

Texas Disposal Systems Landfill, Inc (TDS/ TDSL) vs. Penske/Zenith

- On October 9, 1997 a Penske truck carrying Zenith television tubes was in an accident on I-35 a few miles from the TDS landfill. The driver of the Penske truck was not aware that when television tubes are broken they become hazardous waste due to the amount of lead contained in them. The DPS arranged the cleanup of the accident through a wrecker service and haulers to transport the waste to the nearby TDS landfill.
- Approximately four hours after the accident occurred and approximately 3.5 hours after Zenith reminded Penske that the broken and discarded TV tubes had to be handled as hazardous waste, and after 7 truckloads of the television tubes had been deposited into the TDS landfill and mixed with municipal solid waste, Penske notified the state's regulating agency the Texas Commission on Environmental Quality (TCEQ) (formerly the TNRCC) that the broken television tubes were hazardous waste. TDS immediately halted the receipt of accident debris and relocated the landfill disposal operations to an adjacent area in order to seal off the section of the working face where the hazardous waste had been commingled with the municipal solid waste. TDS, by choice, is not a landfill authorized to treat or dispose of hazardous waste and does not have a permit to handle or store regulated hazardous waste. TDS then demanded Penske and Zenith remove their hazardous waste from the TDS landfill.
- The TCEQ directed Penske, as the generator of the hazardous material, to arrange for the transfer of all of the hazardous waste to an authorized facility. Penske disposed of the remaining hazardous waste that had not gone into the TDS landfill as a manifested hazardous waste but never accepted their responsibility to incur the cost of removing the commingled hazardous waste from TDSL's landfill working face, where the TV waste was stored. In November 1997, the TCEQ issued Penske a directive to remove the already stored hazardous waste, but never enforced the issue to require the removal of the hazardous waste stored in the TDS landfill.
- The TCEQ told TDS that it could not permanently dispose of the hazardous TV tube waste without formally modifying or amending its permit to dispose of the hazardous waste, and then would be required to deed record the TDS site as having hazardous waste disposed on site. TDS did not want the ongoing problems that would come from having regulated hazardous waste in its landfill,

when the stored waste could and should be removed by the generators for proper disposal. TDS did not want the liability of being the generator of the hazardous waste and received the consent of TCEQ to continue storing the commingled hazardous waste, until a resolution to the issue could be found in the civil lawsuit filed by TDS against Penske and Zenith.

- In 2004, after six years of litigation, TDS and Penske/Zenith went to trial in Hays County over the need to remove the hazardous waste now stored in 99 transport containers from the TDS landfill and to determine who should incur the costs related to the generators improper handling of the hazardous waste and all the damages and costs related thereto. A defendant's motion for mistrial at the beginning of the third week of trial was granted after a story appeared in the Austin American-Statesman newspaper regarding the details of the accident and the ongoing battle. The Judge referred the parties back to the TCEQ for a decision on fault and liability.
- In May of 2004, the TCEQ issued a Notice of Violation (NOV) against Penske for improperly handling the hazardous waste and declaring Penske as the generator of the TV tube waste. The TCEQ also issued letters to TDS clarifying that TDS had done nothing wrong related to its handling of the hazardous waste and that the TCEQ would not bring any enforcement action against TDS.
- In June of 2004, Penske requested that the TCEQ allow the disposal of the hazardous waste, as non-hazardous municipal solid waste "special waste." This designation would allow Penske to ship and dispose of the waste stored at the TDS landfill as nonhazardous waste, at a greatly reduced cost, and be disposed of in a municipal solid waste facility permitted to accept nonhazardous "special waste," and allow Penske to claim in the upcoming trial that the waste did not have to be removed from the TDS landfill, in the first place. The TCEQ Executive Director wrongly approved Penske's proposal. TDS appealed two of the Executive Director's decisions and the Commissioners granted TDS' Motions to Overturn on September 16, 2004. (See hearing transcript.) Nevertheless, the Executive Director issued an order on September 24, 2004 that could allow Penske to improperly manifest, treat and dispose of the Penske hazardous waste.
- The nations Resource Conservation and Recovery Act (RCRA) does not allow toxic characteristic hazardous waste to be re-classified to non-hazardous, simply by mixing it with nonhazardous waste. By allowing the hazardous waste generated at the accident scene to be re-designated as a

non-hazardous “special waste,” the TCEQ would have violated Federal law and would have set a precedence to allow the illegal dilution and disposal of regulated quantities of hazardous waste in municipal solid waste landfills. Further, RCRA does not allow the mixture of nonhazardous waste to satisfy the Land Disposal Restriction related to proper treatment of the waste that was generated at the accident scene, the point of generation of the hazardous waste.