

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 24, 2009

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

RE: **IESI TX LANDFILL, LP**
SOAH DOCKET NO. 582-08-1804
TCEQ DOCKET NO. 2007-1302-MSW

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Exceptions to Amended Proposal for Decision in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Scott A. Humphrey".

Scott A. Humphrey, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY To: PUBLIC INTEREST COUNSEL, MC 103 P.O. Box 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

P.O. Box 13087

Austin, Texas 78711-3087

512-239-1000

Internet address: www.tceq.state.tx.us

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

APPLICATION BY IESI TX	§	BEFORE THE STATE
LANDFILL, LP FOR MSW	§	OFFICE OF ADMINISTRATIVE
PERMIT NO. 2332	§	HEARINGS

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
EXCEPTIONS TO AMENDED PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files these Exceptions to Amended Proposal for Decision (PFD) in the above-referenced matter.

I. INTRODUCTION

In her original PFD, the Administrative Law Judge (ALJ) concurred with OPIC's recommendation that the proposed permit application should be denied. OPIC's recommendation was based primarily on the failure of IESI TX Landfill, LP (IESI or Applicant) to provide accurate information regarding the number, location and depth of water wells within one mile of the proposed facility, and the ALJ substantially adopted that reasoning in her original recommendation to deny the application.

OPIC relied on evidence presented by The Two Bush Community Action Group (Two Bush) in making its recommendation to deny the permit. OPIC agreed with Two Bush that the Applicant's mischaracterization of the groundwater beneath the landfill site as flowing to the east is based on the false premise that the landfill is located in the Cretaceous, rather than the Pennsylvanian formation, in which the groundwater flows generally to the west. OPIC also

concluded that the Applicant does not take into account the groundwater in the upper sands of the site (Stratum IA), and this water flows to the north into Benson Springs. Since the Applicant did not take into consideration that there is water flowing to the west and to the north, the proposed permit is not adequately protective of groundwater. The ALJ also relied on Two Bush's evidence to make her original recommendation to deny the permit.

The ALJ has not accepted any additional evidence since she issued her original PFD. However, on September 4, 2009, the ALJ issued a revised PFD in which she is now recommending the permit be granted with new special provisions.

II. DISCUSSION

The following is an excerpt from the ALJ's **amended** PFD concerning her analysis of IESI's failure to identify nearby wells and springs adequately: "The ALJ finds that IESI did not conduct an adequate search of water wells and springs. Based upon Dr. Ross's testimony and the fact that 25 residences are within one mile of the site, IESI should have inquired further about the water supply those residents use. A simple request to and response from the City would have alerted IESI to the fact that residents near the proposed permit boundary do not have access to City or cooperative water lines."

"IESI also ignored valuable information about area wells as outlined in TWDB's Report 308. Had Applicant relied on this published source, it would have been able to identify additional groundwater wells within one mile of the property boundaries of the facility, as required by 30 TAC § 330.56(d)(4)(J). Information in TWDB Report 308 provides a foundation for assuring land use compatibility and water resource protection, and it should have been considered."

“IESI contends that the monitoring wells will detect any contaminants that may be released, regardless of the depth of the wells. Yet, more water wells are west and southwest of the site, and IESI proposed only one monitoring well for the south boundary and one for the west boundary. Monitoring wells will be screened only in the Twin Mountains aquifer, and no system is planned to detect contaminants that could travel in Pennsylvanian sands. Based on IESI’s failure to properly identify nearby wells and springs, particularly in light of the fact that IESI knew there were 25 residence within one mile of the site, the ALJ finds the application should (*sic*) did not comply with the requirement to describe the present use of groundwater withdrawn from aquifers in the vicinity or identify, locate, and list the aquifer for all water wells within one mile of the property boundaries of the facility.”¹

In addressing the issue of groundwater protection, the ALJ concludes that “In light of the finding that IESI did not identify nearby wells through published sources, the application does not include an adequate plan for groundwater monitoring. With only one well on the west and one on the south, they system would not have adequately protected nearby wells against contamination. Yet, in addition to the 11 wells already planned to screen Stratum II, IESI has agreed to place 28 monitoring wells around the perimeter in Stratum IA. The ALJ finds that, with the special provision requiring these wells, IESI’s groundwater monitoring system would be adequate. The wells would screen in Stratum IA and address the concerns that Protestant raised about groundwater flowing to the west and escaping through the Stratum IA sands. The issue has been thoroughly addressed, and this permit will not lack finality is (*sic*) this special provision is added. Therefore, the ALJ finds that, even though the wells were not appropriately identified,

¹ ALJ’s Amended Proposal for Decision, pgs. 15-16

the groundwater monitoring system will protect water resources.”²

Essentially the ALJ has concluded the following: that the Two Bush Community was correct regarding the IESI’s failure to identify groundwater wells within one mile; that as a direct result of that failure, Two Bush was correct that the groundwater monitoring system in the application would not protect water sources; and that Two Bush provided the evidence the ALJ needed to reach this conclusion. Nevertheless, the ALJ is recommending the permit be granted by allowing the Applicant to make changes based on the flaws in the application proven by Two Bush.

OPIC submits that the permit the ALJ is recommending to be approved is not based on the same application and proposed permit that was the subject matter of this contested case hearing. This recommendation raises concerns about the fairness of the Commission’s contested case hearing process. The public may question whether the agency’s public participation procedures are justly served if applicants fail to meet their burden of proof and then are provided additional opportunities to remedy the defective application and proposed permit.

Two Bush originally fought this application because it disputed the underlying facts alleged by IESI, facts that were accepted by the ED but never thoroughly investigated. After the ALJ reviewed the record, she agreed with Two Bush that the purported facts supporting this application were inaccurate, and the resulting proposed permit did not meet the TCEQ requirements. That should be sufficient for Two Bush to receive a favorable outcome in this proceeding.

Instead, the ALJ is allowing the Applicant to patch up its inadequate application and

² ALJ’s Amended Proposal for Decision p. 35

recommend granting the permit. In her amended PFD, the ALJ notes a concern raised by Two Bush about the process: "Since the Applicant did not raise the possibility of adding monitoring wells in Stratum IA until it filed its reply to exceptions, Protestant did not have an opportunity to address this issue. However, Protestant disagreed with the Executive Director's suggestion of remanding the application. Protestant noted it has expended significant effort and resources to review and respond to the application and IESI's positions. If an applicant is provided never-ending opportunities to supplement and revise an application, permits will be granted merely because the public resources have been drained and not because the eventual application is any better, Protestant contend (*sic*)."³ OPIC concurs with Two Bush but is willing to put it more bluntly: in our contested case hearing process, applicants can never lose and protestors can never win. Applicants have months, if not years, to prepare a complete application that it can defend at a contested case hearing, whereas protestors are not going to expend their limited resources until they have been declared a party to the proceeding by an ALJ. If the Applicant can succeed in gaining its permit even though a protesting party demonstrated that the application and proposed permit that was the subject of the hearing did not meet Commission requirements, then protestors have virtually no chance at succeeding in a contested case hearing. Therefore, OPIC is unable to find that the ALJ has provided an adequate response to Two Bush's concern with the amended PFD.

³ ALJ's amended Proposal for Decision pgs. 34-35

III. CONCLUSION

OPIC urges the Administrative Law Judge to withdraw her Amended Proposal for Decision and re-adopt her original Proposal for Decision.

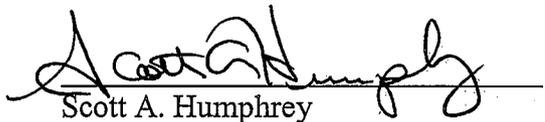
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Scott A. Humphrey
SBN: #10273100
Assistant Public Interest Counsel
(512)239-6363 Phone
(512)239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2009 the original and seven copies of the foregoing was filed with the Chief Clerk and a copy was served by facsimile, electronic transmission, interoffice mail or U.S. Mail to the persons on the attached mailing list.


Scott A. Humphrey

MAILING LIST
IESI TX LANDFILL, LP
SOAH DOCKET NO. 582-08-1804
TCEQ DOCKET NO. 2007-1302-MSW

The Honorable Sarah G. Ramos
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
Tel. 512/475-4993
Fax: 512/475-4994

Ron Olson, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

William J. Moltz
Moltz Morton O'Toole, LLP
The Littlefield Building
106 East 6th Street, Suite 700
Austin, Texas 78701
Tel: 512/439-2170
Fax: 512/439-2165
Representing: IESI TX Landfill, L.P.

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

Marisa Perales
Attorney at Law
Lowerre, Frederick, Perales, Allmon &
Rockwell
707 Rio Grande, Suite 200
Austin, Texas 78701
Tel: 512/469-6000
Fax: 512/482-9346
*Representing: Two Bush Community Action
Group*

Kerry E. Russell
Russell & Rodriguez, LLP
1633 Williams Drive, Bldg. 2, Suite 200
Georgetown, Texas 78628
Tel: 512/930-1317
Fax: 866/929-1641
Representing: City of Jacksboro

Anthony Tatu, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606