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

October 5, 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 Reply to Exceptions to Amended Proposal for Decision in the above-entitled matter.

Sincerely,

Scott A. Humphrey, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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 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 this Reply to Exceptions to Amended Proposal for Decision (PFD) in the above-referenced matter.

I. INTRODUCTION

OPIC supports the exceptions filed by the Two Bush Community Action Group (Two Bush). OPIC disagrees with a fundamental premise to IESI's (Applicant's) exceptions and would recommend the Administrative Law Judge (ALJ) not adopt any of its exceptions.

II. DISCUSSION

The Applicant begins its exceptions by declaring that the ALJ has concluded that IESI has adequately addressed wells and springs.[1] To the contrary, the ALJ found just the opposite to be true: "The ALJ finds that IESI did not conduct an adequate search of water wells and springs." Furthermore, the ALJ found that the Applicant "did not comply with the requirement to describe the present use of groundwater withdrawn from aquifers in the vicinity or identify,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."[2] These findings laid the cornerstone for the ALJ to conclude: "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, the system would not have adequately protected nearby wells against contamination."[3] IESI's exceptions suffer from the same problem as its application. Just as the application relies on inaccurate and inadequately researched data, the exceptions rely at the very core on false premises, thereby making the entire argument unreliable.

In both her original and amended PFD, the ALJ found that the proposed groundwater monitoring system would not protect water resources. Nothing in the record supports the ALJ's change of position in now recommending that the permit be granted. There has been no change in the fundamental findings of fact. IESI did not propose the idea of 28 additional monitoring wells until the unfavorable PFD was issued.

The ALJ indicates that if 28 additional new monitoring wells are added to the proposed permit, then it will meet the groundwater protection requirements of the TCEQ rules. OPIC agrees with Two Bush that such a finding or conclusion is not appropriate because there is no evidence in the record regarding these additional monitoring wells. Rather, that was a suggestion made by IESI in its original exceptions after an adverse finding in the original PFD. It was not part of the application or any amendment to the application. Furthermore, the ED, who would be responsible for enforcing such a permit provision has to this point not considered anything but

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[1] IESI's Exceptions p. 1

[2] ALJ's Amended Proposal for Decision, pgs. 15-16

the inaccurate representations in the original application. Instead, when confronted with Two Bush's evidence regarding the additional wells in the area, wells not accounted for in the application, the ED felt that "sticking with what's in the application" was the most appropriate course of action (Tr. p. 35). Even if the ED had reviewed the evidence, he still would not be in a position to determine whether this new theoretical monitoring system would be adequate because it is not part of the application. Therefore, OPIC agrees with Two Bush that any finding of fact or conclusion of law regarding 28 additional monitoring wells would be inappropriate because: there is no evidence in the record regarding such a system; no party has had the opportunity to explore such a possibility since it was not part of the application; and no party has any idea if such a fix would be sufficient to cure this application's defects.

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

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[3] ALJ's Amended Proposal for Decision p. 35

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.

OPIC also agrees with the Two Bush that allowing the Applicant to make a major change to its proposed groundwater monitoring system after the record is closed violates Two Bush's due process rights as well as the procedural rules of both the TCEQ and SOAH. Two Bush correctly states that allowing the Applicant to change its application and proposed permit after the record is closed and a PFD is issued renders the contested case hearing process an exercise in futility.[4]

III. CONCLUSION

OPIC urges the Administrative Law Judge to recommend that IESI's proposed permit be denied.

[4] Two Bush Exceptions p. 15

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 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
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SOAH DOCKET NO. 582-08-1804
TCEQ DOCKET NO. 2007-1302-MSW

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