

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 1, 2009

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

2009 JUN -1 PM 4:06
CHIEF CLERKS OFFICE
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**Re: IESI Tx. Landfill, LP.
Permit No. 2332
Executive Director's Exceptions to the Administrative Law Judge's Proposal for
Decision and Order**

Dear Ms. Castañuela:

Enclosed for filing is the original and (7) copies of the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and Order regarding the above referenced matter. Please file stamp the original and return the copies to our office.

If you have any questions or comments, please call me at (512) 239-5778. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Anthony Tatu".

Anthony Tatu, Staff Attorney
Environmental Law Division, MC 173

SOAH DOCKET NO. 582-08-1804
TCEQ DOCKET NO. 2007-1302-MSW

2009 JUN -1 PM 4: 07

APPLICATION OF IESI TX LANDFILL
L.P. FOR A NEW MUNICIPAL SOLID
WASTE PERMIT AMENDMENT

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGE'S PROPOSAL FOR DECISION AND ORDER**

The Executive Director of the Texas Commission on Environmental Quality respectfully submits these exceptions to the Administrative Law Judge's (ALJ) Proposed for Decision (PFD) in the above-referenced matter.

The ALJ recommends denial of IESI's application for three reasons : 1) The Applicant did not adequately identify and evaluate all springs and wells within one mile of the proposed facility boundaries; 2) The Applicant did not identify an important regional aquifer; and 3) The Applicant did not properly identify the impact of the landfill on recharge areas. However, the ALJ also found that the Applicant met its burden of proof on the issue of groundwater protection, and concluded that the Applicant's methods for evaluating the particular site were standard and reasonable.

In response to the apparent inconsistencies in the PFD and Order, the Executive Director respectfully recommends that the Commission remand this matter back to SOAH to take additional evidence on the issue of whether additional ground water monitoring wells should be installed at the site.

IESI TX Landfill, L.P.

Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and Order
SOAH Docket No. 582-08-1804
TCEQ Docket No. 2007-1302-MSW

I. Applicable Legal Standard

Section 361.0832 (c) of the Texas Health and Safety Code (HSC) provides that the commission may overturn an underlying finding of fact that serves as the basis for a decision in a contested case only if the commission find that the finding was not supported by the great weight of the evidence. In addition, Section 361.0832 (d) states that the commission may overturn a conclusion of law in a contested case only on the grounds that the conclusion was clearly erroneous in light of precedent and applicable rules.

II. Discussion

Identification of Wells and Springs:

As the ALJ correctly states in the PFD, an Applicant for a new Municipal Solid Waste Landfill is required by rule to identify all “known wells” within 500 feet of the proposed site (30 TAC Section 330.53 (b) (8) (E)). In addition the application must include the identification, location, and aquifer of all water wells within one mile of the property boundaries of the facility. (30 TAC Section 330.56 (d) (4) (I).

In this case, the Applicant testified that the standard of care of identifying and locating water wells is to do a search of regulatory agency records and then to try and identify the wells on the ground. (Tr. 2 at 20 and 32). The Executive Director’s witness, Mr. Gale Baker testified that the well search was adequate, and explained that MSW staff does not independently verify the information provided by the Applicant. (Tr. 2 at 89-90). The requirement that all water wells within a mile of a facility be provided is in 30 TAC Section 330.56 (d) (4) (I). That information is part of

the geology report, and the rules require that the information be “based upon published and open-file sources.” Although those terms are not defined, it is logical to conclude that a search of regulatory agency records meets this standard. The Executive Director does not believe the Applicant in this case should be held to a different or higher standard.

The Commission referred the issue of “Whether the Application adequately identifies and evaluates all springs, water wells, oil and gas wells, homes, churches, and other site specific issues requiring special consideration under Commission rules...” However, there is no specific commission rule requirement relating to springs.

In this case, the Applicant relied on the *Springs of Texas* to identify and locate nearby springs. This reference states that there had been a spring near the site called the “Haley Spring” which failed early due to a high topographical location. The ALJ believes that the Applicant misread the *Springs of Texas* and cites to evidence in the record that the cited reference identifies more than 20 springs in Jack County, including those that could be impacted by the landfill because they are in southeastern Jack County. The PFD also states that there are two key springs located 845 feet north of the Applicant’s property boundary which are identified as the Benson springs.

The Executive Director disagrees with the PFD on the basis that there is no rule requirement that the Applicant identify all the springs in Jack County. The Applicant relied on an established reference to concluded that there were no springs in the area of the proposed landfill. In addition, there is no expert testimony in the record which clearly establishes that the Benson Springs are in fact springs which would affect the groundwater characterization. The Applicant has adequately

characterized the springs in the area, for the purpose of landfill design and groundwater characterization.

Identification of Aquifers and Recharge Areas:

As the PFD correctly states, an applicant must discuss the regional and physiography and topography in the vicinity and describe the regional geology of the area. (30 TAC Section 330.56 (d) (1) and (2)). In addition, the Applicant is required to identify areas of recharge to the aquifers within five miles of the site. (30 TAC Section 330.56 (d) (4) (I)). These issues are closely related and serve to provide a characterization of the site. The purpose of the site characterization is to establish a basis for designing a protective groundwater monitoring system. The Executive Director's expert witness, Teres McCaine, testified that the Applicant complied with rule requirements for a groundwater monitoring system. The ALJ agreed, according to the PFD, the Applicant's methods for evaluating this site were standard and reasonable. The PFD also states that concerns raised about the possibility that contaminant could escape from side of the landfill could be addressed with additional monitoring wells.

III. Conclusion

The Proposal for Decision and the Order which are before the Commission contain some inconsistencies. The ALJ recommends denial based on three issues which are directly related the ground water monitoring system. However, the PFD states that the Applicant met its burden of proof on the issue of groundwater protection, and concludes that the Applicant's methods for evaluating the particular site were standard and reasonable. Therefore, the Executive Director respectfully

recommends that the Commissioners overrule the Proposal for Decision and remand this matter back to State Office of Administrative Hearings to take additional evidence on the issue of whether additional groundwater monitoring wells are needed at the site.

Respectfully Submitted,

TEXAS COMMISSION
ON ENVIRONMENTAL QUALITY

Mark R. Vickery, P.G.
Executive Director

Robert Martinez, Division Director
Environmental Law Division



Anthony Tatu, Staff Attorney
Environmental Law Division
Texas State Bar No. 00792869
P.O. Box 13087, MC-173
Austin, Texas 78711-3087
(512) 239-5778
(512) 239-0606 (Fax)

REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

IESI TX Landfill, L.P.

Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and Order
SOAH Docket No. 582-08-1804
TCEQ Docket No. 2007-1302-MSW

CERTIFICATE OF SERVICE

I certify that on June 1, 2009, the foregoing was sent by first-class mail, agency mail, PDF, or facsimile to all persons on the attached mailing list.



Anthony Tatu
State Bar No. 00792869
Environmental Law Division
TCEQ
P.O. Box 13087, MC-173
Austin, Texas 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2009 JUN - 1 PM 4: 07

CHIEF CLERKS OFFICE

MAILING LIST
APPLICATION FOR PROPOSED PERMIT NO. 2332
IESI TX LANDFILL LP

FOR THE APPLICANT:

William J. Moltz, Attorney
Janessa Glenn
Moltz Morton O'Toole, LLP
106 E. 6th Street, Suite 700
Austin, Texas 78701
wmoltz@mmotlaw.com
jglenn@mmotlaw.com

John Gustafson, Vice President
IESI TX GP Corporation
2301 Eagle, Parkway, Suite 200
Fort Worth, Texas 76177

FOR THE CITY OF JACKSBORO:

Kerry Russell
Russell, & Rodriguez L.L.P.
Texas Heritage Plaza, Suite 103
102 West Morrow
Georgetown, Texas 78626
krussell@txadminlaw.com

FOR THE EXECUTIVE DIRECTOR:

Anthony C. Tatu, Staff Attorney
Ron Olson, Staff Attorney
Texas Commission on Environmental
Quality
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606
atatu@tceq.state.tx.us
rolson@tceq.state.tx.us

Jeff Davis, Technical Staff
Texas Commission on Environmental
Quality
Waste Permits Division,
MSW Permits, MC 124, P.O. Box 13087
Austin, Texas 78711
Tel: (512) 239-6228
jedavis@tceq.state.tx.us

FOR THE EXECUTIVE DIRECTOR:

Gale Baker, Technical Staff
Texas Commission on Environmental
Quality, Environmental Law Division,
MC 124, P.O. Box 13087,
Austin, Texas 78711
Tel: (512) 239-6730
Fax: (512) 239-6000

Teres McCaine, Technical Staff
Texas Commission on Environmental
Quality, Environmental Law Division,
MC 124, P.O. Box 13087,
Austin, Texas 78711
Tel: (512) 239-1480
Fax: (512) 239-6000

FOR PUBLIC INTEREST COUNSEL:

Scott Humphrey, Attorney
Texas Commission on Environmental
Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-6363
Fax: (512) 239-6377
shumphre@tceq.state.tx.us

FOR THE CHIEF CLERK:

Ms. LaDonna Castañuela
Texas Commission on Environmental
Quality
Office of Chief Clerk, MC-105
P. O. Box 13087
Austin, TX 78711-3087
Fax: (512) 239-3311

MAILING LIST
APPLICATION FOR PROPOSED PERMIT NO. 2332
IESI TX LANDFILL LP
CONTINUED

FOR THE PROTESTANTS:

Marisa Perales
Lowerre & Frederick
33 East Ave, Ste 100
Austin, Texas 78701-4384
Tel: (512) 469-6000
Fax: (512) 482-9346
Marisa@lf-lawfirm.com

James H. Henderson
10118 Mapleridge Drive
Dallas, Texas 75238-2151