Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*

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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 11, 2009

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 JUN 11 PM 3:39
CHIEF CLERKS OFFICE

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 Reply to Exceptions in the above-entitled matter.

Sincerely,

Scott A. Humphrey, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2009 JUN 11 PM 3:39

CHIEF CLERKS OFFICE

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

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

THE OFFICE OF PUBLIC INTEREST COUNSEL'S REPLY TO EXCEPTIONS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Reply to Exceptions in the above-referenced matter.

I. INTRODUCTION

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. Two Bush Community Action Group (Two Bush or Protestant) filed exceptions but agreed with OPIC that the application should be denied. OPIC is not opposed to the exceptions provided by Two Bush but recommends no other changes to the Proposal for Decision (PFD) based on any exceptions filed by the other parties.

II. DISCUSSION

In determining the number of wells and springs in the area, the Applicant relied on registry information and a textbook. That concluded the Applicant's analysis.

While the Applicant stated there were eight wells and no springs within a one-mile radius of the proposed site, Two Bush identified 46 wells plus springs. It appears that Two Bush used the published information as a starting point, rather than an ending point, of its analysis and followed up with an extensive and exhaustive field search to obtain the most accurate information possible. By contrast, it appears that the Applicant used registry information and a textbook (which it misread) and conducted no further research.

The Applicant points out that TCEQ witness Gale Baker approved of the Applicant's well research.[1] However, when asked how he reconciles the Applicant's scant information about water wells with the substantially greater information provided by Two Bush, Gale Baker essentially admitted that the Executive Director (ED) ignored Two Bush's evidence and thought the best course of action was "sticking with what's in the application."[2] The ED's Exceptions confirm Mr. Baker's testimony regarding the ED's position of not considering evidence by protesting parties about the additional water wells. Nowhere in the Exceptions does the ED acknowledge the more thorough and comprehensive empirical evidence presented by Two Bush and how that information may have caused the ED to reconsider and re-evaluate the draft permit.

The ED also expresses concern that if the Applicant is going to have to demonstrate that the proposed permit is protective of all of the wells within the area, not just the ones identified in

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[1] Applicant's Exceptions, p. 7

[2] Tr. p. 35

the registries, that the Applicant will be held to a higher standard than other applicants who just have to account for wells that are registered. Indeed, it is a higher standard but appropriately so. An application that is referred to a contested case hearing and ultimately adjudicated by the Commission is going to be substantially more scrutinized than an uncontested application that relies solely on representations by an applicant and is never seen by the commissioners. The very reason for referral to SOAH is because there are factual disputes, and the Commission wants to consider all the facts, both those that work in favor of and against the application, so that the Commission can make an informed decision on the application. If the ED's position were correct, that all we should consider are the representations from the Applicant and the draft permit and nothing presented by opposing parties, it would defeat the purpose of having an evidentiary hearing.

OPIC believes it is essential for the ED, when he participates in an evidentiary hearing, to consider all of the evidence presented, not just the evidence that supports the original draft permit based on basic representations by the Applicant. In this case, from an analytical standpoint, the ED never moved past the draft permit that was referred to SOAH before the hearing ever began. The ED's failure to consider the evidence provided by the public amounts to a bolstering of the case presented by the Applicant and nothing more than a rubber stamp of the draft permit. It is not in the public interest to turn a blind eye to other evidence presented by protesting parties, especially more thorough and researched evidence, and limit the critical analysis only to what is in the application.

III. CONCLUSION

OPIC does not opposed any changes to the Administrative Law Judge's Proposal for Decision based on exceptions filed by Two Bush. OPIC recommends that no changes to the PFD be made based on any other exceptions filed by any of the other parties.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By _____
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2009 the original and seven copies of the foregoing was filed with the Chief Clerk and a copy was served by facsimile, 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

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