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Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 11, 2007

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

CHIEF CLERKS OFFICE

2007 JUL 11 PM 4:40

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Re: **TEXAS DISPOSAL SYSTEM LANDFILL, INC.**  
**TCEQ Docket No. 2007-1019-IHW**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Texas Disposal Systems Landfill, Inc.'s Petition to Review the Executive Director's Action and Order Proper Disposal of Hazardous Waste in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney  
Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2007-1019-IHW

2007 JUL 11 PM 4:40

TEXAS DISPOSAL SYSTEMS  
LANDFILL, INC.  
CREEDMOOR, TRAVIS COUNTY

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BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**OPIC'S RESPONSE TO TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S  
PETITION TO REVIEW THE EXECUTIVE DIRECTOR'S ACTION AND  
ORDER PROPER DISPOSAL OF HAZARDOUS WASTE**

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) files this response to Texas Disposal Systems Landfill, Inc.'s (TDSL) petition to review the Executive Director's (ED) action and order proper disposal of hazardous waste.

**I. Introduction**

On June 21, 2007, TDSL filed the present petition seeking Commission review of actions relating to the ongoing dispute over how to dispose of 99 roll-off bins of waste currently located at the TDSL site. TDSL states that it seeks review of the ED's failure to enforce state and federal laws governing management and disposal of hazardous waste, and requests the Texas Commission on Environmental Quality (TCEQ or "Commission") to order that the hazardous waste left on TDSL's site be removed and disposed of by Penske Logistics, Inc. ("Penske") in compliance with all applicable laws. The TCEQ's procedural rules do not specifically provide for Commission consideration of this type of petition, but TDSL asserts that the Commission can provide the requested relief using its plenary authority. OPIC agrees that the Commission does have the authority to consider TDSL's petition under its plenary authority, particularly because

the petition invites the Commission to consider whether the intent of prior Commission orders and ED directives has been satisfied.

## **II. Discussion**

On May 13, 2004, the TCEQ issued a Notice of Violation (NOV) to Penske as a generator of hazardous waste. On May 25, 2004, the ED sent a subsequent letter to Penske clarifying that Penske was responsible for the proper disposal of the subject hazardous waste. After receiving a proposal from Penske concerning disposal of this waste, the ED issued a June 18, 2004 letter which stated his decision that the co-mingled waste in question could be disposed of as special waste. TDSL sought and obtained Commission review of the ED's approval of the Penske plan through the filing of a motion to overturn. On September 16, 2004, the Commission issued an interim order which granted TDSL's motion to overturn and remanded the matter to the ED.

By letter dated September 24, 2004, the ED directed Penske to remove the containers of waste from the TDSL landfill. Penske was directed to manifest the waste as hazardous waste and have it removed by October 27, 2004. It is clear this was required, and equally clear that it did not happen. However, it is not clear why this did not happen.

There appears to be a dispute as to what may happen to the waste once it leaves the TDSL site as hazardous waste. The September 24, 2004 directive from the ED provided that Penske could pursue alternatives once Penske, as the generator, manifested and removed the waste. The first alternative is for Penske to dispose of all of the removed waste as hazardous waste. That option is clear, and it is also clearly not the option Penske favors.

The second option allowed by the ED's September 24, 2004 letter is the source of the current controversy. The letter states, "Alternatively, Penske may pursue the actions discussed at

the September 16<sup>th</sup> [2004] hearing related to the assessment and any necessary extraction of the waste in the roll-off containers.” Exactly what is required of Penske if the waste is removed to a separate authorized facility? This is the unresolved issue that brings us here. This is the issue that must be clarified now by a new Commission order.

By letter to the ED dated October 10, 2005, Penske, through its attorney, stated that Penske had attempted on numerous occasions to remove the roll-off containers in accordance with the ED’s September 24, 2004 letter, but TDSL refused to allow Penske access. By letter dated October 12, 2005, the ED responded to Penske and opined that Penske had made “appropriate attempts” to address the NOV and, therefore, he planned no further action on the NOV pending the resolution of this matter in court proceedings.

This exchange of letters does not explain any specific measures Penske proposed or why the ED concluded that Penske made appropriate attempts to address the NOV. These letters also shed no light on TDSL’s response to Penske’s attempts to comply with the ED’s directives. Based on this exchange, OPIC can neither agree nor disagree with any conclusion regarding the appropriateness of Penske’s actions.

There appears to be no dispute over the fact that Penske is required to manifest all waste stored in the 99 roll-off containers as hazardous waste and remove all such waste from the TDSL facility. The dispute arises over questions as to: (1) whether, once the waste is removed to a separate authorized facility, it can be further assessed, sampled, or segregated for purposes of determining whether all or any portion of the subject waste may be re-classified as non-hazardous; and (2) if future re-classification is a possibility, what specific steps, if any, would first be required to extract D008 hazardous waste from the remaining waste in the roll-off containers.

These very issues were contemplated and discussed during the Commission's September 16, 2004 Agenda. Opinions about the appropriate measures to take for any assessment, sampling, characterization, possible treatment and disposal of the subject waste were expressed by various persons at the Agenda in the following ways:

(1) "I think the appropriate thing to do here is to manifest that material out, take it to a licensed handler, have the handler characterize the material, do a treatability study, see if there are any hazards posed by this material. If there are, if there is CRT waste, other lead containing waste, pull that material out and make sure it is properly treated." (Marianne Horinko, RCRA Specialist for TDSL; Transcript of Commission hearing on TDSL's MTO at the 9/16/04 Agenda; p. 16)<sup>1</sup>

(2) "We should find out if there is CRT waste in any of those bins and if we find it, deal with it according to the regulations .... We can make sense of these regulations by saying that which is CRT waste, that was placed in that landfill as a result of the accident, which was classified as D008 hazardous waste, take that waste and handle it according to the regulations .... Obviously there is 200 something TVs that we can't account for because we can't find the bands. They are in there somewhere, let's keep looking until we are satisfied that we just can't find them anymore. ... I read SW-846. And I think there are ways to test this waste in each one of the bins that scientifically ... will determine whether or not there is any CRT waste in that particular bin. I believe as I have outlined that there are ways that this issue can be once and for all resolved." (Commissioner Soward, Transcript pp. 33-34)

(3) "[T]o me there is a clear way to resolve this. Go sample, go sample each of the 99 roll off bins using appropriate and approved EPA sampling and testing protocol. If there is any

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<sup>1</sup> The transcript cited throughout this response is available at <http://www.texasdisposal.com>. OPIC has verified that this transcript accurately reflects the contents of audio recordings of the September 16, 2004 Agenda at which the Commission considered TDSL's motion to overturn.

measurable amount of D008 waste in that bin as a result of that sampling, handle it appropriately under the regulations.” (Commissioner Soward, Transcript p. 35)

(4) In response to Pam Giblin’s request for Commissioner Soward to state his views on how sampling of heterogeneous waste should proceed: “I guess that it is very fundamental. Go out to each one of the 99 roll off bins. Take samples pursuant to the approved protocol established by EPA for this type of heterogeneous waste. Test those samples and if there are detectable levels of CRT waste in that particular bin then handle it accordingly.” (Commissioner Soward, Transcript p. 36)

(5) In response to Chairman White’s request for Kerry Russell to clarify his expression of agreement with Commissioner Soward’s views: “I understood that against his better wishes as he seconded the motion, he was asked to say what he would suggest to directions to the ED [sic] that every roll off out there be sampled in accordance with SW-846 sampling procedures for heterogeneous mixtures and if any D008 waste from those CRT waste tubes was identified, it be handled appropriately. And if a roll off is not identified as D008 CRT waste, then it will go back to the landfill as regular municipal solid waste. The rest of it obviously will be manifested as hazardous waste. That is what TDSL has been trying to get all along.” (Kerry Russell, Transcript pp. 37-38)

During the September 16, 2004 Agenda, the Commission discussed whether to include specific instructions with respect to these issues in its order. At the time, Commissioner Ralph Marquez stated: “What message, what instructions are we sending to staff as on what we expect them to be doing? I do not want to dump it all back to staff without direction. ... [L]et’s have the guts to go ahead to tell the Executive Director what is it that we expect from him. Good, initiate a new sampling program like you suggested, that, you know, is fine. Is it to punt and not

do anything? I do not agree with that. I believe that we need to take an action.” (Commissioner Marquez, Transcript at p. 35) Nevertheless, it was decided that “we should let the Executive Director review a proposal from Penske as to how to deal with this waste consistent with what at least a majority of us have indicated our concerns are.” (Transcript at p. 36) Almost three years later, here we are again. The 99 bins are still at the TDSL site. It is now obvious that there is a need for a Commission order that includes very specific step-by-step instructions on what is expected of all parties with respect to this waste. OPIC recommends that these ideas be revisited and considered for inclusion in new ordering provisions.

### **III. Conclusion**

For the reasons stated, OPIC recommends that the Commission consider the relevant discussions from its September 16, 2004 meeting cited above, along with any additional input received from the parties’ RCRA experts, regarding any necessary sampling, treatment, assessment, characterization, reclassification and/or disposal of the subject waste under the two alternatives previously presented to Penske in the ED’s September 24, 2004 letter. These specific proposals should be considered for inclusion in a new Commission order clarifying actions now required and establishing a new deadline for compliance binding on all parties. Given TDSL’s statements concerning the deteriorating integrity of the containers and the need to prevent any resulting potential impacts to human health and the environment, a speedy and decisive resolution of this stalemate is in the public’s best interest.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By 

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### CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2007, the original and eleven true and correct copies of the foregoing document were filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.

  
Garrett Arthur

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