITH ELECTRONICS CORP.	)	
Defendants,	)	207th JUDICIAL DISTRICT

PLAINTIFF'S ELEVENTH SUPPLEMENTAL RESPONSES TO REQUEST FOR DISCLOSURE UNDER RULE 194.2

TO: Defendants Penske Truck Leasing Co., L.P., and Penske Logistics, Inc., by and through counsel of record, Douglas Y. Christian, Reed Smith, L.L.P., 2500 One Liberty Place, 1650 Market Street, Philadelphia, Pennsylvania 19103-7301, and William P. Johnson, Baker Botts, L.L.P., 1500 San Jacinto Center, 98 San Jacinto Blvd., Austin, Texas 78701-4039

Defendant Zenith Electronics Corp., by and through counsel of record, Philip L. Comella, Seyfarth Shaw, LLP, 55 East Monroe, Suite 4200, Chicago, Illinois 60603 and David W. Waddell, Seyfarth Shaw, LLP, 700 Louisiana Street, Suite 3850, Houston, Texas 77002-2731.

Now comes Texas Disposal Systems Landfill, Inc. ("TDSL"), Plaintiff herein, and files this eleventh supplemental responses to the various requests for disclosure propounded upon the Plaintiff.

Rule 194.2(c): The legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);

RESPONSE: Plaintiff supplements its earlier responses by indicating that the legal theories and factual bases of Plaintiff's claims are also set forth in Plaintiff's Seventh Amended Petition as well as in the pretrial and trial filings and proceedings prior to the April 12 trial date

as well as the matters produced or developed during the trial. This specifically includes the claims for declaratory judgment and for quantum meruit that have been set out in detail in the Seventh Amended Petition. Plaintiff's further bases for its claims are found in the TCEQ's determination indicated in its May 2004 letters to the parties in the memorandum attached analyzing issues related to the disposition of the commingled CRT waste attached as **Exhibit A.**

Rule 194.2(d): the amount and any method of calculating economic damages;

RESPONSE: Plaintiff supplements and amends its response regarding damages on the elements indicated. Plaintiff continues to rely on previous disclosures regarding elements not mentioned here.

Plaintiff continues to update and revise its actual damages based on recent activities.

1. **Increased Costs Incurred by TDSL in the Past Because of the Occurrence.** As soon as TDSL was advised that the CRT waste must be considered regulated hazardous waste, it took steps to isolate that waste and the municipal solid waste with which had been commingled. It cordoned off the area to restrict access and constructed sidewall berms and additional rainfall runoff diversion berms to isolate the waste from a new working face area. It incurred survey costs to survey the area with the commingled waste to assure accurate information on the quantity involved. It had to incur additional work to create a new working face and, as Zenith and the Penske Defendants continued to refuse to remove their waste, additional costs to keep the commingled waste area isolated.

Construction Cost for Additional sideslope and run-on berms	$10,500.00

TDSL also incurred additional costs and charges to handle the CRT waste that did not go into the landfill:

Construction of wind break and set up storage area for Code 3 to classify materials hauled to a hazardous waste landfill:	$100.00
Handling of roll off boxes, on-site supervision and assistance during Code 3 separation of materials temporarily stored on TDSL property:	$1,017.50

After months of unproductive discussions, TDSL obtained permission from the TCEQ to push the waste to an area immediately adjacent to the initial working face where the CRT waste was received and on the outer edge of the certified disposal cell. TDSL incurred increased costs to push the material out of the way to a temporary storage location within the landfill cell.

Capping of tubes for temporary storage at TDSL landfill and pushing them to the edge of the waste disposal unit	$9,500.00

Following the pushing of the commingled tube waste to the temporary storage, TDSL incurred increased costs to fill in the area around the commingled CRT waste.

Equipment rental and operating cost to push waste from tipping area to around location where tube waste was encapsulated	$18,000.00

TDSL was forced to store the commingled CRT hazardous waste when the Defendants refused to remove it. TDSL stored the approximately 1660 cubic yards of waste within a certified landfill cell from October 9, 1997 to February 3, 2004, a period of approximately 6.3 years.

Storage Cost (See Pierce Chandler July 13, 2004 memos attached as **Exhibit A**).

Method I	$242,270.00
or	
Method II	$244,327.00
or	
Method III	$1, 172,300 to $1,297,300

2. **Loss of Use of Landfill in the Past.** TDSL experienced real diminishment of its opportunity for revenue with its landfill. TDSL is not claiming any past lost profits or any future lost profits. Instead, it seeks the revenue opportunity that has been lost as a result of the impairment of TDSL's property arising from the disposal of a regulated hazardous waste in the landfill. As a result of that disposal the space has either been consumed by excess soil cover and berms, lost because of a lack of compaction of solid waste now buried, or lost because of the inability to use the area impaired by the presence of the tubes. Those amounts include:

Airspace lost due to additional soil sideslope and runon berms built up with compacted clay to accommodate the ongoing development of the landfill while working around the isolated CRT waste storage area instead of the space being filled with waste (4200 yd^3 x 0.8 x 0.65 tons/yd^3 x $15.02/ton):	$32,804.00
Cost related to loss of airspace use for six months while TDSL filled its wet weather area and while waiting for Zenith/Penske to arrange for removal (98,000 yd^3 ÷ 2 = 49,000 yd^3 average) (49,000 yd^3 x 0.65 tons/yd^3 x $15.02/tons x 12%/year x 0.5 year):	$28,703.00
Landfill filling operating efficiency impact due to the change in the way the landfill had to be operated to work around the CRT waste storage area (compaction ratio decrease from 56-month average of 2.943 to 2.574 during 6-month tube period) 952,431 gate yd^3 x (1/2.574 – 1/2.943) x 0.65 tons/yd^3 x $15.02/ton:	$452,944.00
Subtotal	$514,451.00

3. **Cost of Restoring the Land, Including Removal, Storage, and Proper Disposal of the Commingled CRT Waste.** When Zenith and the Penske Defendants refused to take responsibility for the waste, TDSL stored the waste within a certified landfill cell until when TDSL's filling operations were scheduled to move into the storage area and when the TCEQ state office made it clear that TDSL was not authorized to have the CRT commingled waste in its landfill absent changes in TDSL's permit. As a result, TDSL has moved the waste from storage

within its landfill and stored it, wrapped and covered in plastic, in approximately 99 roll-off boxes held at the landfill. TDSL incurred additional costs to remove the waste:

Environmental professional services (Remediation Plan, Health and Safety Plan, application for TCEQ concurrence, supervision of remediation, environmental testing, Closure Report, etc.) and contracting services (removal of MSW overburden, relocation and containerization of TV tube debris and commingled MSW).	$162,835.00
Costs to July 13, 2004 associated with maintenance of containers (removal of water. (Invoice attached as **Exhibit B)**	$ 8,535.56
Costs with Texas Landfill Management associated with CRT waste container testing (invoice attached as **Exhibit C).**	$ 1,359.72
Analytical Testing Cost for CRT waste container testing (quotation attached as **Exhibit D)**	$ 3,540.00
*Container rental pending transportation/disposition of materials 99 roll-off containers x $100.00/month x 13 months estimated; (dependent on resolution of proper manifesting and completion of trial by February 2005)	$128,700.00
*Transportation to American Ecology/TECO in Corpus Christi 99 roll-off container = 99 trips x 400 miles/trip = 39,600 miles x $3.00/mile	$118,800.00
*Disposal at American Ecology/TECO 1,582 tons x $175.00/ton	$276,850.00
*Contingency for container rental during post-trial appeal period 99 roll-off containers x $100.00/month x 38 months	$376,200.00
*Contingency for container maintenance and handling for 42 months (invoice with estimate attached as **Exhibit E)**	$ 85,936.62
Subtotal	$1,162,756.90

*Contingent on resolution of manifesting issue resulting from TCEQ's order requiring Penske to remove the waste.

4. **Value of Contingent Liability for Becoming a Generator of Regulated Hazardous Waste.**

See previous disclosures regarding this element. $131,559 to $167,634

5. **Value of Time Spent by TDSL Officers and Employees Dealing with Issues Raised by the CRT Waste From the Accident.** $56,400 (past); $56,400 (future). These numbers are the previous estimate. Actual numbers are still being calculated and will be updated when they are available.

6. **Reputational or Stigma Losses from Having Had Hazardous Waste on Site.** TDSL does not claim any specific past reputational damages or assert that it has lost any contract in the past as a result of having the broken picture tubes in the landfill until April 2004, when this case first went to trial. As a result of the trial, and publicity related to TDSL's efforts to force the Defendants to meet their responsibility under the law, TDSL has now been associated with this CRT hazardous waste to a much larger group of individuals. TDSL's concern is that TDSL's competitors, customers, neighbors, regulatory agencies, or future potential purchasers will make an issue of the prior existence of a regulated hazardous waste area in the landfill that will affect TDSL's ability to obtain future contracts, receive permit expansions or realize property value that would have been possible without the question of whether all of the CRT waste was actually removed from the facility. Such stigma or reputational loss damages are not based on any specific lost contract, but instead are based, like other reputational damages, on a presumption of damage arising from the presence of what is recognized as a negative factor in the landfill and the potential impact to the landfill and the facility permit. This number is one that will have to be determined by a jury, but TDSL believes that a conservative figure would be $2 million.

7. **Attorneys' Fees and Costs.** Attorneys fees and litigation costs incurred through June 30 with the George & Donaldson and the Graves Dougherty firms are approximately $1,109,517 in fees and $134,250 in costs. Additional fees and costs have been incurred with the Russell, Moorman & Rodriguez, L.L.P. firm in an amount that will be provided to Defendants. Given the development and the history of this case, Plaintiff anticipates that it could spend another $450,000 in attorneys' fees and another $150,000 in costs through the completion of the trial and post-trial. Plaintiff estimates attorneys' fees and costs for appeal will be approximately $75,000 through the Court of Appeals and, if a petition to the Supreme Court is sought, another $50,000 for the Supreme Court work.

8. **Expert Expenses.** As part of the development and presentation of this case, Plaintiff has incurred reasonable and necessary fees for experts to provide opinions related to the issues raised by Plaintiff's claims. Plaintiff has incurred, and estimates that it will incur, the following in testifying expert fees:

Expert	Incurred to Date	Estimated Future Costs	Total
Roger Allen	$30,915.62	$10,000	$40,915.62
Angel Arzaga	$9,537.50	$20,000	$29,537.50
Pierce Chandler	$20,212.50	$29,560*	$49,772.50
Keith Hopson	$20,265	$36,550*	$56,815.00
Bob Zoch	$21,854.63	$45,000	$66,854.63
Steve Phillips	$-0-	$16,061*	$16,061.00
Tom Watkins	$-0-	$10,000	$10,000.00
Jim Neyens	$-0-	$20,000	$20,000.00
		Total	$289,956.25

* Written estimate for future costs attached as **Exhibits F, G, and H** respectively.

9. **Punitive Damages.** The conduct of Zenith, Penske Logistics, and Penske Truck Leasing, Inc. was of the nature and form to make them liable for punitive damages. Plaintiff TDSL seeks punitive damages in the maximum amount allowed by law. Plaintiff intends to prove the amounts that it has incurred in attorneys' fees, testifying expert fees, and costs of

litigation in pursuing the Defendants as part of its evidence of the sense and sensibilities of the parties in justification for its costs. Plaintiff estimates attorneys' fees and costs for appeal will be approximately $75,000 through the Court of Appeals and, if a petition to the Supreme Court is sought, another $50,000 for the Supreme Court work.

Rule 194.2(e): Persons with knowledge and their connection to the case:

RESPONSE: In addition to the persons previously provided, Plaintiff identifies:

Glenn W. Shankle
Acting Executive Director
Texas Commission on Environmental Quality (TCEQ)
12100 Park 35 Circle
Building F, 4th Floor, MC 109
Austin, Texas 78753
(512) 239-3900; Fax: (512) 239-3939

Issued letters confirming that TDSL acted responsibly, citing Penske for violating Texas environmental regulations, and other communications related to this matter.

John Steib
Deputy Director, Office of Compliance and Enforcement
Texas Commission on Environmental Quality (TCEQ)
12100 Park 35 Circle
Building C, MC 172
Austin, Texas 78753
(512) 239-5100; Fax: (512) 239-0532

Received and processed TDSL's request for enforcement and letters from Penske and Zenith responding to that request and other communications related to this matter.

Mark Vickery
Acting Deputy Executive Director
Texas Commission on Environmental Quality (TCEQ)
12100 Park 35 Circle
Building F, MC 109
Austin, Texas 78753
(512) 239-2255; Fax: (512) 239-3939

Involved with TCEQ's action on TDSL enforcement request and other communications related to this matter.

Daniel Eden
Acting Deputy Director
Office Permitting Remediation and Registration
Texas Commission on Environmental Quality (TCEQ)
12100 Park 35 Circle, MC 122
(512) 239-5536

Patricia A (Pat) Fontenot
Emergency Response Program Division
Oversight of TCEQ sampling and analysis plan.
Texas Commission on Environmental Quality (TCEQ)
12100 Park 35 Circle, MC 174
(512) 239-2220

Pete Wehner
Emergency Response Program Division
Oversight of TCEQ sampling and analysis plan.
Texas Commission on Environmental Quality (TCEQ)
12100 Park 35 Circle, MC 174
(512) 239-4133

Steve Thompson
Emergency Response Program Division
Oversight of TCEQ sampling and analysis plan.
Texas Commission on Environmental Quality (TCEQ)
12100 Park 35 Circle, MC 174
(512) 239-2598

Lydia Gonzalez Gromatzky
Deputy Director, Office of Legal Services
Texas Commission on Environmental Quality (TCEQ)
12100 Park 35 Circle
Building A, MC 218
Austin, Texas 78753
(512) 239-0660; Fax: (512) 239-0330

Involved with TCEQ's action on TDSL, Penske, and Zenith enforcement

Philip L. Comella
Seyfarth Shaw, LLP
55 East Monroe, Suite 4200
Chicago, Illinois 60603
(312) 346-8000

Members of TCEQ who may have participated in determining whether sampling necessary and those who participated in sampling of waste in rolloff boxes at TDSL in July 2004. Also those familiar with sampling activities.

Members of the Zenith Freight Commodity Outsourcing Team that prepared the 1996 Request for Quote and negotiated with bidders, including Penske, on that business, which ultimately led to the Transportation Agreement between Zenith and Penske Logistics, Inc. Other than Ed Reszke, Plaintiff does not know who else on Zenith's team; as Zenith has refused to provide any discovery that could be used to identify those personnel.

Penske personnel who reviewed, discussed, or responded to the Zenith RFQ in 1996. The identity of these persons is not known to Plaintiff.

Brian Hard, President
Penske Truck Leasing Co.
P.O. Box 563
Route 10-Green Hills
Reading PA 19603-0563

Received May 13, 2004 letter from TCEQ containing Notice of Violations by Penske Truck Leasing Co. and Penske Logistics, Inc.

Bret Pardue, President
USA Environment, L.P.
10234 Lucore St.
Houston, Texas 77017
(713) 307-9692

Transportation contractor for Penske who was contracted to remove waste from TDSL without hazardous waste manifest.

Pam Giblin
Derek McDonald
Bob Strauser
Baker Botts, LLP
1500 San Jacinto Center
98 San Jacinto Boulevard
Austin, Texas 78701-4039
(512) 322-2500; Fax: (512) 322-2501

Attorneys or representatives for Penske involved in discussions with TCEQ concerning matters at issue in connection with this action.

Representatives of landfills contacted by Penske for disposal of commingled CRT waste in 2004.

Henry M. Wise, PG, CAPM
Technical Services Manager
1700 North E Street
LaPorte Texas 77571
(281) 867-9131

TCEQ contractor doing testing of waste at TDSL.

Richard E. Greene
Regional Administrator
Environmental Protection Agency Region 6 Office
1445 Ross Ave., Suite 1200
Dallas, Texas
(214) 665-2100

Received TDSL letter and Legal Memorandum concerning proper classification of waste removed from TDSL.

Rule 194.2(f): For any testifying expert:

(1) the expert's name, address, and telephone number;
(2) the subject matter on which the expert will testify;
(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:
(a) all documents, tangible things, reports, models or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
(b) the expert's current resume and bibliography;

RESPONSE:

In addition to the expert designations, expert interrogatory responses, and depositions previously provided or taken in this case and previous disclosures, TDSL makes the following additional designations and supplementation:

1. Keith Hopson
Brown McCarroll, LLP
111 Congress Ave., Suite 1400

Austin, Texas 78701-4043
(512) 472-5456

In addition to the items for which he has previously been designated, Mr. Hopson is expected to give opinions agreeing with the TCEQ's determinations in its May 2004 letters but disagreeing with the TCEQ's position that the commingled CRT waste in the rolloff boxes at TDSL are not required to be manifested as hazardous waste while stored at TDSL and may be transported from TDSL without a hazardous waste manifest. Mr. Hopson has reviewed TDSL correspondence to the TCEQ and to the EPA on this matter, as well as its supporting memorandum, and agrees with the positions taken by TDSL.

In addition, to the items previously provided, Mr. Hopson has received Plaintiff's Seventh Amended Petition, TDSL's correspondence with the EPA, TCEQ, Penske, and Zenith, and TDSL's July 13, 2004, Legal Memorandum.

2. Bob Zoch
2100 County Rd. 326
Lincoln, Texas 78948
(P.O. Box 248)
(512) 253-6209

In addition to the items for which he has previously been designated, Mr. Zoch is expected to give opinions agreeing with the TCEQ's determinations in its May 2004 letters but disagreeing with the TCEQ's position that the commingled CRT waste in the rolloff boxes at TDSL are not required to be manifested as hazardous waste while stored at TDSL and may be transported from TDSL without a hazardous waste manifest. Mr. Zoch has reviewed TDSL correspondence to the TCEQ and to the EPA on this matter, as well as TDSL supporting memorandum, and agrees with the positions taken by TDSL. He will also testify as to the inadequacy of the TCEQ sampling done on 20 of the 99 rolloff container loads on July 12, 2004.

In addition, to the items previously provided, Mr. Zoch has received Plaintiff's Seventh Amended Petition, TDSL's correspondence with the EPA, and TDSL's July 13, 2004, Legal Memorandum.

3. Pierce L. Chandler, Jr., P.E.
Professional Engineering Services
1204 Bayshore
Rockwall, TX 75087
(972) 771-1310

In addition to the items for which he has previously been designated, Mr. Chandler is expected to give opinions agreeing with the TCEQ's determinations in its May 2004 letters but disagreeing with the TCEQ's position that the commingled CRT waste in the rolloff boxes at TDSL are not required to be manifested as hazardous waste while stored at TDSL and may be transported from TDSL without a hazardous waste manifest. Mr. Chandler has reviewed TDSL correspondence to the TCEQ and to the EPA on this matter, as well as TDSL's supporting memorandum, and agrees with the positions taken by TDSL.

RESPONSE: TDSL supplements its disclosures of expected expert testimony from Pierce Chandler by stating that he is expected to testify as follows (in addition to previously designated topics):

- To give testimony consistent with the positions that TDSL obtained from TCEQ personnel Wade Wheatley, Director of the Waste Permits Division; Richard Carmichael, Municipal Solid Waste Permits Section Manager; and Jesse Boultinghouse, as well as give testimony consistent with the positions in the January 15, 2004 letter from Wade Wheatley of the TCEQ.

- That it would be improper to characterize the commingled waste based on testing of its commingled state.

- That the 1997-98 authorization for storage from Ben Milford of the regional office of the TCEQ allowing TDSL to store the waste during the pendency of the suit was, at best, a temporary emergency authorization only and that TDSL is not authorized to dispose of the cathode ray tube contaminated waste in TDSL's landfill without further authorization from the TCEQ.

- That had TDSL wished to dispose of the waste in its landfill, it would be required to obtain a change to its permit or a new permit to authorize disposal of this regulated hazardous waste in its landfill. Mr. Chandler will also testify as to the process and costs involved in obtaining such a change to its permit or to seek a new permit, and how those costs outweigh the cost of removing the commingled waste.

- That the entire 1660 cubic yards of CRT waste commingled with municipal solid waste must be removed to insure all the regulated hazardous waste is removed.

- That all of the CRT waste is the responsibility of the generators, Penske and/or Zenith.

- That if a sample of the CRT commingled waste does not now exhibit hazardous waste characteristics, the waste classification cannot be changed from hazardous waste to non-hazardous waste for disposal purposes. A hazardous waste cannot be diluted as non-hazardous waste to re-classify it under TCEQ and federal regulations.

- Mr. Chandler, who is familiar with the permitting process and the costs and effort associated with that process will testify that even if TDSL were inclined to accept the stigma of disposing of the hazardous waste in the landfill (which TDSL does not plan to do), the cost, effort, increased regulatory requirements and risk of a permitting proceeding will far exceed the cost of removing and disposing of the waste.

Further, Mr. Chandler will provide expert testimony on the standard of care in Texas for management of municipal solid wastes and hazardous wastes under applicable State and federal statutes and regulations. The scope of his testimony may include management structures, processes, and procedures to address hazardous waste generation during manufacturing and transportation operations as well as spill response protocols. He will also testify regarding hazardous waste characterization, manifesting, recycling, treatment and disposal options and requirements.

He will testify that Zenith and Penske had responsibility to anticipate and provide for the proper management and disposal of CRT waste generated from an accident, that as a result of the accident they had responsibility, upon learning of the accident, to provide for proper notification, management and disposal of the CRT waste, that Zenith and the Penske entities were negligent, and that this negligence resulted in the CRT waste ending up in TDSL's landfill.

Mr. Chandler will testify that TDSL was not at fault regarding the receipt of the CRT waste, that TDSL is in compliance with its permit, is a model site, and that its handling of the CRT waste is consistent with this, as the TCEQ has recognized.

Mr. Chandler will testify to issues regarding generator status and hazardous waste designation, including that Zenith and Penske were generators, Zenith and Penske had designated the waste as hazardous, that a generator of waste can self-classify the waste as hazardous and that such waste must be treated as hazardous regardless of its characteristics, that TDSL did not become a generator when it pushed the CRT waste within its landfill, other acts that would or would not make TDSL a generator, and that TDSL would become a generator upon removal of the CRT waste, even if TDSL contracted with someone to do the actual work.

Mr. Chandler will testify that TDSL cannot or could not keep the CRT waste in its landfill, regardless of statements made by regional TCEQ representatives and that TDSL acted appropriately in removing the material from its landfill, as is further confirmed by the recent correspondence from the TCEQ.

Mr. Chandler will testify that he would not be surprised that the CRT waste had contaminated a large amount of the MSW in TDSL's working face and that it would not necessarily have been easier to segregate the tubes from the commingled MSW in October 1997 than today.

Mr. Chandler will testify that Zenith and Penske had an obligation to properly dispose of the CRT waste and that others in similar situations in the past had removed the waste and properly disposed of it when the waste could be located as it could here. He will testify that Penske and Zenith's refusal to arrange for removal of the waste was unjustified, wrong, a violation of the standard of care in such situations, and showed a conscious indifference to the

substantial injury that this conduct caused. Mr. Chandler will testify that his opinions are supported by the recent correspondence from the TCEQ.

Mr. Chandler will give testimony consistent with his reports and memoranda that are attached to this Response and incorporated as if fully set forth herein.

Mr. Chandler may also give opinion testimony in response to testimony by other witnesses or Defendants' retained or non-retained experts.

Plaintiff TDSL further supplements its response by referring Defendants to the opinions and bases for those opinions set out in the deposition of Pierce Chandler taken Tuesday, September 30, 2003, and the exhibits marked therein:

PAGES	TESTIMONY
20-22	Staff members of TCEQ could not authorize permanent disposal of regulated hazardous waste at TDSL.
23-24	Chandler has told them tubes must be removed, and TDSL has to get them out.
27-31 34-35 49-51	If TDSL removed the tubes it could become the generator of the CRT regulated hazardous waste coming from its landfill.
48	Surprised that a generator whose waste was not allowed at a MSW landfill would refuse to pick up the waste.
60-61 64-75	Zenith and Penske engaged in improper management of the tube waste at the accident scene.
78-81	TDSL was not at fault for allowing the tube waste into its landfill before it was declared regulated hazardous waste and did not contribute to this problem.
82-84	TDSL did not have a duty to make inquiries regarding any material that shows up at its gate. As long as the material is properly identified and labeled, they are under no obligation beyond that. TDSL's duty is to screen for unauthorized waste.
85-86	Once notified of unauthorized waste, TDSL had a duty to handle the waste consistent with its site operating permit, which it did.
86-87	TDSL's situation, where a generator refused to take responsibility for its unauthorized waste, is a situation not contemplated in the rules.
87-88	TDSL is in compliance with its permit.
89-90	Jim Gregory's actions on 10/9/97 prior to allowing the waste in were reasonable, prudent, and diligent.
220-222	Hazardous waste rules are not limited to the management of waste materials.

232-234	TDSL could not simply shovel up the CRT waste once it was put in the working face.
235	Texas recognizes self-classification of waste.
238-239	A generator can declare a waste to be regulated hazardous waste, and it will be treated as such without the necessity of testing.
244-245	A representation by Alfred Vallejo or M&M Trucking that the CRT waste was non-hazardous would not change his opinion regarding Zenith and Penske's obligations.
245-246	Zenith generated a hazardous waste and did so as part of the manufacturing process. Zenith's responsibility to manage the CRT waste began when it generated the product that could become the waste.
248-249	The actions of Special Automotive or Alfred Vallejo would not change his opinion that Zenith and Penske were responsible for communicating to the hazardous nature of the waste at the scene of the accident.
260-261	A TCEQ staff member's opinion does not have the weight of regulation or the weight of law behind them. Nor does the TCEQ have the authority to allow regulated hazardous waste remain in a facility not permitted to dispose of such waste.
267	Even if a TCEQ staff member said the waste could remain, another TCEQ staff member could come to a different conclusion.
269-270	All of the municipal solid waste in the area where the CRT waste went is suspect. If you dealt with all the MSW where the CRT waste was involved and a small portion of the daily cover underneath it, should have gotten it all.
274-276	While the TCEQ may choose to ignore enforcement of its authority temporarily, that does not preclude TDSL's future liability for TCEQ enforcement. The TCEQ could determine that TDSL must remove the tubes.
278-280	Penske was a generator of the CRT waste.
282-283 284	A TNRCC or TCEQ representative's statement that it is the position of TCEQ that tubes could remain at TDSL does not provide any assurance.
287-288	A statement from the regional staff is not necessarily an official statement of the TCEQ. The staff in Austin may disagree with the regional staff.
290-291	The tubes should be removed from TDSL's landfill.
291	TDSL is in compliance with its permit and MSW management regulations.

Mr. Chandler also may offer testimony on the following points:

- It was the conduct of Defendants, not the actions performed by the accident response personnel, that caused the accident waste to be sent to TDSL.
- It is not likely that, if tested using the Toxicity Characteristic Leaching Procedure (TCLIP), the material that went to TDSL's working face would have been below the 5.0 mg/L level for lead associated with classification as a hazardous waste.

- The material that was shipped to Texas Ecology's (TECO's) hazardous waste landfill in Robstown, Texas is not likely to be representative of the accident waste that went to TDSL's working face.

- It is very likely that the material sent to the TDSL landfill would meet the criteria for classification as a characteristic hazardous waste; even in the unlikely event that it did not meet those criteria, it would be required to be treated as hazardous waste because it was so designated by the generator(s).

- Even if the commingled waste excavated from the TDSL landfill was below the 5.0 mg/L level for lead associated with classification as a hazardous waste, the commingled waste still must be treated as hazardous waste consistent with the rules prohibiting dilution.

- It was the conduct of Defendants, not the actions performed by the accident response personnel, that caused the accident waste to become subject to regulation under RCRA.

- TDSL was under no obligation to immediately remove the commingled waste from its landfill upon discovering that it had been designated as hazardous by Defendants.

- The damage to the CRTs as a result of the traffic accident was extensive, and Zenith considered the load a total waste; neither Defendant made any effort to salvage any of the load, and thus the entire load became waste at that point because it had been discarded.

- It was the traffic accident, not the actions performed by the accident response personnel, that caused the majority of breakage to the CRTs.

- Upon discovering the true nature of the CRT waste, TDSL could not unilaterally have excavated the material for disposal as hazardous waste.

- Upon discovering the true nature of the CRT waste, TDSL could not have treated the material to render it non-hazardous.

- TDSL could not have left the CRT waste in its landfill permanently without changing its permit or obtaining a new permit.

- Potential CERCLA liability associated with the offsite disposal of the CRT waste in an authorized hazardous waste landfill will be significant enough that TDSL must take steps to protect itself from such liability.

- Penske Logistics should have provided training and information regarding the handling of broken or discarded CRTs to its driver, dispatcher, and supervisor.

- Penske and Zenith should have ensured that written materials accompanied the CRT shipments indicating that broken or discarded CRTs had to be treated as hazardous waste.

- There is no obligation for TDSL to test waste before it is placed in its landfill and no obligation for it to hold waste; the entire waste regulatory scheme relies on accurate classification or characterization of waste by its owner and/or generator, which a landfill is entitled to rely upon, and which Penske and Zenith failed to properly accomplish, proximately causing TDSL's damages.

- There was no "required waste analysis" that TDSL was required to undertake in connection with the accident waste, and TDSL had no obligation to make contact with the shipper or transporter regarding the characteristics of the waste. If the characteristics of the waste had been communicated to either TDSL or the accident responders by Penske or Zenith, the waste would not have ended up at TDSL's facility; the failures of Penske and Zenith to use reasonable care proximately caused TDSL's damages.

- TDSL had no obligation and no reason to reject the accident waste at the time it began arriving at the landfill.

- TDSL had no obligation and no reason to hold the accident waste at the time it began arriving at the landfill.

- TDSL had no obligation and no reason to call Zenith or Penske when the accident waste began arriving at the landfill.

- TDSL had no obligation and no reason to call the TNRCC when the accident waste began arriving at the landfill.

- A landfill operator does not necessarily have the "ultimate responsibility for what goes into the landfill," particularly if (as in this case) waste is sent to a municipal solid waste landfill because the owner, shipper, and carrier – all of whom knew that the waste was hazardous – failed to take steps to ensure that accident responders knew of the waste's hazardous nature.

- It is far from "extremely unlikely" that the TCEQ would require removal of the commingled waste from the TDSL facility; indeed, TCEQ personnel indicated that either removal or a permit change would be required.

In addition, to the items previously provided, Mr. Chandler has received Plaintiff's Seventh Amended Petition, TDSL's correspondence with the EPA, TCEQ, Penske, and Zenith, and TDSL's July 13, 2004 legal memorandum.

4. Gary Newton, General Counsel
Texas Disposal Systems Landfill, Inc.
12200 Carl Rd.
Creedmoor, Texas 78610
(512) 421-1305

In addition to the items for which he has previously been designated, Mr. Newton is expected to give opinions agreeing with the TCEQ's determinations in its May 2004 letters but disagreeing with the TCEQ's position that the commingled CRT waste in the rolloff boxes at TDSL are not required to be manifested as hazardous waste while stored at TDSL and may be transported from TDSL without a hazardous waste manifest. Mr. Newton has reviewed TDSL correspondence to the TCEQ and to the EPA on this matter, as well as TDSL's supporting memorandum, and agrees with the positions taken by TDSL. He will also testify as to the inadequacy of the TCEQ sampling done on 20 of the 99 rolloff container loads on July 12, 2004.

In addition, to the items previously provided, Mr. Newton has received Plaintiff's Seventh Amended Petition, TDSL's correspondence with the EPA, TCEQ, Penske, and Zenith, and TDSL July 13, 2004 Legal Memorandum.

5. Bob Gregory, CEO
Texas Disposal Systems Landfill, Inc.
12200 Carl Rd.
Creedmoor, Texas 78610
(512) 421-1300

In addition to the items for which he has previously been designated, Mr. Gregory is expected to give opinions agreeing with the TCEQ's determinations in its May 2004 letters but disagreeing with the TCEQ's position that the commingled CRT waste in the rolloff boxes at TDSL are not required to be manifested as hazardous waste while stored at TDSL and may be transported from TDSL without a hazardous waste manifest. Mr. Gregory has reviewed TDSL correspondence to the TCEQ and to the EPA on this matter, as well as TDSL's supporting

memorandum, and agrees with the positions taken by TDSL. He will also testify as to the inadequacy of the TCEQ sampling done on 20 of the 99 rolloff container loads on July 12, 2004.

In addition, to the items previously provided, Mr. Gregory has received Plaintiff's Seventh Amended Petition, TDSL's correspondence with the EPA, and TDSL's July 13, 2004, Legal Memorandum.

6. David H. Donaldson, Jr.
Graves Dougherty Hearon & Moody, P.C.
515 Congress Ave., Suite 2300
Austin, Texas 78701
(512) 480-5760

Mr. Donaldson is expected to testify that the amounts of attorneys' fees identified as incurred or likely to be incurred by TDSL as set out above are reasonable and necessary attorneys' fees. He will also testify that the attorney's fees incurred on other causes of action are inextricably intertwined with the attorneys' fees that are reasonable and necessary to obtain the relief for which attorneys' fees are recoverable.

7. Kerry E. Russell
Russell, Moorman & Rodriguez, L.L.P.
102 West Morrow, Suite 103
Georgetown, Texas 78626
(512) 930-1317

Mr. Russell is expected to testify that the amounts of attorneys' fees identified as incurred or likely to be incurred by TDSL with his firm as set out above are reasonable and necessary attorneys' fees. He will also testify that the attorneys' fees incurred on other causes of action are inextricably intertwined with the attorneys' fees that are reasonable and necessary to obtain the relief for which attorneys' fees are recoverable.

8. Tom Watkins
Brown McCarroll, LLP
98 San Jacinto, Suite 1300
Austin, Texas 78701
476-4716; Fax: 476-5139

Mr. Watkins is expected to testify that the amounts of attorneys' fees identified as incurred or likely to be incurred by TDSL as set out above are reasonable and necessary attorneys' fees. He will also testify that the attorneys' fees incurred on other causes of action are inextricably intertwined with the attorneys' fees that are reasonable and necessary to obtain the relief for which attorneys' fees are recoverable. Some biographical information from his web page is attached as **Exhibit I.**

9. Jim Neyens, P.E.
Neyens Associates
15206 Camino del Sol
Houston, Texas 77083
(281) 879-1468; Fax: (281) 879-1468

Mr. Neyens, a licensed professional engineer, is expected to testify that TDSL's municipal solid waste permit did not authorize it to accept or dispose of regulated hazardous waste. If the regulated hazardous waste that came in from the Penske/Zenith accident scene on October 9 were to stay in TDSL's landfill, TDSL's existing municipal solid waste permit could not be changed to allow the disposal of that regulated hazardous waste. For TDSL to dispose of that waste on site in a lawful manner, it would have to apply for and receive a new permit under a different set of state and federal regulations that relate to hazardous waste landfills. TDSL could not simply amend its permit, it would have to obtain a brand new permit under the hazardous waste regulations and statutes. Furthermore, TDSL would be in violation of the hazardous waste storage and land disposal regulations if it allowed this regulated hazardous waste to remain in the landfill during the permitting process.

Based on his experience in this area, Mr. Neyens can confirm that the cost for attempting to obtain such a permit, even if it could be obtained, would substantially exceed the cost of managing the regulated hazardous waste until it could be removed and properly disposed of offsite at a properly permitted facility. Mr. Neyens has seen the estimates of cost for managing, removing, and disposing of the waste and it is his opinion that these costs are significantly less than the cost of attempting to obtain a new hazardous waste permit.

Mr. Neyens agrees that there is no procedure that he is aware of where the regulated hazardous waste that came into TDSL's landfill could remain in that landfill without obtaining a hazardous waste permit. Federal and state regulations do not allow a reclassification of regulated hazardous waste into non-hazardous waste within TDSL's landfill.

Mr. Neyens agrees that having regulated hazardous waste in a municipal solid waste landfill would have a significant negative effect on the fair market value of the landfill. Mr. Neyens is familiar with the fair market value of landfills. It is his belief that TDSL's estimate of $2 million in impact on the fair market value of TDSL's landfill is far too conservative if TDSL, in fact, left the regulated hazardous waste in its landfill. Any potential buyer of TDSL's landfill would have to look at the regulatory impact of having regulated hazardous waste in a facility not permitted to accept that waste. The landfill would have to deed record that it had accepted hazardous waste. The landfill also might face substantially increased costs for handling its leachate as hazardous waste should the waste migrate into the leachate. At a minimum any buyer of such a landfill would deduct from any offer the cost that he would estimate it would take to either obtain the permit to allow the waste to stay or to locate, remove, and dispose of the waste in a proper fashion. There is no way that TDSL could expect to realize the fair market value of its landfill prior to having this waste in its landfill if it allowed the waste to stay.

Having reviewed the estimated costs for managing, removing, and disposing of the waste, it is Mr. Neyens' opinion that those costs are far less than the impact on the value of the landfill if the waste were to stay.

It is Mr. Neyens' opinion that the value of the landfill, once the waste was properly removed and disposed of, would still be affected by the fact that the waste was once in the landfill. Having regulated hazardous waste in one's landfill is somewhat similar to having mold in someone's house: while professionals can be hired who can work extraordinarily hard to assure that the material is properly removed, the fact that the landfill (house) had a deleterious substance in it at one time carries a stigma that will have an effect on the buyer's evaluation of a landfill. It is Mr. Neyens' view that TDSL's landfill would have a higher fair market value if it had never received this waste or had to deal with this situation than its current status. Mr. Neyens is not in a position to identify a specific figure at this time, but he believes that TDSL's estimate of $2 million is a reasonable and conservative figure in light of the overall value of landfills in general.

Mr. Neyens' normal rate is $120 an hour for consulting and $180 an hour for depositions and trial testimony, along with reasonable expenses incurred as part of the engagement. A copy of Mr. Neyens' biographical information is attached as **Exhibit J**.

Mr. Neyens has been provided a copy of portions of the Plaintiff's Seventh and Supplemental and Amended Responses to Request for Disclosure and a portion of Plaintiff's Ninth Supplemental Responses to Request for Disclosure, as well as a copy of the Sixth Amended Petition.

9. Steve Phillips
Route 4, Box 60-2
Paris, Texas 75462
(903) 785-7636

Mr. Phillips observed the sampling by the TCEQ and may be called to testify as to inadequacy of the TCEQ sampling done on 20 of the 99 container loads on July 12, 2004. Mr. Phillips has reviewed the work and proposed testimony of Pierce Chandler and is expected to testify consistent with that testimony.

Rule 194.2(i): Witness Statements.

Plaintiff TDSL has previously produced correspondence between and among Zenith, the Penske Defendants, the TCEQ, and TDSL and refers Defendants to that production. TDSL has also produced as TDS 04674-4680 and TDS 04833-4854 a copy of its letters to Region 6 of the Environmental Protection Agency, including a copy of a July 13, 2004 Legal Memorandum also provided to the EPA.

Respectfully submitted,

By: _____

David H. Donaldson, Jr.
State Bar No. 05969700
James A. Hemphill
State Bar No. 00787674
Graves Dougherty Hearon & Moody, P.C.
515 Congress Ave., Suite 2300
Austin, Texas 78701
(512) 480-5600
Donaldson: 480-5760; Fax: (512) 536-9910
Hemphill: 480-5762; Fax: (512) 536-9907

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this 15th day of July 2004, to the following:

Douglas Y. Christian Reed Smith, L.L.P. 2500 One Liberty Place 1650 Market St. Philadelphia, PA 19103-7301 *via* Hand Delivery	William P. Johnson Baker Botts, L.L.P. 1500 San Jacinto Center 98 San Jacinto Blvd. Austin, Texas 78701-4039 *via* Hand Delivery
Attorneys for Penske Truck Leasing Co., L.P., and Penske Logistics, Inc.	
Philip L. Comella Seyfarth Shaw, LLP 55 East Monroe, Suite 4200 Chicago, Illinois 60603 *via* Hand Delivery	David W. Waddell Seyfarth Shaw, LLP 700 Louisiana Street, Suite 3850 Houston, Texas 77002-2731 *via* Hand Delivery
Attorneys for Zenith Electronics Corp.	

David H. Donaldson, Jr.
James A. Hemphill

TEXAS DISPOSAL SYSTEMS

TEXAS DISPOSAL SYSTEMS, INC. • TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

P.O. BOX 17126
AUSTIN, TEXAS 78760-7126
512-421-1300
512-243-4123 (FAX)
www.texasdisposal.com

January 13, 2004

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WASTE PERMITS DIV MC-126

Mr. Wade Wheatley, P.E., Director
Waste Permits Division
MC 126
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: Cathode Ray Tube Regulated Hazardous Waste
Texas Disposal Systems Landfill, Inc.
TCEQ Permit No. MSW-2123
Travis County, Texas

Dear Mr. Wheatley:

This letter is an inquiry by Texas Disposal Systems Landfill, Inc. (TDSL) to ascertain the Texas Commission on Environmental Quality's (TCEQ) position on several issues related to a segregated storage area within the TDSL landfill containing approximately 1,660 compacted cubic yards of commingled municipal solid waste and cathode ray tube (CRT) waste that has been designated by the generators as regulated hazardous waste. The CRT waste was generated as a result of a trucking accident. The Texas Department of Public Safety directed cleanup of the accident debris included the delivery of seven small dump truck loads of debris containing the CRT waste to the TDSL Landfill on October 9, 1997. The generator designated the CRT's as hazardous waste on the same day shortly after a portion of the waste materials had been delivered to TDSL and commingled with the municipal solid waste at the landfill working face during normal landfill operations.

Neither TDSL management personnel or its gatehouse attendants had any knowledge at that time that CRT waste could or should be considered a hazardous waste. TDSL received this regulated hazardous waste despite TDSL's compliance with the hazardous waste screening procedures required by its permit and the TCEQ regulations. TDSL also took the appropriate steps to remove all CRT waste from the surface of the working face, to return that waste to the generators, and to insure that no additional waste was commingled into the approximately 1,660 cubic yards of waste contaminated by the CRT waste.

After more than four months of unsuccessful efforts to convince the generators to take responsibility for the waste, the approximately 1,660 cubic yards of CRT contaminated waste was pushed to the edge of the landfill's certified lined area and was consolidated into an encapsulated, segregated area of the landfill cell where it was covered with a plastic barrier and clay soils, in order to allow waste disposal operations to resume adjacent to and above the CRT waste. This waste has remained in storage at TDSL, under a temporary emergency authorization contained in the TCEQ Hazardous Substances Spill Report (attached) for the trucking accident,

while TDSL continued its efforts to persuade the generators to take responsibility for the removal and proper disposal of all the CRT contaminated waste.

TDSL filed a lawsuit against the generators of the CRT waste on February 23, 1998 and has pursued litigation as part of TDSL's efforts to have the generators take responsibility for the consequences of allowing the CRT waste to be shipped to the TDSL landfill after allowing emergency response personnel to perform the cleanup thinking the materials were not hazardous and without informing anyone at the scene of the accident or at TDSL that the waste was a regulated hazardous waste until after the CRT waste had been received by TDSL. The trial is scheduled to begin January 26, 2004. The pretrial rulings have brought several issues into question requiring direction from the TCEQ before proceeding.

Questions for TCEQ:

1. Is TDSL obligated by TCEQ rules to keep in its landfill hazardous waste that was delivered to TDSL under the representation and belief that the waste was nonhazardous and when, within an hour or so of the load's receipt at the landfill, the generator designated and declared the waste to be a hazardous waste and later provided documentation (an example of which is attached) to prove that the waste would test to be a hazardous waste?
2. At this time, is this generator-designated hazardous waste authorized by the TCEQ, to be disposed in the TDSL landfill?
3. Has any entity even requested authorization from the TCEQ for the regulated hazardous CRT waste to be disposed in the TDSL Landfill?
4. Would TDSL have to formally request additional authorization in order for the TCEQ to provide TDSL the authorization to dispose of the hazardous CRT waste in the TDSL landfill?
5. Does the attached TNRCC Oil or Hazardous Substances Spill or Discharge Report signed June 10, 1998, which states that, "The TNRCC allowed them to remain in the landfill", in any way require TDSL to permanently keep the generator designated hazardous waste in the TDSL landfill against its will?
6. Considering that the ongoing development and construction of the TDSL landfill, as currently authorized by TCEQ Permit Number MSW-2123, requires TDSL to fill waste in the same area of the landfill in which the CRT contaminated waste is stored in the immediate future; and considering that the generators of the hazardous waste continue to refuse to remove and properly dispose of the waste themselves; and considering that at least one of the generators has recently provided TDSL documentation (attached) allowing TDSL to utilize their generator number and have agreed to indemnify TDSL from liability for the disposal of the hazardous waste at a hazardous waste landfill; and considering that TDSL will prepare a Health and Safety Plan documenting the steps TDSL will take to insure the health and safety of on-site personnel and surrounding property owners and how TDSL will conduct the excavation and storage of the waste on site until the waste is transported offsite to a proper waste disposal facility, can TDSL move and repackage the approximately 1,660 compacted cubic yards of CRT contaminated waste for off-site disposal and

store it in plastic covered transport containers until shipment off-site, under the authority granted by the agency to store the hazardous waste signed June 10, 1998? (Please see the attached Oil or Hazardous Substances Spill or Discharge Report.) (Also, please note that by relying upon the attached generators' letter dated December 19, 2003, TDSL is not waiving its right to seek damages from the waste generators to recover its related costs to remove, transport, process and dispose of the CRT contaminated waste or other damages to which it may show itself entitled.)

7. Does the generator of the CRT waste, that was designated by the generator as regulated hazardous waste, have responsibility for the proper disposal of their waste, even after it is commingled with other solid waste?
8. Is it possible for the waste generator to test the approximately 1,660 compacted cubic yards of waste currently stored in the TDS landfill, which consists of the generator designated regulated hazardous waste commingled with municipal solid waste from residences and various types of businesses, and to reclassify the CRT waste from a hazardous waste to a nonhazardous waste?
9. Would TDSL be obligated to keep a reclassified waste (reclassified from hazardous waste to a nonhazardous waste), if TDSL did not want the CRT waste to permanently remain in its landfill?
10. If the approximately 1,660 compacted cubic yards of commingled solid waste in its present state is tested to be nonhazardous waste, could the generator of the CRT waste take custody of all the approximately 1,660 compacted cubic yards of waste and transport it to another municipal solid waste landfill that will accept the waste?
11. Can a landfill operator accept for disposal a generator designated and characteristic hazardous waste and mix 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?

Please let me know the Waste Permits Section's response to these questions as soon as possible. These responses would be most helpful in a pretrial hearing now scheduled for Friday morning, January 16, 2004. Also, please let me know whether you can readily identify any other issues TDSL or the generators should address, that are not identified above. We have a very short window of opportunity to deal with these issues and prepare for the January 26, 2004 trial date. I appreciate all your assistance in this matter. Feel free to contact me at 421-1300, if you have questions or comments.

Sincerely,

Bob Gregory
President and CEO

Ll/bg
Attachments

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 15, 2004

Mr. Bob Gregory
President and CEO
Texas Disposal Systems, Inc
P.O. Box 17126
Austin, TX 78760-7126

Re: Commingled Cathode Ray Tube Regulated Hazardous Waste
Texas Disposal Systems Landfill, Inc.
TCEQ Permit No. MSW-2123
Travis County, Texas

Dear Mr. Gregory:

This letter is in response to our recent conversation where you raised an issue regarding the placement of approximately 1,660 compacted cubic yards of commingled hazardous and municipal solid waste into plastic covered transport containers. There appear to be many issues relating to the events that led to the receipt of this waste at your facility which I do not address by this letter. However, given the environmental considerations associated with this waste material being managed in your landfill, it is acceptable to place the referenced waste material into transport containers and to ship the waste material to an authorized facility.

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.

Should you have additional questions or comments, please feel free to contact me at 239-6787.

Sincerely,

Wade M. Wheatley, P.E., Director
Waste Permits Division

WMW/jm

EXHIBIT A

February 27, 2004

Project No.: 4004-0001
Via Courier

Mr. Gary Russell, CHMM
Onyx Environmental Services, Inc.
1800 South Highway 146
Baytown, Texas 77520

Re: ***Summary of Findings***
Professional Oversight and Sampling Activities of
Commingled Waste Material
Texas Disposal Systems - Creedmoor Landfill
12200 Carl Road
Creedmoor, Travis County, Texas

Mr. Russell:

Transmitted herein is SKA Consulting, L.P.'s (SKA) summary of findings pertaining to the Professional Oversight and Sampling Activities conducted during the removal of the Commingled Waste Material from January 29, 2004 through January 31, 2004 and February 2, 2004 at the above-referenced site located in Creedmoor, Travis County, Texas (***Attachment 1***). This work was performed in accordance with SKA's Work Plan Preparation and Consulting Services Proposal (M2004P10) dated January 15, 2004 and authorized on January 26, 2004 by Skyler Kerby, General Manager of Onyx Environmental Services (Client).

BACKGROUND

According to information obtained from Onyx Environmental Services (Onyx), an estimated 220 television tubes were disposed within Sector 5 of Phase I (Commingled Waste Area) of the Texas Disposal System Landfill located in Creedmoor, Travis County, Texas in February 1998. According to Texas Disposal System Landfill (TDSL) personnel, the Commingled Waste Area (CWA) reportedly contained approximately 1,600 cubic yards of material consisting of commingled television tubes and various other municipal solid waste (MSW) from depths of 2 to 3 feet below grade to a maximum depth of 29 feet below grade. The horizontal and vertical extent of the CWA is based on topographical survey information provided to SKA and Onyx by TDSL personnel.

OBJECTIVE

The ultimate objective of the Professional Oversight and Sampling Activities was to determine if the commingled waste contained within the Commingled Waste Area exhibited a characteristically hazardous concentration of lead as defined by 40 CFR, Part 261.24.

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Russell
EXHIBIT NO. 325
2-27-04 JH

The commingled waste was excavated (i.e., removed) by TDSL personnel and/or their contractors, placed into roll-off boxes, and transported to a staging area within the TDSL. As a result, this Scope of Services included third-party professional oversight activities during the removal of the commingled waste, collection of representative samples of the commingled waste, and analytical testing of the samples in the laboratory. This work plan was developed by SKA Consulting L.P. located in Houston, Texas based on the United States Environmental Protection Agency (USEPA) guidance documents entitled: *Methods for Evaluating the Attainment of Cleanup Standards, Volume 1: Soils and Solid Media (EPA 230/02-89-042, February 1989) and Guidance for the Data Quality Objectives Process (EPA QA/G-4, 2000b).*

Overburden Removal Activities

Mr. Brian T. Weaver, P.G. and Mr. Gene Hickam, Geologist, with SKA mobilized to the site on January 29, 2004 to initiate the Professional Oversight and Sampling Activities. Upon arrival at the Administrative Offices of TDSL, SKA personnel met with Mr. Gary Russell and Mr. Rich Kamp with Onyx; Mr. Steve McMillen with Baker & Botts, LLP; and Mr. Gary Newton, General Council for TDSL.

Once all parties were acquainted, Mr. Newton directed all persons to the excavation activities subsequently being performed at the Commingled Waste Area (CWA) within the Landfill. Once SKA and Onyx personnel arrived at the CWA, the aerial extent of the CWA was clearly marked with surveyors paint in the field. Additionally, most of the overburden, that material described by TDSL personnel that consisted mainly of MSW and clay (presumed daily cover) was already removed from the limits of the CWA. The overburden material was actively being removed by TDSL personnel and/or their contractors with a trackhoe and temporarily stockpiled adjacent to the CWA, as determined by TDSL personnel.

In an effort to access the buried commingled waste, TDSL personnel ultimately determined the necessary amount of overburden to remove from the CWA by two methods. The first method was with the aid of historical and current topographical survey data provided by Mr. Lynn Rutters, TDSL's on-site Registered Professional Land Surveyor. The second method was by visual observation of the commingled waste material by TDSL personnel. Specifically, the clear poly-sheeting the commingled waste was reportedly encapsulated within by TDSL personnel in February 1998 (at the time the material was covered on-site).

Mr. Rutters reportedly surveyed the top elevation of the buried commingled waste (noted by poly-sheeting) shortly after the material was buried on-site in 1998. As a result, the historical topographical survey data was used with continuous (current) survey data while excavation activities (removal of overburden) were being performed by TDSL personnel and/or their contractors. Once the surveyed lower elevation of the overburden was determined to be close to that of the previously surveyed top of the commingled waste (from 1998), hand shovels were utilized by TDSL personnel and/or their contractors to visually identify the clear poly-sheeting used to reportedly contain the commingled waste material. The clear poly-sheeting, a visual confirmation of the commingled waste material, was ultimately discovered at the presumed elevation as previously noted by the on-site surveyor. As a result, TDSL personnel and/or their contractors removed all remaining overburden, as defined by its elevation and visual confirmation of the clear poly-sheeting.

Once all overburden was removed, the CWA was segregated into approximately three equal sections. The three sections consisted of the southernmost, central, and northernmost areas. TDSL's proposed plan was to remove all buried commingled waste from one section at a time, sample the material, load the material into roll-off boxes, and cover the excavated area with previously removed and stockpiled overburden before successively continuing on to the next areas.

Excavation/Sampling Activities of the Commingled Waste

Prior to the excavating and sampling of the commingled waste material, TDSL personnel and/or their contractors established an exclusion zone surrounding the work area. This exclusion zone encompassed the entire CWA and the immediate surrounding area. TDSL personnel and/or their contractors utilized red marking tape and "danger – lead abatement" signs to define the boundaries of the exclusion zone. No persons were allowed within the exclusion zone unless properly fitted in the appropriate personal protective equipment (PPE). The PPE required by persons within the exclusion zone consisted of Level C (full face respirator, tyvek coveralls, steel-toe boots, hardhat, and double gloves [nitrile taped]). Photographic documentation is included in ***Attachment 3***.

Once TDSL personnel and/or their contractors began to excavate (i.e., remove) the commingled waste material from the CWA with the trackhoe, the commingled waste material was placed into 30 to 40 cubic yard metal roll-off boxes. TDSL personnel lined each metal roll-off box with poly-vinyl sheeting (formerly large billboard [advertisement] signs) prior to placing the waste material into each box. Once the roll-off box was considered full (as determined by TDSL personnel), the poly-vinyl sheeting was sealed closed at the top with spray adhesive and tape. Once sealed, the roll-off box was transported to a staging area within the landfill for storage.

On January 29, 2004, TDSL personnel and/or their contractors initiated the excavation (i.e., removal) activities of the commingled waste from the southernmost area of the CWA. The excavation of the southernmost area of the CWA was completed on January 30, 2004. The excavation of the central area of the CWA was initiated and completed on January 31, 2004. The excavation of the northernmost area of the CWA was initiated and completed on February 2, 2004. Upon completion of all excavation activities, the excavation areas were backfilled with the previously removed and stockpiled overburden. SKA and Onyx personnel demobilized from the TDSL property on February 2, 2004.

Commingled Waste Material Sampling

SKA and Onyx personnel performed all waste material sampling activities. For safety precautions, no SKA or Onyx personnel were permitted to enter the roll-off boxes for sample collection once the boxes were loaded with commingled waste. Therefore, representative (composite) samples were collected during waste material excavation activities from the trackhoe bucket utilized by TDSL personnel and/or their contractors. The composite samples were collected by an Onyx Field Technician equipped with proper PPE during the loading of each roll-off box within the exclusion zone.

TDSL personnel determined that approximately six (6) trackhoe bucket loads of commingled waste would constitute one fully loaded roll-off box (based on weight requirements). As a result,

SKA and Onyx determined that several (i.e., three to five) random "grab" samples would be collected from every third and sixth trackhoe bucket load of commingled waste. The Onyx Field Technician then randomly collected the individual "grab" samples from different locations within the trackhoe bucket and placed the sample into an appropriately decontaminated stainless steel mixing bowl. After all of the random "grab" samples were collected from the third and sixth trackhoe bucket loads, the composite sample contained within the stainless steel mixing bowl was either placed into an appropriately decontaminated 5-gallon bucket (temporarily) or placed directly on a new sheet of 6-mil plastic. Once placed on the plastic sheeting, the entire sample matrix was then mixed either by hand or a with a stainless steel spoon.

Once the entire sample matrix was thoroughly mixed on the plastic sheeting, SKA's on-site personnel then placed the sample into a properly labeled, 32-ounce glass, laboratory-supplied sample container which was then placed into an ice-filled chest for preservation and shipment to the testing laboratory. During SKA's sample collection, split samples were also collected by TDSL's on-site environmental consultant (HBC/Terracon). The representative from HBC/Terracon collected split samples of the sample matrix; however, the samples were placed into a sealed plastic bag (i.e., Ziploc bag) which was then placed into a pick-up truck. The final disposition of the samples collected by HBC/Terracon is unknown.

Based on the sampling plan, only composite waste samples which represented every other roll-off box were collected and submitted to the testing laboratory. As a result, forty-nine (49) samples (which represented every other roll-off box) were collected by SKA and Onyx (a total of ninety-nine [99] roll-off boxes were ultimately filled with commingled waste by TDSL personnel and/or their contractors). Commingled waste samples submitted to the testing laboratory generally consisted of remnants, (in whole or in part) of plastic bags, magazines, newspaper, wood, paper, some glass, rocks, clay, and soda cans.

In an effort to reduce the possibility of cross-contamination, equipment decontamination was conducted in accordance with applicable Texas Commission on Environmental Quality (TCEQ), USEPA, and Occupational Safety and Health Administration (OSHA) guidelines. All sampling equipment and/or tools were continuously washed with Alconox soap and rinsed with de-ionized water. All decontamination (rinse) water was placed into properly labeled and sealed 55-gallon drums on-site pending proper waste disposition.

Sampling Activities of the Basal Clay

TDSL personnel determined when all of the commingled waste material was removed from the CWA primarily by two (visual) methods. The first method was by visual confirmation of the clear poly sheeting used in February 1998 by TDSL personnel representing the bottom of the encapsulated commingled waste. The second method was by visual confirmation of clay cover used beneath the poly sheeting (i.e., basal clay beneath the commingled waste material). Once TDSL personnel confirmed both of these limits, the entire commingled waste material was considered removed from the CWA.

Once TDSL personnel determined all commingled waste material had been removed, TDSL personnel requested the basal clay beneath the commingled waste material be sampled. As a result, four (4) basal clay samples were collected by ONYX and HBC/Terracon for analytical

testing in the laboratory. One (1) composite sample was collected from the southernmost area (S-BS-1), two (2) composite samples were collected from central area (M-BS-2 and M-BS-4), and one (1) composite sample was collected from the northernmost area (N-BS-3).

At the time basal clay sample M-BS-2 was collected from the central area of the CWA, there was some remaining commingled waste present within the bottom of the excavation. As a result, the representative from HBC/Terracon requested TDSL personnel to "clean up" the bottom of the central area of the excavation utilizing a bulldozer. Once the central area of the CWA was "cleaned up" (as determined by the representative of HBC/Terracon), a second composite soil sample from the basal clay was collected (M-BS-4).

All of the basal clay samples collected from the CWA were comprised of five-part composite soil samples which were collected from the bottom of the excavation. Each five-part composite soil sample consisted of a "grab" sample collected from each of the four corners of its respective CWA area, and one "grab" sample which was collected from the central portion of its respective area. Each "grab" sample was then mixed together in a stainless steel mixing bowl utilizing a stainless steel spoon. Once the entire sample matrix was thoroughly mixed, SKA's on-site personnel then placed the sample into a properly labeled, 8-ounce glass, laboratory-supplied sample container which was then placed into an ice-filled chest for preservation and shipment to the testing laboratory.

During SKA's sample collection, split samples were also being collected by TDSL's on-site environmental consultant (HBC/Terracon). The representative from HBC/Terracon collected split samples of the sample matrix and placed them into glass jars. However, the origin of the jars and final disposition of the samples collected by HBC/Terracon is unknown.

Analytical Testing

All of the commingled waste material samples and the basal clay samples collected by SKA and Onyx were submitted to the testing laboratory for Toxicity Characteristic Leaching Procedure (TCLP) Lead testing by EPA Method 6010B. The laboratory analyses were performed by Severn Trent Laboratories (STL) of Houston, Texas, which is an EPA-approved laboratory and inspected by the TCEQ. All analyses were performed in accordance with EPA approved methods referenced in Title 40 of the Code of Federal Regulations (40 CFR) and "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (EPA SW-846). Laboratory Analytical Reports and Chain-of-Custody documentation are included as ***Attachment 4***.

The TCLP analytical results are reported by the testing laboratory in the units: milligrams per liter (mg/L). Additionally, the laboratory reports the analytical testing results from Method Detection Limit (MDL) to Reporting Limit (RL). The MDL is an estimated concentration of the analyte by the laboratory while the RL is a concentration that can be quantified by the laboratory (as described in the procedures outlined in 40 CFR 136). Furthermore, concentrations less than the MDL are denoted on the final laboratory report with a "U" flag ("not detected") while concentrations greater than the MDL but less than the RL are denoted on the final laboratory report with a "B" flag.

Laboratory Testing Results

Commingled Waste Material Samples

A total of forty-nine (49) composite waste samples (CW-1 through CW-49) were submitted to the testing laboratory. Of the forty-nine commingled waste samples analyzed in the testing laboratory, only four samples: CW-6 (3328), CW-12 (4299), CW-29 (3165), and CW-44 (4494) exhibited TCLP lead concentrations above their respective laboratory MDL of 0.00190 mg/L. These (estimated) TCLP lead concentrations for the commingled waste ranged from 0.00321 mg/L (CW-12 [3103]) to 0.0345 mg/L (CW-44 [4494]). Although four waste samples reported TCLP lead concentrations above the MDL, no quantifiable TCLP lead concentrations were reported above the laboratory's RL of 0.100 mg/L.

Basal Clay Samples

Of the four basal clay soil samples collected from beneath the CWA and analyzed in the testing laboratory, only basal clay sample M-BS-4 exhibited a TCLP lead concentration above its respective laboratory MDL (0.0028 mg/L). Although this basal clay sample reported a TCLP lead concentration above the MDL, a quantifiable TCLP lead concentration was not reported above the laboratory's RL of 0.100 mg/L.

A summary of laboratory analytical results is presented as ***Attachment 2***. Laboratory documentation is included as ***Attachment 4***.

SUMMARY AND CONCLUSIONS

None of the commingled waste material samples or basal clay samples collected from the CWA exhibited concentrations of TCLP lead that exceed the testing laboratory's Reporting Limit (RL) of 0.100 mg/L and subsequently, the 40 CFR, Part 261.24, Maximum Concentrations of Contaminants for the Toxicity Character of 5.0 mg/L. Additionally, none of the samples collected from the CWA exhibited TCLP lead concentrations in excess of their respective Texas Administrative Code (TAC) Title 30, Part 1, Chapter 335, Subchapter R, Rule §335.505, Maximum Leachable Concentrations (for Class I Non-Hazardous) of 1.5 mg/L.

The analytical testing results of the commingled waste material samples and the basal clay samples conclude there are no hazardous concentrations of lead resulting from the approximate 220 television tubes that were disposed within Sector 5 of Phase I of the Texas Disposal System Creedmoor Landfill. As a result, SKA concludes that no further sampling or analytical testing is warranted for the commingled waste that was removed from Sector 5 of Phase I of the Texas Disposal System Creedmoor Landfill.

CLOSING REMARKS

SKA appreciates the opportunity to be of service to Onyx on this project. Should you have any questions regarding this transmittal, please contact either of us at (713) 266-6056.

Sincerely,

SKA CONSULTING, L.P.

Brian T. Weaver, P.G.
Project Manager

Scott K. Leafe
Managing Partner

Attachments:

Attachment 1 – Site Vicinity Map
Attachment 2 – Summary of Analytical Testing Results
Attachment 3 – Photographic Documentation
Attachment 4 – Laboratory Documentation

BTW/skl/tb

MARC E. ALTHEN
SENIOR VICE PRESIDENT
ADMINISTRATION AND FACILITIES

VIA HAND DELIVERY

RECEIVED
JUN 01 2004
COMPLIANCE & ENFORCEMENT

June 1, 2004

Mr. John Steib
Deputy Director, Office of Compliance and Enforcement
Texas Commission on Environmental Quality
12100 Park 35 Circle
Austin, TX 78753

Subject: Proposed Removal Plan
Notice of Violation dated May 13, 2004
Spill Investigation at IH-35 South, near Exit 221
Buda, Hays County, Texas

Dear Mr. Steib:

This letter is written to describe the proposed plan of Penske Truck Leasing, Co. L.P. ("Penske") for the removal and disposal of waste located in 99 roll-off containers at the Texas Disposal Systems Landfill ("TDSL"). The waste was excavated by TDSL between January 29, 2004 and February 2, 2004, and consists of waste accepted by TDSL for disposal on October 9, 1997. This waste includes clay soils and the remaining debris (approximately 18-50 cubic yards) from emergency response activities following an accident involving a Penske truck transporting new Zenith television picture tubes and the removal by TDSL of some of the debris the day after the incident. The characteristics of this waste are more particularly described by sampling findings and results previously provided to you by Penske and Zenith.

Penske proposes to implement the following plan to resolve the violations alleged by TCEQ:

- Transfer the contents of the 99 roll-offs to 30-yd end-dump transportation vehicles over a two-day period in June 2004.
- Transport and dispose of the waste as Municipal Solid Waste in the Class I cell at Tessman Road Landfill (Permit Number 1410C)
- Submit written documentation of completion of removal and disposal activities to TCEQ by July 13, 2004.

PENSKE TRUCK LEASING / RT. 10 GREEN HILLS / P.O. BOX 563 / READING, PA 19603-0563
TELEPHONE: 610-775-6268 / FAX: 610-775-6442 / CELL: 610-207-9789 / E-MAIL: marc.althen@penske.com
www.penskettruckleasing.com

Please provide your concurrence on the proposed course of action as soon as possible so that Penske can be prepared to meet the deadline for the removal and disposal of the waste.

Neither this plan nor the proposed corrective action is intended to be an admission of liability for the alleged violations. Penske is submitting this plan in a good faith attempt to fully resolve this matter.

If you have any questions, please contact my office at (610) 775-6268.

Sincerely,

Marc E. Althen

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 18, 2004

Mr. Marc E. Althen
Senior Vice President
Penske Truck Leasing
P. O. Box 563
Reading, Pennsylvania 19603-0563

Dear Mr. Althen:

We have received your recent letter describing your proposed plan for removal and disposal of waste located at the Texas Disposal Systems Landfill (TDSL). This waste was generated as result of emergency response cleanup activities related to an accident involving a Penske Truck Leasing (Penske) truck carrying Zenith picture tubes. Penske submitted the plan in response to a Notice of Violation issued by the Texas Commission on Environmental Quality (TCEQ) dated May 13, 2004.

According to your letter, Penske proposes the following actions:

- Transfer the contents of the 99 roll-offs to 30-yard end dump transportation vehicles over a two-day period in June 2004.
- Transfer and dispose of the waste as Municipal Solid Waste in the Class I cell at the BFI Tessman Road Landfill.
- Submit written documentation of completion of removal and disposal activities to TCEQ by July 13, 2004.

Please note that, based on our discussions, we understand that you are proposing to dispose of the waste as a special waste. We have reviewed your plan and approve your approach of transferring the waste from the TDSL facility and disposing of it as special waste. We also understand that you will ensure that the wastes are disposed of at a facility authorized to accept special wastes. Before the waste can be disposed of as a special waste, you must receive approval from the TCEQ. To receive authorization for disposal, please complete TCEQ Form 0152 (Request for Authorization for Disposal of a Special Waste) and submit it to the MSW Permits Section, Waste Permits Division, TCEQ, P.O. Box 13087, MC 124, Austin, Texas 78711-3087. You may also fax the completed form to (512) 239-6000.

Please also note that regarding the transfer of roll-off contents, we do have concerns about the potential for odors and particulates generated as a result of transfer of the materials from the roll-offs to the 30-yard end dump transportation vehicles. Removal of the roll-offs in their current state would address this concern. An alternative approach would entail Penske achieving consent from TDSL for the unloading and transfer of the waste on its site and we would expect that appropriate measures to mitigate odors and particulates would be undertaken.

We look forward to receiving your completion report by July 13, 2004 as required in the May 13, 2004 Notice of Violation. Please feel free to contact me at (512) 239-5100 if you have any questions.

Sincerely,

John F. Steib, Jr., Deputy
Office of Compliance & Enforcement
Texas Commission on Environmental Quality

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 30, 2004

Mr. Marc E. Althen
Penske Truck Leasing Co., L.P.
Route 10 Green Hills
P.O. Box 563
Reading, PA 19603-0563

Re: Notice of Violation
Proposed Removal Plan dated May 13, 2004

Dear Mr. Althen:

This letter is in response to your letter of June 28, 2004 requesting acknowledgment of the approval given by the Texas Commission on Environmental Quality (TCEQ) in a letter dated June 18, 2004, signed by Mr. John Steib, Deputy Director, for disposal of the above waste material as a special waste and to concur that the landfills listed in your letter meet the requirements of that letter. The landfills listed below have Class 1 industrial non-hazardous waste cells and are authorized to accept municipal solid waste (MSW) special waste.

1. Covel Gardens Landfill, San Antonio TX - MSW permit 2093
2. Atascocita Landfill, Humble, TX - MSW permit 1307
3. Itasca Landfill, Itasca TX - MSW permit 241
4. U.S. Ecology Landfill, Robstown TX - Industrial Hazardous Waste permit 50052
5. Newton County Landfill, Mauriceville TX - MSW permit 2242
6. Safety Kleen Landfill, Altair TX - MSW permit 203
7. CSC Disposal and Landfill, Avalon TX - MSW permit 1209

The Brazos County Landfill in College Station, Texas, MSW permit 1444C is not listed because it does not have a cell to accept Class 1 industrial non-hazardous waste.

Although the above cited landfills meet the criteria of the June 18, 2004 TCEQ letter the landfills are not required to accept the waste. Please be reminded that each landfill may require additional information before acceptance.

For any questions concerning this authorization, you may call (512) 239-2334. Mailing address: Municipal Solid Waste, MC-124, P.O. Box 13087, Austin, TX 78711-3087.

Sincerely,

Wade M. Wheatley, P.E., Director
Waste Permits Division

WMW/ETB

MARC E. ALTHEN
SENIOR VICE PRESIDENT
ADMINISTRATION AND FACILITIES

July 1, 2004

Mr. Bob Gregory
President and CEO
Texas Disposal Systems, Inc.
12200 Carl Road
Creedmoor, TX 78610-2184

VIA: Facsimile (512) 243-4123

Dear Mr. Gregory:

By letter dated June 30, 2004, the Texas Commission on Environmental Quality ("TCEQ") authorized Penske Truck Leasing Co., L.P. ("Penske") to remove and dispose of the waste presently located in 99 roll-off containers at the Texas Disposal Systems Landfill ("TDSL"). A copy of TCEQ's letter is attached.

Penske has contracted with USA Environment, L.P., based in Houston, Texas, to arrange for the transportation of the waste to one of the approved landfills for disposal by USA Environment's wholly-owned subsidiary Bayou City Environmental Services, L.P. Bayou City Environmental Services is an insured and licensed waste transporter in Texas (TCEQ ID No. 86133; EPA ID No. TXR000043539). Our contractor estimates that it will take 12 days to remove all of the waste from TDSL. The roll-offs will be transported to the selected disposal facility and will be returned to TDSL in their present condition within two days of pick up, with the waste having been removed.

Because of the time constraints that we face, we plan to commence removal at 8:00 am on Tuesday, July 6, 2004. Access to the TDSL property, the roll-offs, and scale will be required between 8:00 am and 5:00 pm Monday thru Saturday until the work is completed.

If you have any questions, please contact my office at (610) 775-6268.

Sincerely,

Marc E. Althen

Enclosure

cc: Gary T. Newton, Esquire (via facsimile)

PENSKE TRUCK LEASING / RT. 10 GREEN HILLS / P.O. BOX 563 / READING, PA 19603-0563
TELEPHONE: 610-775-6268 / FAX: 610-775-6442 / CELL: 610-207-9789 / E-MAIL: marc.althen@penske.com
www.penskетruckleasing.com

PENSKE

Marc E. Althen
Senior Vice President
Administration and Facilities

VIA HAND DELIVERY

July 7, 2004

Mr. John Steib
Deputy Director, Office of Compliance and Enforcement
Texas Commission on Environmental Quality
12100 Park 35 Circle
Austin, TX 78753

Subject: Notice of Violation dated May 13, 2004
Spill Investigation at IH-35 South, near Exit 221
Buda, Hays County, Texas

Dear Mr. Steib:

Enclosed please find the Affidavits of Marc Althen and Bret Pardue that are being submitted to you as documentation of Penske Truck Leasing Co., L.P.'s ("Penske's") diligent efforts to comply with the action requested of Penske in the Notice of Violation dated May 13, 2004 ("NOV"). As you will see, Penske and its contractor USA Environment, L.P. are today ready, willing and able to commence the removal of the waste being stored in the 99 roll-offs located at the Texas Disposal Systems Landfill in Creedmoor, Texas. A number of verbal and written statements made by Bob Gregory, President, and Gary Newton, General Counsel, both of Texas Disposal Systems Landfill, Inc. ("TDSL"), including statements made yesterday in our final preparations for the removal of the waste, have made it abundantly clear that TDSL will not allow access to the landfill for removal of the waste unless the waste is managed as a hazardous waste. TDSL's refusal to allow us to remove the waste in accordance with the approved nonhazardous classification of this material for disposal in one of the landfills that TCEQ also approved has left Penske with no means to comply with the action requested of it. We therefore request that you accept the enclosed documentation as confirmation of Penske's compliance with directives of the NOV and provide written concurrence that no further action of Penske is required.

Please understand that Penske's efforts to comply with the NOV are not intended to be an admission of liability for the alleged violations.

If you have any questions, please contact my office at (610) 775-6268.

Sincerely,

Marc E. Althen

Marc E. Althen
Senior Vice President, Administration and Facilities

RECEIVED
JUL 07 2004
COMPLIANCE & ENFORCEMENT

AFFIDAVIT OF MARC E. ALTHEN

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared Marc E. Althen, known to me to be the person whose name is ascribed below who being by me first duly sworn, upon his oath, stated as follows:

1. My name is Marc E. Althen. I am over 21 years of age and fully competent to make this affidavit. I have personal knowledge of all facts recited herein and state that such facts are true and correct.
2. I am the Senior Vice President for Administration and Facilities for Penske Truck Leasing Co. L.P. ("Penske"), whose address is Route 10, P.O. Box 563, Reading, Pennsylvania. Since May 13, 2004, I have been personally and substantially involved in developing options for the removal and disposal of waste being stored in 99 roll-offs at the Texas Disposal Systems Landfill ("Landfill") in Creedmoor, Texas. As part of my work, I have had numerous communications with representatives of the Texas Commission on Environmental Quality ("TCEQ") and Texas Disposal Systems Landfill, Inc. ("TDSL"). I have also had communications with numerous landfill companies and Bret Pardue, President of USA Environment, L.P., an environmental contractor retained by Penske.
3. On June 1, 2004, I submitted to TCEQ a proposed removal plan for the removal of the waste on behalf of Penske. My proposed removal plan was approved by TCEQ on June 18, 2004,

subject to the submittal of a "Request for Authorization for Disposal of a Special Waste" form.

4. Despite the TCEQ's concurrence as to the classification of this waste as a special waste, I encountered significant difficulties in locating a landfill that was willing to accept the waste for disposal based on negative publicity concerning the waste. On June 28, 2004, landfill options were identified and the necessary form was provided to TCEQ. On June 30, 2004, TCEQ approved the disposal of the waste in the roll-offs at the Landfill as a special waste in any one of seven landfills that had been identified.

5. Access to the Landfill and the waste is necessary for Penske to implement its approved plan for the removal and disposal of the waste. On July 1, 2004, I sent a letter to Bob Gregory, President of TDSL, by facsimile informing TDSL of Penske's plan and schedule for the removal of the waste in accordance with the TCEQ's June 30, 2004 approval. Attached to this affidavit as Exhibit A is a true and correct copy of a facsimile from Bob Gregory dated July 1, 2004, responding to my July 1, 2004 letter to him. On July 2, 2004, I sent Bob Gregory a second letter by facsimile providing additional details of Penske's proposed removal plan. Attached to this affidavit as Exhibit B is a true and correct copy of a facsimile from Bob Gregory dated July 2 , 2004, but not received by my office until July 6, 2004, responding to my July 2, 2004 letter to him. In Exhibit A and Exhibit B, Bob Gregory conditioned Penske's removal of the waste on, among other things, TDSL's receipt of a hazardous waste manifest for each of the 99 roll-off containers.

6. On the morning of July 6, 2004, at approximately 9:05 am, I placed a call to TDSL to make the arrangements for Bret Pardue's visit to the Landfill. I spoke to Gary Newton. During our telephone conversation Mr. Newton advised me that TDSL's position had not changed and

that TDSL would only release the material if Penske handled it as a hazardous waste. I explained to Mr. Newton that Penske had not changed its position and it was going to treat the waste in the roll-offs as a special waste as the TCEQ had approved. Mr. Newton then told me that "if that is how we are going to treat it, they would not allow it to be shipped."

7. Later on July 6, 2004, around 4:00 pm, I returned a phone message that I had received from Bob Gregory. Mr. Gregory answered and told me during the course our conversation that if Penske was not willing to ship the waste in roll-offs as a hazardous waste, then not to bother to come pick it up because TDSL would not allow it to be shipped off-site.

8. Penske stands ready, willing and able to comply with the TCEQ's desires to remove the waste in the roll-offs from the Landfill as a special waste to one of the approved landfills for disposal. Penske's contractor USA Environment had scheduled the necessary equipment and personnel to mobilize at the Landfill on July 7, 2004. Through repeated verbal and written statements to Penske, TDSL is refusing to allow Penske to remove the waste from the Landfill as a nonhazardous waste.

Marc E. Althen

SUBSCRIBED AND SWORN TO BEFORE ME on this 7 th day of July, 2004 to certify which witness my hand and official seal.

Jimi Lee Riverkamp
Notary Public in and for the State of Texas

My Commission Expires:
3-3-05

NOTARY PUBLIC STATE OF TEXAS
JIMI LEE RIVERKAMP
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
MARCH 3, 2005

TEXAS DISPOSAL SYSTEMS, INC.
TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

P.O. Box 17126
Austin, TX 78760-7126
(512) 421-1300 Office
(512) 243-4123 Fax
www.texasdisposal.com

FACSIMILE
TRANSMISSION MEMORANDUM

DATE: July 1, 2004

NUMBER OF PAGES TRANSMITTED: 2 (including cover)

MESSAGE IS FOR: Marc Althen, Senior Vice President, Penske Truck Leasing Co.

MESSAGE IS FROM: Bob Gregory, President, Texas Disposal Systems Landfill, Inc.

FAX NO. CALLED: (610) 775-6442

REGARDING: I am responding to your fax received several hours ago at 4:13 CDT. I noticed a reference to a June 28, 2004 letter from you to the TCEQ. Please fax me a copy of this letter to clarify the TCEQ response. In the interest of time, I am sending to you, via Fed Ex, Priority Overnight, a copy of the June 30, 2004 TDSL letter to the TCEQ that presents our response to John Steib's June 18, 2004 letter. This TDSL letter lists several of the issues to address related to removal of the Penske/Zenith hazardous CRT waste from our site. Please also obtain a copy of the June 16, 2004 letter from TDSL to the TCEQ that was sent to your General Counsel, Mike Duff. That letter also stated some of the issues that must be addressed in order to facilitate the removal of the Penske/Zenith hazardous CRT waste.

(Continued on page 2)

EXHIBIT
tabbies
A

(Continuation of July 1, 2004 fax to Marc Alfhen from Bob Gregory)

The issues include basic items such as a description of your work plan while on TDSL property; timing of your work; who will be the on-site coordinator for Penske; your need for use of TDSL services; standard insurance coverage for TDSL employees and equipment during your work; verifying the transporter is licensed and insured to transport this waste; method for providing copies of hazardous waste manifests for TDSL files for each load leaving TDSL and each fully completed manifest by the receiving disposal facility; identification of the specific hazardous waste disposal facility to be used; and other similar issues. Please forward me a sample standard hazardous waste manifest identifying the generator, identifying D008 waste, etc., so that we can evaluate whether it will meet the needs for our permanent Site Operating Record we are required to maintain by TCEQ rules.

Please let us know whether the trucking company you will use will be able to clean the mud off their truck tires before leaving the TDSL site. As you may know, the 99 containers are stored on an uncompacted clay pad and the area is quite muddy. I understand this was the wettest June on record for our area. We will need the roll-off containers cleaned and free of any of this waste residue upon their return to TDSL.

Please contact me to discuss the particulars for certificates of insurance etc., since Penske will be taking custody and exerting their ownership of the waste removed and since the trucking firm will be transporting containers owned by Texas Disposal Systems, Inc. You may reach me at (512) 421-1300. I look forward to completing the final disposal of this waste.

TEXAS DISPOSAL SYSTEMS, INC.
TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

P.O. Box 17126
Austin, TX 78760-7126
(512) 421-1300 Office
(512) 243-4123 Fax
www.texasdisposal.com

FACSIMILE TRANSMISSION MEMORANDUM

DATE: July 2, 2004

NUMBER OF PAGES TRANSMITTED: 2 (including cover)

MESSAGE IS FOR: Marc Althen, Senior Vice President, Penske Truck Leasing Co.

MESSAGE IS FROM: Bob Gregory, President, Texas Disposal Systems Landfill, Inc.

FAX NO. CALLED: (610) 775-6442

REGARDING: Thank you for your partial response, received today at 2:08 CDT, to my July 1, 2004 fax response to your fax dated July 1, 2004. We will be glad to meet with your trucking firm to discuss logistics of the removal of the 99 roll-off containers on Tuesday July 6, 2004 at 12 noon, to inspect the area and work out the details necessary to begin the removal of the containers.

Please understand that the removal of the containers will not commence until Penske has met all the concerns expressed in my fax to you yesterday. I would appreciate your full response to the remainder of the issues, at your earliest convenience. If you feel any of these issues are unreasonable or unclear, please let me know your concerns at your earliest convenience.

(Continued on page 2)

EXHIBIT
B

(Continuation of July 2, 2004 fax to Marc Althen from Bob Gregory)

Please understand that a standard Hazardous Waste Manifest indicating the generator, D008 waste, the location of the landfill to receive the waste, etc, must accompany each of the 99 roll-off containers. TDSL will require a copy of each manifest before each container is released. As you know, the TCEQ has not taken ownership or custody of this hazardous waste. A hazardous waste generator must be named. TDSL will not violate federal and state law or its permit, nor will TDSL subject its customers' waste to potential superfund liability, by simply giving away approximately 1,600 ton of waste that has been contaminated by Penske and Zenith hazardous waste. Proper documentation must be in place to protect each party. Penske and Zenith or an appropriate entity must agree to be the generator of this hazardous waste and must be responsible for the waste, should a spill occur in transit to the final disposal facility and for the liability related to the final disposal. Further, the TDSL permanent Site Operating Record must receive adequate documentation concerning the final disposition of both the hazardous waste and any relocated municipal solid waste.

These are significant issues that are essential to the proper management of this hazardous waste. Your insistence on conducting business in such a haphazard manner is the type of approach that caused the illegal disposal of hazardous waste by Penske and Zenith on October 9, 1997 and has caused more than six years of litigation since. I am not going to do anything that could cause another misstep in the management of this hazardous waste.

If you would like to discuss this further, please contact me at (512) 421-1300.

AFFIDAVIT OF BRET PARDUE

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared BRET PARDUE, known to me to be the person whose name is ascribed below who being by me first duly sworn, upon his oath, stated as follows:

1. My name is Bret Pardue. I am over 21 years of age and fully competent to make this affidavit. I have personal knowledge of all facts recited herein and state that such facts are true and correct.
2. I am the President of USA Environment, L.P. ("USA Environment"), whose address is P.O. Box 87687, Houston, Texas. USA Environment is a full service environmental contractor with significant experience in the transportation of hazardous and nonhazardous wastes. On July 6, 2004, USA Environment was contracted by Penske Truck Leasing Co., L.P. to transport the waste being stored in 99 roll-offs located at the Texas Disposal Systems Landfill ("Landfill") in Creedmoor, Texas for off-site disposal.
3. USA Environment, in conjunction with its wholly-owned subsidiary Bayou City Environmental Services, L.P. ("BCES"), had scheduled a fleet of at least eight trucks and personnel to load and transport the 99 roll-offs, starting on July 7, 2004, at 8:00 am, for off-site disposal. BCES is an insured and licensed waste transporter in Texas (TCEQ ID No. 86133; EPA ID No. TXR000043539). BCES's plans for the removal and transportation of the waste included the re-location, loading, and transportation of the waste in the roll-offs as

a nonhazardous waste to an approved landfill, and the return of the roll-offs, once empty, to the Landfill within two days of pick-up.

4. In accordance with written determinations of the Texas Commission on Environmental Quality ("TCEQ") that I reviewed, BCES prepared to transport the waste in the roll-offs as a nonhazardous special waste in full compliance with all applicable regulatory requirements.

5. On Tuesday, July 6, 2004, I visited the Landfill and met with representatives of Texas Disposal Systems Landfill, Inc. ("TDSL") to prepare for the pick up and removal of the roll-offs. Bob Gregory, Jim Gregory, Gary Newton and Ron Leahy participated in the meeting with me. During our meeting, Bob Gregory told me at least three times that TDSL was not going to allow the waste that is contained in the roll-offs to leave the Landfill unless it is manifested as a hazardous waste. His specific words to me were "We will not let it leave our site unless it is manifested as a hazardous waste."

6. Based on my meeting with TDSL and the numerous statements made by Bob Gregory, it is my belief that it would be futile for my company to show up at the Landfill on July 7, 2004, as scheduled, solely because TDSL is not going to allow us to remove the waste for disposal unless it is managed as a hazardous waste. No other issues were raised either during our meeting or our tour of the site that would preclude the project from moving forward as scheduled. USA Environment and BCES are ready, willing and able to begin the transportation of the roll-offs on July 7, 2004, as scheduled, but for TDSL's refusal to allow us to remove the waste as a nonhazardous waste.

Bret Pardue

SUBSCRIBED AND SWORN TO BEFORE ME on this 6 th day of July, 2004 to certify which witness my hand and official seal.

Missy Teel
Notary Public in and for the State of Texas

My Commission Expires:

11-16-04

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 8, 2004

Mr. Bob Gregory
President and CEO
Texas Disposal Systems, Inc.
12200 Carl Road
Creedmoor, Texas 78610-2184

Dear Mr. Gregory:

On May 13, 2004, the Texas Commission on Environmental Quality (TCEQ) directed Penske Trucking Leasing (Penske) to take corrective action regarding waste materials generated as a result of a tractor trailer accident involving a Penske truck carrying cathode ray tubes manufactured by Zenith. In their response to TCEQ, Penske proposed to remove the waste stored in 99 roll-off containers at the Texas Disposal Systems Landfill (TDSL) and dispose of it as special waste. The TCEQ approved Penske's plan.

We now have been notified by Penske that TDSL has refused to release the waste to Penske citing a disagreement with the waste classification. In light of this development and your continued concerns about the characteristics of this waste, TCEQ is scheduling a date and time to sample and analyze the waste contained in the roll-off containers. TCEQ staff will be contacting you to arrange for access to your site by our contractors. We anticipate that the sampling will take place on Friday and Saturday, July 9 and 10. Upon receipt of the sample analyses, we will share the results with you and Penske and proceed with appropriate action.

We look forward to your cooperation with TCEQ staff and our contractors during this investigation. Please feel free to contact me at (512) 239-5100 if you have any questions.

Sincerely,

John F. Steib, Jr., Deputy
Office of Compliance & Enforcement

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 13, 2004

Mr. Marc E. Althen
Senior Vice President
Penske Truck Leasing
P.O. Box 563
Reading, Pennsylvania 19603-0563

Dear Mr. Althen:

We received your letter dated July 7, 2004 regarding Penske Truck Leasing Company, L. P.'s (Penske) efforts to comply with the Notice of Violation (NOV) issued May 13, 2004. You indicated that you have been unable to complete the removal of waste stored in roll-off containers at the Texas Disposal Systems Landfill (TDSL). You have also stated that TDSL has refused to allow you to move the waste unless it is manifested as hazardous waste.

As a result of this development, the Texas Commission on Environmental Quality will conduct an independent evaluation of the waste stored at TDSL in order to determine the characteristics of the waste. Once our investigation is completed, we will make a determination regarding the appropriate disposition of the waste.

In light of your attempts to comply with the NOV and our decision to pursue additional testing, the July 13, 2004 compliance date for the NOV is deferred until further notice.

Please feel free to contact me at (512) 239-5100 if you have any questions.

Sincerely,

John F. Steib, Jr., Deputy
Office of Compliance & Enforcement

Henry Wise
Eagle Construction
Box 159
Cibolo, TX 78108

MicroLife Laboratories, Ltd.

Page 1

Control # 410235

Project TDS Landfill
Sample SA3200
Date/Time Taken Jul 12, 2004 8:22

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run		By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/17/04	18:29	MCK	1311									
Metals Digestion-aqueous	done			7/19/04	13:24	MCK										
Lead, TC	0.070	mg/L	.05	7/19/04	20:56	MCK	6010B	<0.01	0.6	20	102.4	103.0	75-125	107.3	105.9	80-120

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Methods from USEPA unless otherwise noted.
SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD - laboratory control standard/duplicate recovery

Respectfully submitted,

Michael Machen, Ph.D.

12133 Colwick San Antonio, TX 78216 (512) 348-8808 (800) 543-1206 Fax (210) 348-8847 www.microlifelabs.com

Henry Wise
Eagle Construction
Box 159
Cibolo, TX 78108

MicroLife Laboratories, Inc.

Page 1

Report Date 7/20/2004
Control # 410235

Project TDS Landfill
Sample SA3200
Date/Time Taken Jul 12, 2004 8:22

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Added	Sample	Matrix Spike MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500904	1	0.002	1.027	1.033	102.4	103.0	75-125	0.5	20	1	1.074	1.060	107.3	105.9	80-120	1.3	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

12133 Colwick San Antonio, TX 78216 (512) 348-8806 (800) 643-1206 Fax (210) 348-8847 www.microlifelabs.com

Henry Wise
Eagle Construction
Box 159
Cibolo, TX 78108

MicroLife Laboratories, Ltd.

Page 1

Control # 410236

Project TDS Landfill
Sample 24-07
Date/Time Taken Jul 12, 2004 8:53

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/17/04 18:29	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.053	mg/L	.05	7/19/04 21:00	MCK	6010B	<0.01	0.6	20	102.4	103.0	75-125	107.3	105.9	80-120

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Methods from USEPA unless otherwise noted.
SQL - sample quantitation limit (method quantitation limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD-laboratory control standard/duplicate recovery

Respectfully submitted,

Michael Machen, Ph.D.

12133 Colwick San Antonio, TX 78216 (512) 348-8808 (800) 543-1206 Fax (210) 348-8847 www.microlifelabs.com

Henry Wise
Eagle Construction
Box 159
Cibolo, TX 78108

Page 1

Report Date 7/20/2004
Control # 410236

Project TDS Landfill
Sample 24-07
Date/Time Taken Jul 12, 2004 8:53

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Added	Sample	Matrix Spike MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500904	1	0.002	1.027	1.033	102.4	103.0	75-125	0.5	20	1	1.074	1.060	107.3	105.9	80-120	1.3	20

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Added - Actual amount of standard added to spike/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

12133 Colwick San Antonio, TX 78216 (512) 348-8808 (800) 543-1206 Fax (210) 348-8847 www.microlifelabs.com

Henry Wise
Hagle Construction
Box 159
Cibolo, TX 78108

MicroLife Laboratories, Ltd.

Page 1

Control# 410237

Project TDS Landfill
Sample 3137
Date/Time Taken Jul 12, 2004 . 9:36

Matrix soil
Date/Time Rec'd Jul 13, 2004 . 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/17/04 18:29	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.060	mg/L	.05	7/19/04 21:04	MCK	6010B	<0.01	0.6	20	102.4	103.0	75-125	107.3	105.9	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

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Report Date 7/20/2004
Control # 410237

Project TDS Landfill
Sample 3137
Date/Time Taken Jul 12, 2004 9:36

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Added Sample	Matrix Spike MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																	
Metals Digestion-aqueous																	
Lead, TC	500904	1	0.002	1.027	1.033	102.4	103.0	75-125	0.5	20	1	1.074	1.060	107.3	105.9	80-120	1.3	20

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Added - Actual amount of standard added to spiked/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410238

Project TDS Landfill
Sample 3338
Date/Time Taken Jul 12, 2004 9:45

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/17/04 18:29	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.062	mg/L	.05	7/19/04 21:08	MCK	6010B	<0.01	0.6	20	102.4	103.0	75-125	107.3	105.9	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration).
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

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Report Date 7/20/2004
Control # 410238

Project TDS Landfill
Sample 3338
Date/Time Taken Jul 12, 2004 9:45

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Added	Sample	Matrix Spike MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500904	1	0.002	1.027	1.033	102.4	103.0	75-125	0.5	20	1	1.074	1.060	107.3	105.9	80-120	1.3	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410239

Project TDS Landfill
Sample 3062
Date/Time Taken Jul 12, 2004 10:15

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/17/04 18:29	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.069	mg/L	.05	7/19/04 21:12	MCK	6010B	<0.01	0.6	20	102.4	103.0	75-125	107.3	105.9	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

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Report Date 7/20/2004
Control # 410239

Project TDS Landfill
Sample 3062
Date/Time Taken Jul 12, 2004 10:15

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Matrix Spike Added	Sample	MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500904	1	0.002	1.027	1.033	102.4	103.0	75-125	0.5	20	1	1.074	1.060	107.3	105.9	80-120	1.3	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410240

Project TDS Landfill
Sample SA3006
Date/Time Taken Jul 12, 2004 10:41

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/17/04 18:29	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.062	mg/L	.05	7/19/04 21:15	MCK	6010B	<0.01	0.6	20	102.4	103.0	75-125	107.3	105.9	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

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Report Date 7/20/2004
Control # 410240

Project TDS Landfill
Sample SA3006
Date/Time Taken Jul 12, 2004 10:41

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Added	Sample	Matrix Spike MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500904	1	0.002	1.027	1.033	102.4	103.0	75-125	0.5	20	1	1.074	1.060	107.3	105.9	80-120	1.3	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410241

Project TDS Landfill
Sample 3295
Date/Time Taken Jul 12, 2004 11:03

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/17/04 18:29	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.058	mg/L	.05	7/19/04 21:19	MCK	6010B	<0.01	0.6	20	102.4	103.0	75-125	107.3	105.9	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD - laboratory control standard/duplicate recovery

Respectfully submitted,

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Report Date 7/20/2004
Control # 410241

Project TDS Landfill
Sample 3295
Date/Time Taken Jul 12, 2004 11:03

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Matrix Spike Added	Sample	MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500904	1	0.002	1.027	1.033	102.4	103.0	75-125	0.5	20	1	1.074	1.060	107.3	105.9	80-120	1.3	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410242

Project TDS Landfill
Sample 3175
Date/Time Taken Jul 12, 2004 11:11

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/17/04 18:29	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.058	mg/L	.05	7/19/04 21:23	MCK	6010B	<0.01	0.6	20	102.4	103.0	75-125	107.3	105.9	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

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Report Date 7/20/2004
Control # 410242

Project TDS Landfill
Sample 3175
Date/Time Taken Jul 12, 2004 11:11

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Added	Sample	Matrix Spike MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500904	1	0.002	1.027	1.033	102.4	103.0	75-125	0.5	20	1	1.074	1.060	107.3	105.9	80-120	1.3	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410243

Project TDS Landfill
Sample 0002
Date/Time Taken Jul 12, 2004 11:37

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/17/04 18:29	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.054	mg/L	.05	7/19/04 21:27	MCK	6010B	<0.01	0.6	20	102.4	103.0	75-125	107.3	105.9	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD ,replicate MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

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Report Date 7/20/2004
Control # 410243

Project TDS Landfill
Sample 0002
Date/Time Taken Jul 12, 2004 11:37

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Added	Sample	Matrix Spike MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500904	1	0.002	1.027	1.033	102.4	103.0	75-125	0.5	20	1	1.074	1.060	107.3	105.9	80-120	1.3	20

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Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410244

Project TDS Landfill
Sample 1129
Date/Time Taken Jul 12, 2004 11:55

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/17/04 18:29	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.063	mg/L	.05	7/19/04 21:31	MCK	6010B	<0.01	0.6	20	102.4	103.0	75-125	107.3	105.9	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD - laboratory control standard/duplicate recovery

Respectfully submitted,

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Report Date 7/20/2004
Control # 410244

Project TDS Landfill
Sample 1129
Date/Time Taken Jul 12, 2004 11:55

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Added Sample	Matrix Spike MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																	
Metals Digestion-aqueous																	
Lead, TC	500904	1	0.002	1.027	1.033	102.4	103.0	75-125	0.5	20	1	1.074	1.060	107.3	105.9	80-120	1.3	20

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Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410245

Project TDS Landfill
Sample Equipment Blank
Date/Time Taken Jul 12, 2004 12:01

Matrix water
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead	<0.01	mg/L	.01	7/19/04 21:35	MCK	6010B	<0.01	0.6	20	102.4	103.0	75-125	107.3	105.9	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

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Report Date 7/20/2004
Control # 410245

Project TDS Landfill
Sample Equipment Blank
Date/Time Taken Jul 12, 2004 12:01

Matrix water
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Matrix Spike Added	Sample	MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
Metals Digestion-aqueous																		
Lead	500904	1	0.002	1.027	1.033	102.4	103.0	75-125	0.5	20	1	1.074	1.060	107.3	105.9	80-120	1.3	20

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Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control# 410246

Project TDS Landfill
Sample 3297
Date/Time Taken Jul 12, 2004 14:15

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/18/04 17:04	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.092	mg/L	.05	7/19/04 21:58	MCK	6010B	<0.01	0.6	20	102.4	103.0	75-125	107.3	105.9	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

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Report Date 7/20/2004
Control # 410246

Project TDS Landfill
Sample 3297
Date/Time Taken Jul 12, 2004 14:15

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Matrix Spike Added	Sample	MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500904	1	0.002	1.027	1.033	102.4	103.0	75-125	0.5	20	1	1.074	1.060	107.3	105.9	80-120	1.3	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410247

Project TDS Landfill
Sample 3331
Date/Time Taken Jul 12, 2004 14:32

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/18/04 17:04	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.084	mg/L	.05	7/19/04 22:01	MCK	6010B	<0.01	5.2	20	111.1	117.0	75-125	113.0	111.7	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD - laboratory control standard/duplicate recovery

Respectfully submitted,

Michael Machen, Ph.D.

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Report Date 7/20/2004
Control # 410247

Project TDS Landfill
Sample 3331
Date/Time Taken Jul 12, 2004 14:32

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Matrix Spike Added	Sample	MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500905	1	0.004	1.115	1.175	111.1	117.0	75-125	5.1	20	1	1.130	1.118	113.0	111.7	80-120	1.2	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410248

Project TDS Landfill
Sample 3067
Date/Time Taken Jul 12, 2004 14:51

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/18/04 17:04	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.081	mg/L	.05	7/19/04 22:05	MCK	6010B	<0.01	5.2	20	111.1	117.0	75-125	113.0	111.7	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD - laboratory control standard/duplicate recovery

Respectfully submitted,

Michael Machen, Ph.D.

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Report Date 7/20/2004
Control # 410248

Project TDS Landfill
Sample 3067
Date/Time Taken Jul 12, 2004 14:51

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Matrix Spike Added	Sample	MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500905	1	0.004	1.115	1.175	111.1	117.0	75-125	5.1	20	1	1.130	1.118	113.0	111.7	80-120	1.2	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410249

Project TDS Landfill
Sample 3103
Date/Time Taken Jul 12, 2004 15:15

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/18/04 17:04	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.076	mg/L	.05	7/19/04 22:09	MCK	6010B	<0.01	5.2	20	111.1	117.0	75-125	113.0	111.7	80-120

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SQL - sample quantitation limit (method quantitation limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

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Report Date 7/20/2004
Control # 410249

Project TDS Landfill
Sample 3103
Date/Time Taken Jul 12, 2004 15:15

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Matrix Spike Added	Sample	MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500905	1	0.004	1.115	1.175	111.1	117.0	75-125	5.1	20	1	1.130	1.118	113.0	111.7	80-120	1.2	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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MicroLife Laboratories, Ltd.

Control # 410250

Project TDS Landfill
Sample 4299
Date/Time Taken Jul 12, 2004 15:48

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/18/04 17:04	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.073	mg/L	.05	7/19/04 22:13	MCK	6010B	<0.01	5.2	20	111.1	117.0	75-125	113.0	111.7	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

Michael Machen, Ph.D.

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Page 1

Report Date 7/20/2004
Control # 410250

Project TDS Landfill
Sample 4299
Date/Time Taken Jul 12, 2004 15:48

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Matrix Spike Added	Sample	MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500905	1	0.004	1.115	1.175	111.1	117.0	75-125	5.1	20	1	1.130	1.118	113.0	111.7	80-120	1.2	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Page 1

Control # 410251

Project TDS Landfill
Sample 3322
Date/Time Taken Jul 12, 2004 16:02

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/18/04 17:04	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.076	mg/L	.05	7/19/04 22:17	MCK	6010B	<0.01	5.2	20	111.1	117.0	75-125	113.0	111.7	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

Michael Machen, Ph.D.

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Report Date 7/20/2004
Control # 410251

Project TDS Landfill
Sample 3322
Date/Time Taken Jul 12, 2004 16:02

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Added	Sample	Matrix Spike MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500905	1	0.004	1.115	1.175	111.1	117.0	75-125	5.1	20	1	1.130	1.118	113.0	111.7	80-120	1.2	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410252

Project TDS Landfill
Sample SA3196
Date/Time Taken Jul 12, 2004 16:18

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/13/04 17:04	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.086	mg/L	.05	7/19/04 22:21	MCK	6010B	<0.01	5.2	20	111.1	117.0	75-125	113.0	111.7	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD - laboratory control standard/duplicate recovery

Respectfully submitted,

Michael Machen, Ph.D.

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Page 1

Report Date 7/20/2004
Control # 410252

Project TDS Landfill
Sample SA3196
Date/Time Taken Jul 12, 2004 16:18

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Added	Sample	Matrix Spike MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500905	1	0.004	1.115	1.175	111.1	117.0	75-125	5.1	20	1	1.130	1.118	113.0	111.7	80-120	1.2	20

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Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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MicroLife Laboratories, Inc.

Control # 410253

Project TDS Landfill
Sample 3232
Date/Time Taken Jul 12, 2004 16:36

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/18/04 17:04	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.073	mg/L	.05	7/19/04 22:24	MCK	6010B	<0.01	5.2	20	111.1	117.0	75-125	113.0	111.7	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

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Page 1

Report Date 7/20/2004
Control # 410253

Project TDS Landfill
Sample 3232
Date/Time Taken Jul 12, 2004 16:36

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Matrix Spike Added	Sample	MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500905	1	0.004	1.115	1.175	111.1	117.0	75-125	5.1	20	1	1.130	1.118	113.0	111.7	80-120	1.2	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Page 1

Control # 410254

Project TDS Landfill
Sample SA3103
Date/Time Taken Jul 12, 2004 16:53

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/18/04 17:04	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.073	mg/L	.05	7/19/04 22:28	MCK	6010B	<0.01	5.2	20	111.1	117.0	75-125	113.0	111.7	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

Michael Machen, Ph.D.

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Report Date 7/20/2004
Control # 410254

Project TDS Landfill
Sample SA3103
Date/Time Taken Jul 12, 2004 16:53

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Matrix Spike Added	Sample	MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500905	1	0.004	1.115	1.175	111.1	117.0	75-125	5.1	20	1	1.130	1.118	113.0	111.7	80-120	1.2	20

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Added - Actual amount of standard added to spikes/LCS
Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410255

Project TDS Landfill
Sample SA3113
Date/Time Taken Jul 12, 2004 17:10

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
TCLP leachate prep	done			7/18/04 17:04	MCK	1311									
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead, TC	0.083	mg/L	.05	7/19/04 22:32	MCK	6010B	<0.01	5.2	20	111.1	117.0	75-125	113.0	111.7	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

Michael Machon, Ph.D.

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Page 1

Report Date 7/20/2004
Control # 410255

Project TDS Landfill
Sample SA3113
Date/Time Taken Jul 12, 2004 17:10

Matrix soil
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Matrix Spike Added	Sample	MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
TCLP leachate prep																		
Metals Digestion-aqueous																		
Lead, TC	500905	1	0.004	1.115	1.175	111.1	117.0	75-125	5.1	20	1	1.130	1.118	113.0	111.7	80-120	1.2	20

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Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Control # 410264

Project TDS Landfill
Sample Equipment Blank
Date/Time Taken Jul 12, 2004 17:15

Matrix water
Date/Time Rec'd Jul 13, 2004 9:45

Analyte	Result	Units	SSQL	Date/Time Run	By	Method	Blank	RPD	Limit	MS	MSD	Limit	LCS	LCSD	Limit
Metals Digestion-aqueous	done			7/19/04 13:24	MCK										
Lead	<0.01	mg/L	.01	7/19/04 22:36	MCK	6010B	<0.01	5.2	20	111.1	117.0	75-125	113.0	111.7	80-120

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SQL - sample quantification limit (method quantification limit adjusted for sample dilution or concentration)
RPD - MS/MSD precision MS - matrix spike recovery MSD - matrix spike duplicate recovery
LCS/LCSD- laboratory control standard/duplicate recovery

Respectfully submitted,

Michael Machen, Ph.D.

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Page 1

Report Date 7/20/2004
Control # 410264

Project TDS Landfill
Sample Equipment Blank
Date/Time Taken Jul 12, 2004 17:15

Matrix water
Date/Time Rec'd Jul 13, 2004 9:45

Expanded Quality Assurance Data

Analyte	QA Batch	Matrix Spike Added	Sample	MS	MSD	MS%	MSD%	Limits	RPD	Limit	Laboratory Control Standard Added	LCS	LCSD	LCS%	LCSD%	Limits	RPD	Limit
Metals Digestion-aqueous																		
Lead	500905	1	0.004	1.115	1.175	111.1	117.0	75-125	5.1	20	1	1.130	1.118	113.0	111.7	80-120	1.2	20

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Sample/MS/MSD - actual measured amount in sample and MS/MSD
MS/MSD% - calculated spike recovery
RPD - calculated spike precision
LCS/LCSD - Actual measured amount in LCS/LCSD
LCS/LCSD% - Calculated spike recovery
Limits - Current laboratory control limits for analyte

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Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 23, 2004

Mr. Marc E. Althen
Senior Vice President
Penske Truck Leasing
P.O. Box 563
Reading, Pennsylvania 19603-0563

Dear Mr. Althen:

On July 12, 2004, the Texas Commission on Environmental Quality (TCEQ) conducted sampling of the roll-off containers at the Texas Disposal Systems Landfill (TDSL) at Creedmoor. A representative number of samples were collected and analyzed for lead by the Toxicity Characteristic Leaching Procedure.

Analysis of samples revealed that all samples were well below the 5mg/l lead leachate threshold for characteristically hazardous waste. You may proceed with your previous proposal to dispose of this waste as special waste. We request that you continue discussions with TDSL concerning Penske's removal of this waste from the TDSL site.

In light of the TCEQ sampling activity, we are extending the date for corrective action on the Notice of Violation issued May 13, 2004 to August 21, 2004. By copy of this letter, we are urging TDSL to provide you with their full cooperation and support.

If you have any questions or need any additional information, please feel free to contact me at (512) 239-5100.

Sincerely,

John F. Steib, Jr., Deputy Director
Office of Compliance & Enforcement

cc: Mr. Bob Gregory, Texas Disposal Systems, Inc.

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 28, 2004

Mr. Bob Gregory
President and CEO
Texas Disposal Systems, Inc.
12200 Carl Road
Creedmoor, Texas 78610-2184

Dear Mr. Gregory:

On July 8, 2004, we informed you that the Texas Commission on Environmental Quality (TCEQ) would begin sampling and analysis of the commingled waste materials stored in roll-off containers at the Texas Disposal Systems Landfill (TDSL) in Creedmoor. This sampling and analysis was initiated as a result of concerns about the characteristics of the waste and Penske Truck Leasing's (Penske) plan for disposal as special waste.

The sampling and analysis has been completed. The results that we provided you on Monday, July 26, 2004, indicate that all samples were well below the 5 mg/l lead leachate threshold for characteristically hazardous waste. We have instructed Penske to proceed with their plan for disposal of this waste as special waste.

Although the sampling results reflect that this waste material in its current form is not hazardous waste, we acknowledge that, as reflected in the information we have been provided, the CRT tubes delivered to the TDSL site in 1997 were declared hazardous by the generator (Penske). However, when the waste arrived at the landfill, it was inadvertently mixed with other landfill waste. The waste in its current form no longer exhibits hazardous waste characteristics. Under these circumstances, we have concluded that classification as special waste is appropriate for disposal of this waste at this time. We note that while dilution as a substitute for adequate treatment is prohibited, applicable rules and guidance provide that the actual waste that results may be considered non-hazardous if it no longer exhibits hazardous waste characteristics. See, for example, 54 Fed. Reg. 48372 and 55 Fed. Reg. 22520. It is also relevant to note that only a low volume of CRT tubes remained at the landfill and was inadvertently commingled with approximately 3,000 cubic yards of non-hazardous waste. Penske proposes to remove all of this commingled waste. Please be advised that this agency will not hold TDSL liable for the associated waste storage, removal or disposal, now, or in the future, provided that TDSL fully cooperates with the removal of this waste from the TDSL site.

We urge you to provide your full cooperation and support to Penske as they arrange for removal and disposal. Please feel free to contact me at (512) 239-5100 if you have any questions or need additional information.

Sincerely,

John F. Steib, Jr., Deputy
Office of Compliance & Enforcement

TEXAS DISPOSAL SYSTEMS

TEXAS DISPOSAL SYSTEMS, INC. • TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

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July 27, 2004

Mike Duff
Assistant General Counsel
Penske Logistics, Inc.
Route 10 Green Hills
P.O. Box 563
Reading, PA 19603-0563

Via Facsimile without attachments
Via Certified Mail with attachments

Re: Response to your July 23, 2004 letter

Dear Mr. Duff:

This letter is in response to your July 23, 2004 letter (copy attached) regarding your proposal to transport and dispose the CRT waste according to the July 23, 2004 letter from John Steib of the TCEQ to Marc Althen of Penske Truck Leasing Co. L.P. and Penske Logistics, Inc. (Penske). There remain, however, many issues to be addressed before the CRT waste can be removed. Bob Gregory previously raised several of these issues with Marc Althen in a series of communications at the beginning of this month (copies attached). The issues outlined in those communications would be a good place to begin any discussion regarding the transport and disposal of the CRT waste that TDSL has been storing for Penske and Zenith Electronics Corporation (Zenith) since October 9, 1997. Furthermore, there are still outstanding legal and practical issues that must be resolved prior to moving the CRT waste.

Your contractor, Bayou City Environmental Services, L.P. has inspected the site, but we have not received a detailed operational plan to remove the CRT waste. TDSL must have some firm assurances of how this project will be executed to minimize the impact to TDSL's daily operations and to assure the proper handling of the roll-off containers owned by one of our affiliated corporations. Liability concerns need to be addressed more specifically than a simple statement that Bayou City is an insured waste transporter. TDSL has to know that the on-site employees, property and equipment will be insured in case of any damage during any part of the loading, transportation, or disposal process. Penske's December 19, 2003 offer (copy attached) to identify itself as the generator of the commingled hazardous CRT waste and to provide an indemnity to TDSL needs to be reduced to a more detailed, written Penske document. It also should include a similar Penske generator identification and Penske indemnity for known and unknown TDSL customers whose municipal solid waste is commingled with the hazardous CRT waste. None of these issues have yet been addressed.

I understand Penske's and Zenith's desire to rush the disposal of the CRT waste, since it may moot any different opinions within the TCEQ regarding the legal classification of

the CRT waste, even though the TCEQ declared the CRT waste to be a hazardous waste in the May 13, 2004 Notice of Violation to Penske. Penske and Zenith have previously insisted on the hazardous waste classification for the CRT waste from October 9, 1997 until January of 2004. Given this previous insistence and regulatory agreement with this classification, I do not understand why suddenly you would want to rush the disposal process, via a nonhazardous waste classification, without a full legal analysis; unless of course you are attempting to gain an advantage in the pending civil litigation that might not be available later. It is in the best interests of all the affected parties to be certain about the legal classification of the CRT waste because of all the affected parties potential liability if Penske disposes of hazardous waste at an unauthorized facility. The affected parties include the TCEQ, Penske, Zenith, TDSL, TDSL's customers who have their waste included within the approximately 1,600 tons of commingled CRT waste, and the nonhazardous waste disposal facility that might receive this waste.

TDSL has filed Motions to Overturn the TCEQ executive staff's decision expressed in the June 18, 2004 John Steib letter and the June 30, 2004 Wade Wheatley letter. These motions are for the TCEQ Commissioners to consider. This administrative appeal process has not been completed, as of this date. TDSL believes that a careful review of the regulations, the motions (copies attached), and brief in support of the motions (copy attached) will compel a change in the executive staff's decision and reinstate the technical staff's position that the commingled CRT waste is still legally a hazardous waste, no matter how it is analyzed. A similar appeal of these decisions has also been filed in Travis County state district court to be pursued in the event these decisions are not overruled by the motion to overturn process.

Regarding your August 21, 2004 deadline to remove the hazardous CRT waste, TDSL could join Penske in seeking a delay to allow time to complete the appeal process mentioned above. Otherwise, Penske should not be able to benefit from a waste removal deadline for the disposal of a regulated hazardous waste, as designated per the TCEQ's May 2004 letters to Penske and TDSL, as a nonhazardous waste, according to the TCEQ's June 18th and 30th 2004 letters to Penske.

There are also problems of validity with the TCEQ's sample plan that is the basis of the July 23, 2004 letter from John Steib. TDSL's hazardous waste experts have advised TDSL that even if one could legally reclassify the commingled hazardous CRT waste to non-hazardous, you still need a representative sample to test. TDSL needs to receive a detailed description of the entire sampling plan implemented by the TCEQ, as well as the lab results from TCEQ and from TDSL's split samples to perform its own review. TDSL's independent hazardous waste experts believe the TCEQ plan does not meet any of the acceptable sampling methods, based on their own observations of the samples collected from the containers storing the CRT waste. The TCEQ sampling plan was flawed because it assumed the material stored in the roll-off containers was homogeneous, rather than the heterogeneous mixture of hazardous CRT waste, municipal solid waste, and clay soil that it is. A hazardous waste expert for TDSL collected split samples from the TCEQ's consultants that TDSL has sent for analysis. TDSL has not

received these lab results, which could affect the outcome of any decision regarding the CRT waste.

TDSL also asked Marc Althen for a copy of his letter (copy attached) with all attachments, including a special waste authorization form, submitted to the TCEQ on June 28, 2004 by Penske. TDSL has not received a copy of the special waste authorization form as of today's date from Mr. Althen or anyone else connected with Penske. This document supposedly contains the Penske certification that the CRT waste is nonhazardous and it would seem that this would contain information relevant to any decision by TDSL to release the CRT waste for the proper treatment and disposal of the CRT waste at an authorized facility.

You should know by now that, due to the regulatory requirements and the analysis presented in the July 22, 2004 Brief in Support of the Motions to Overturn, TDSL is requiring Penske and/or Zenith to transport the 1600 tons of commingled CRT waste as the generator via a uniform hazardous waste manifest to an authorized hazardous waste treatment and disposal facility. If the receiving facility performs a treatability test that indicates the CRT waste can be managed as a non-hazardous waste, then, it is my understanding that facility can terminate the hazardous waste manifest and reduce Penske's and/or Zenith's cost of disposal. This option has the advantages of allowing TDSL's site operating record to reflect the off-site movement of the hazardous CRT waste received from Penske and Zenith on October 9, 1997 and of removing the question of the generator status of the commingled waste that has been stored at the TDSL landfill for Penske and Zenith since October 9, 1997. In order for TDSL's site operating record to be clear that all of the hazardous CRT waste was removed, Penske and/or Zenith must be listed as the generator, rather than Bayou City Environmental Services, L.P. or some other remediation company that had no association with the waste generated on October 9, 1997.

In summary, the issues identified above must be addressed before Penske or Zenith will be able to remove the hazardous CRT waste. To move forward without resolving these issues would expose TDSL and others to additional potential liabilities. We hope that we can expect your cooperation in this resolution process.

Sincerely,

Gary Newton

Gary Newton
General Counsel

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Attachments