

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

APPLICATION OF IESI TX LANDFILL § BEFORE THE STATE OFFICE
L.P. FOR A NEW TYPE 1 MSW PERMIT § OF
PROPOSED PERMIT NO. 2332 § ADMINISTRATIVE HEARINGS

REPLY BRIEF

OF

THE CITY OF JACKSBORO

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 OCT -5 PM 4: 39
CHIEF CLERKS OFFICE

OCTOBER 5, 2009

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BEFORE THE STATE OFFICE OF
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2009 OCT 15 PM 4:29
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE CITY OF JACKSBORO'S REPLY TO TWO BUSH COMMUNITY ACTION GROUP AND THE OFFICE OF PUBLIC INTEREST COUNSEL'S EXCEPTIONS TO THE AMENDED PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the City of Jacksboro ("Jacksboro" or the "City") and presents this its *Reply to Two Bush Community Action Group and the Office of Public Interest Counsel's Exceptions to the Amended Proposal for Decision* in the above-referenced proceeding.

I. INTRODUCTION

On May 5, 2009, the Administrative Law Judge ("ALJ") issued her Proposal for Decision¹ ("PFD") and Proposed Order² based on evidence presented during the Hearing on the Merits in this proceeding and on the legal arguments of the parties. On September 4, 2009, the

¹ Proposal for Decision, *Application of IESI TX Landfill, L.P. for a new Type I MSW Permit, Proposed Permit No. 2332*, SOAH Docket No. 582-08-1804, TCEQ Docket No. 2007-1302-MSW (May 5, 2009) [hereinafter "PFD"].

² Proposed Order, *Application of IESI TX Landfill, L.P. for a new Type I MSW Permit, Proposed Permit No. 2332*, SOAH Docket No. 582-08-1804, TCEQ Docket No. 2007-1302-MSW (May 5, 2009) [hereinafter "Proposed Order"].

ALJ issued her Amended PFD³ and Proposed Order⁴ in the above-referenced docket based on the same evidence presented during the Hearing on the Merits and on the legal arguments of the parties. The Amended PFD stated the ALJ's conclusion that the Applicant, IESI TX Landfill, L.P. ("IESI" or "Applicant"), met its burden of proof on issues referred by the Commissioners related to the above-referenced application. However, the ALJ found that IESI: (1) did not adequately identify and evaluate all groundwater wells within one mile of the proposed facility's boundaries;⁵ (2) failed to identify areas of groundwater recharge;⁶ and (3) did not identify aquifers for the wells within one mile of the site, based on published sources.⁷

In this *Replies to Exceptions to the Amended PFD*, the City will address each of the Two Bush Community Action Group's ("TBCAG's") and the Office of Public Interest Counsel's ("OPIC's") exceptions to the Amended Proposal for Decision under the same headings utilized by TBCAG. However, it should be noted that as stated in the City's Exceptions to the Amended PFD filed on September 24, 2009, the City supports the ALJ's conclusion to issue the proposed permit, but does take exception to several Findings of Fact and one Conclusion of Law.

³ Amended Proposal for Decision, *Application of IESI TX Landfill, L.P. for a new Type I MSW Permit, Proposed Permit No. 2332*, SOAH Docket No. 582-08-1804, TCEQ Docket No. 2007-1302-MSW (Sept. 4, 2009) [hereinafter "Amended PFD"].

⁴ Amended Proposed Order, *Application of IESI TX Landfill, L.P. for a new Type I MSW Permit, Proposed Permit No. 2332*, SOAH Docket No. 582-08-1804, TCEQ Docket No. 2007-1302-MSW (Sept. 4, 2009) [hereinafter "Amended Proposed Order"].

⁵ Amended PFD at 1 and 15, *supra* note 3.

⁶ *Id.* at 1 and 18.

⁷ *Id.* at 1 and 16.

II. SURFACE WATER PROTECTION

In order to determine the adequacy of surface water controls an applicant must first determine what the pre-development drainage patterns are and compare those with post-development drainage patterns. TBCAG continues to make its same baseless argument that IESI did not utilize the proper methodology to demonstrate pre- and post-development drainage patterns. Not surprisingly, TBCAG's unfounded allegation is supported only by its own witness, Mr. Larry Dunbar, and not by any regulation or authority. Mr. Dunbar's theory of utilizing the Rational Method for post-development drainage patterns is technically wrong and has been repeatedly rejected by the Commission. Mr. Dunbar's flawed theory has even been rejected by SOAH.⁸ In an attempt to support Mr. Dunbar's theory, TBCAG distorts the evidence and misapplies TCEQ rules.

It is important to remember that TCEQ rules do not allow use of the Rational Method to analyze post-development drainage patterns, except in a specific instance which is not at issue in this Application. TBCAG believes that even though the proposed landfill encompasses more than 200 acres, IESI should have utilized the Rational Method to determine pre-development and post-development drainage conditions. The TCEQ Guidance Document, RG-417, relevant to this proceeding provides that the Rational Method can be used for small drainage areas of less than 200 acres, but the HEC-HMS model is needed for areas larger than 200 acres.⁹

There is a good reason for the Commission to again reject Mr. Dunbar's theory. The Rational Method is not a valid model to compare pre- and post-development conditions because

⁸ See APP Ex. 24 at 41-42. The ALJs in said instant agree that when a watershed area is greater than 200 acres "the use of the Rational Method in drainage area hydrologic analyses is inappropriate and inconsistent with TCEQ requirements." *Id.* at 42.

⁹ See APP Ex. 4 at 10.

post-development conditions are based on factors that cannot be input into the Rational Method. Specifically, the Rational Method cannot be utilized for post-development conditions since it cannot take into account the effect detention ponds will have on natural drainage patterns.¹⁰ Unfortunately, Mr. Dunbar, even though he is a licensed engineer, still does not seem to understand this critical distinction. Fortunately, the TCEQ and other professional engineers realize this and do not require the analysis of nonsensical post-development Rational Method data. Such data has no value because it is fundamentally flawed.

While the Rational Method is still found in TCEQ rules, it has limited application in the landfill permitting process, as frequently noted by TCEQ staff. The TCEQ has consistently required that the entirety of a landfill facility that is greater than 200 acres must utilize a HEC-1, or HEC-2, or other method approved by the executive director.¹¹ The Rational Method is simply a holdover from the days of much smaller landfills. IESI utilized the TCEQ approved HEC-HMS model because the total drainage areas that were evaluated are greater than 200 acres.¹² It is undisputed in the record that the overall drainage area evaluated in relation to the proposed landfill site is close to 1,000 acres.¹³

TBCAG attempts to twist the record and cast dispersion on the Applicant because IESI's professional engineer, Mr. Kenneth Welch, chose to also run both the Rational Method and the HEC-HMS models for comparison purposes. This is simply a continued attempt by TBCAG to distort the evidentiary record and, thereby, discredit IESI. As such, the argument by TBCAG

¹⁰ Tr., Vol. 1, at 29, l. 18-22.

¹¹ 30 TEX. ADMIN. CODE § 330.55(b)(5)(B).

¹² Tr., Vol. 1, at 35, l. 4-8.

¹³ *Id.* at 41, l. 16-18.

should be wholly rejected and given no weight. The bottom line is that IESI utilized accepted TCEQ and industry-standard methodology to design its surface water drainage and storm water containment systems.

III. GROUNDWATER PROTECTION

On this issue TBCAG continues to rely on its mischaracterization of the Pennsylvanian formation as an “important” aquifer. TBCAG seeks to reinforce this fallacy by arguing against the ALJ’s Amended PFD. Once again TBCAG utilizes the old adage that if you tell a lie often enough, people will begin to believe it. Dr. Lauren Ross, TBCAG’s expert, admitted that the TCEQ defines an aquifer as “a water bearing unit in the ground that produces water in quantities that—and a quality that is usable for some human purpose.”¹⁴ In TBCAG’s Exhibit 8-B, *Nordstrom Report 308*, Nordstrom states that the Pennsylvanian aquifers, while important to a small number of people, are not considered regional aquifers due to having the characteristics of water that is not suitable for domestic use or even for extensive irrigation practices.¹⁵ In reviewing *Nordstrom Report 308*, the source supposedly providing the foundation for Dr. Ross’s opinion, it is easy to determine that even Dr. Nordstrom does not characterize the Pennsylvanian as an aquifer. Thus, this begs the question: why should IESI be required to analyze the Pennsylvanian as an aquifer when “relevant published sources” do not? The question is particularly important when those same sources are incorrectly cited by TBCAG’s witnesses to state supposedly contradictory information.

In the context of TCEQ rules, there is a significant difference between limited amounts of perched groundwater and an “aquifer.” Clearly, TCEQ rules require that aquifers be analyzed on

¹⁴ Tr., Vol. 6, at 96, l. 21 to 97, l. 1.

¹⁵ See TBCAG Ex. 8B at iii, 63, and 67.

a regional basis. When this is done, it is clear that there are no regional aquifers under the proposed landfill site. The legally unsupportable insistence by TBCAG that any water bearing formation is “significant” to the property owners near the site and is, therefore, a regional aquifer is totally contrary to TCEQ regulations and previous Commission approvals of landfill permit applications. While a property owner may withdraw water, of questionable quantity and quality, from a formation, such withdrawal is not “significant” when analyzing regional aquifers. Because the Pennsylvanian is not an “aquifer”, IESI properly designed the groundwater monitoring system for the uppermost aquifer that underlies the site.

TBCAG would also have the Commission believe that IESI did not perform a specific site investigation in developing its Groundwater Monitoring Plan. This is simply not true. IESI demonstrated that it utilized site specific information to prove that groundwater travels in a northeasterly direction under the site. In utilizing site specific data, Mr. Michael Snyder, a registered geoscientist, designed a conservative groundwater monitoring system. Mr. Snyder explained that in designing the system he utilized:

“aquifer thickness, groundwater flow rates, groundwater flow direction (including the evaluation of seasonal and temporal fluctuations in flow), the effect of site construction and operations on groundwater flow directions and rates, as well as the hydrogeologic evaluation of the uppermost aquifer and materials of the lower confining unit.”¹⁶

In performing his evaluation, and in the design of the groundwater monitoring system, Mr. Snyder identified the downgradient groundwater pathways, and designed the groundwater monitoring system to include a sufficient amount of groundwater monitoring wells.

¹⁶ Tr., Vol. 1, at 42.

30 TEX. ADMIN. CODE § 330.403 lists the requirements for landfill groundwater monitoring systems. Specifically, the current version of the TCEQ's MSW rules require monitoring wells to be spaced at no more than 600 feet apart. Based on site specific information, IESI could have designed a system with fewer wells. However, IESI chose to take a more conservative approach and space the downgradient wells 600 feet apart and to include groundwater monitoring wells in Stratum I that are not even required by the rules.¹⁷

In its attempt to discredit IESI's groundwater monitoring system, TBCAG alleges that groundwater is flowing in a different direction in the upper formation, Stratum I, which will be excavated during landfill construction. This allegation is not supported by any evidence in the record. IESI conclusively proved that the Application adequately characterized groundwater at the site and that the proposed groundwater monitoring system protects water quality.

Sampling and analytical testing for the proposed groundwater monitoring system will be performed in accordance with the regulations outlined in 30 TEX. ADMIN. CODE § 330.29.¹⁸ IESI's groundwater sampling and analysis plan ("GWSAP") was developed to meet or exceed the requirements of 30 TEX. ADMIN. CODE §§ 330.230-234 and 330.241 and will be protective of human health and the environment.¹⁹ No controverting evidence was presented during the Hearing on the Merits to refute the fact that IESI has more than adequately addressed all regulatory issues in regard to groundwater characterization and monitoring.

¹⁷ Tr., Vol. 2, at 83, l. 17 through 84, l. 1.

¹⁸ See Applicant Ex. 100, Vol. 2, Part III, Attachment 5, at 5-5.

¹⁹ See Applicant Ex. 100, Vol. 3, Part III, Attachment 11, at 11-1; see also Applicant Ex. 9 at 15, l. 19-20 (Prefiled Testimony of Dr. Charles W. Kreitler, P.E.).

IV. REGIONAL AQUIFERS, SITE SPECIFIC GEOLOGY, AND SUBSURFACE INVESTIGATION

TBCAG disagrees with the ALJ that IESI provided sufficient evidence to support its Subsurface Investigation Report. However, instead of arguing the evidence in the record, TBCAG makes a strained legal argument regarding the legal sufficiency of the evidence. In accordance with 30 TEX. ADMIN. CODE § 330.56(d)(5), the Application contains a geologic cross-section location map, geologic cross-sections, and geologic contour maps that depict subsurface geologic conditions beneath the proposed landfill site.²⁰ In spite of a clear evidentiary record to the contrary, TBCAG continues to characterize the limited number of “wash borings” as the only methodology used by IESI to evaluate groundwater flow. IESI did not solely, or even primarily, rely upon “wash borings.” Wash borings were only utilized for a minor part of the site exploration. The majority of the information that was utilized came from the drilling logs and core samples. IESI included such evidence in the Application. Both Mr. Snyder and Mr. Gregg Adams testified that such information was utilized.

TBCAG well knows that an objection at the time of the introduction of an opinion or evidence is the only proper time in which to make a *Daubert* objection.²¹ The fact that TBCAG did not make a timely objection renders said objection waived. The attempt to make the objection after the fact demonstrates the desperate measures TBCAG will take in order to defeat the Application. It will make an invalid legal argument that clearly cannot be sustained under the Texas Rules of Evidence. Therefore, TBCAG’s argument should be rejected in its entirety under applicable evidentiary and legal principles.

²⁰ See Applicant Ex. 7 at 46, l. 6-12 (Prefiled Testimony of Mr. Michael Snyder, P.G.).

²¹ See *In the Matter of Bates*, 555 S.W.2d 420 (Tex. 1977); see also *Baylor U. Med. Cent. V. Travelers Ins. Co.*, 587 S.W. 2d 501 (Tex.Civ.App. Dallas 1979, writ ref’d n.r.e).

V. SLOPE STABILITY

Once again, TBCAG's failure to properly evaluate the evidence in the record leads to its erroneous conclusion that the slope stability analysis in the Application is inadequate. IESI performed an adequate number of tests to characterize the materials and Mr. Adams testified that the compressive strength data was not the only data that was used to assess the strength parameters.²² The assumed strength parameters were based on not only compressive strength test results, but also the results of the classification tests, dry unit weight tests, moisture content tests, and split spoon sample blow counts.²³ TBCAG introduced no credible controverting evidence to refute the slope stability analyses prepared by IESI.

TBCAG's allegation regarding the potential for block failure was wholly refuted by Mr. Adams. As testified to by Mr. Adams, such a block failure cannot occur at this site.²⁴ Based on the evidence in the record, any competent professional engineer would reach the same conclusion. Demanding that IESI analyze a physical situation that cannot exist at this site is another attempt by TBCAG to impose a new regulatory requirement that has no technical or legal foundation. The ALJ determined that the slope stability analysis was properly performed by the Applicant. No controverting testimony was provided to cast any doubt on that conclusion. TBCAG's arguments should simply be disregarded.

VI. LAND USES/GROUNDWATER WELLS AND SPRINGS

TBCAG recommends findings regarding identification of springs and land use compatibility due to groundwater depletion. TBCAG's recommendation is another attempt to impose new regulatory constraints outside of the required APA process. IESI identified and evaluated all water wells within a one mile radius of the proposed landfill site in accordance with

²² Tr., Vol. 1, at 164.

²³ *Id.* at 161-162.

²⁴ *Id.* at 172, l. 1 through 173, l. 17; *see also* Tr., Vol. 9, at 43, l. 6 through 45, l. 19.

applicable TCEQ rules. Mr. Snyder relied upon information obtained in the standard industry practice of completing a MSW landfill permit application. TCEQ rules require that a water well search be conducted by relying on available public records, which is exactly what Mr. Snyder did.

TBCAG continues to argue that IESI inadequately characterized springs in the area and failed to recognize the existence of the Pennsylvanian formation, as well as its importance as a possible source of groundwater. That assertion is simply not true and is not supported by any evidence in the record. In fact, the exact opposite is true. A search for springs was conducted within a one mile radius of the proposed site.²⁵ No springs were located within that one mile radius and, thus, the Application contains no reference to springs within that area.²⁶ Mr. Snyder reviewed and relied on the *Springs of Texas* to further substantiate the fact that there are no active springs in this area of Jack County.²⁷ No reliable testimony was offered by TBCAG to controvert the factual evidence contained in the Application.

TBCAG's argument that IESI failed to recognize the Pennsylvanian Canyon Group as an aquifer has been discussed above and will not be repeated here. The ALJ's "confusion" on this issue seems to surround the characterization of a formation containing limited amounts of perched groundwater as "significant" in the context of TCEQ rules. While a property owner may withdraw limited amounts of groundwater of questionable quality, from a formation near a landfill, such withdrawal is not "significant" in terms of applicable TCEQ landfill permitting regulations.

²⁵ See App Ex. 7 at 13, l. 12-13 (Prefiled Testimony of Mr. Michael Snyder, P.G.).

²⁶ See *id.*, l. 13-14.

²⁷ See *id.*, l. 15-17.

VII. VECTORS AND SCAVENGING

Although scavenging is clearly a dead issue in this proceeding, TBCAG now attempts to give it new life. TBCAG asserts that the ALJ provided an incorrect analysis of the term “scavenger” and, in support, attaches a Final Order from a previous TCEQ proceeding. What TBCAG fails to advise the Commission is that all evidence presented at this Hearing on the Merits demonstrates that feral hogs will not be a problem at the proposed landfill site and that IESI has developed a Site Operating Plan that addresses vectors and scavenging in compliance with TCEQ regulations. TBCAG also fails to advise the Commission that its own witnesses failed to provide any evidence demonstrating a feral hog problem at the proposed landfill site. During cross examination of Mr. Byron Sewell he testified that he has never seen a hog enter a landfill.²⁸ During cross examination of Mr. Kim Rife, TBCAG’s hog expert, Mr. Rife stated that he “has never been called to trap hogs at a landfill.”²⁹ Even though he was testifying as TBCAG’s hog expert, Mr. Rife supported IESI’s Site Operating Plan by stating on the record that he has no doubt he could take care of any hog problem that could occur on a tract of property the size of the proposed landfill site.³⁰ Feral hogs are a statewide issue. As Mr. Rife testified, it is a simple issue to address if a feral hog problem arises at a landfill.

In this Application IESI states “scavenging will be prohibited at all times”.³¹ IESI also provides that landfill personnel will conduct daily inspections, as required by Section 8.24 of the Site Operating Plan, to observe waste disposal operations and to eliminate areas that may be

²⁸ Tr., Vol. 4, at 28, l. 18.

²⁹ *Id.* at 83, l. 2-3.

³⁰ *Id.* at 84, l. 19-23.

³¹ *See* Applicant Ex. 100, Volume 3, Part IV, at IV-37.

conducive to insects and rodents.³² If the site operator cannot control specific vectors, a licensed professional will be called in to do so.³³ This is exactly what is required by TCEQ regulations.

VIII. OPIC'S RECOMMENDATION

As OPIC essentially makes the same arguments as TBCAG, this Reply also applies to *OPIC's Exceptions to the Amended Proposal for Decision*.

IX. CONCLUSION AND PRAYER

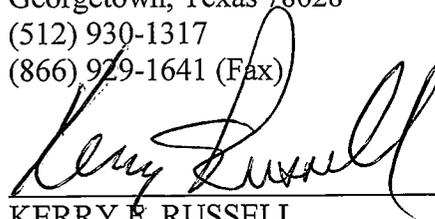
The evidentiary record in this proceeding clearly demonstrates that IESI has satisfied all statutory and regulatory requirements for a municipal solid waste permit to be granted for this site.

The City of Jacksboro respectfully requests that the Commissioners confirm through appropriate Findings of Fact and Conclusions of Law that IESI's Application meets or exceeds all statutory and regulatory requirements and issue the requested municipal solid waste permit to IESI.

Respectfully submitted,

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³² See *id.* at IV-36.

³³ See *id.* at IV-36 through IV-37.

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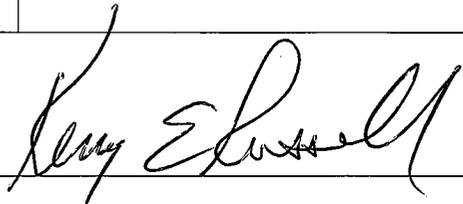
**ATTORNEYS FOR THE CITY OF
JACKSBORO, TEXAS**

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2009, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to the following counsel or party representatives of record:

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