

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

APPLICATION BY  
IESI TX LANDFILL LP  
FOR MSW PERMIT NO. 2332

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BEFORE THE  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS

CHIEF CLERK'S OFFICE

2009 OCT - 5 PM 4:

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

TWO BUSH COMMUNITY ACTION GROUP'S REPLY TO EXCEPTIONS TO  
THE AMENDED PFD

TO THE HONORABLE COMMISSIONERS OF THE TCEQ:

Protestant Two Bush Community Action Group ("Two Bush" or "Protestant") submits these replies to the exceptions submitted by Applicant IESI TX Landfill LP ("Applicant" or "IESI"), the City of Jacksboro ("City"), and the Executive Director in the above-referenced matter. Two Bush supports and adopts the Exceptions submitted by the Office of Public Interest Counsel.

**I. Introduction and Summary**

IESI has proposed a landfill with the potential to impact two valuable groundwater resources in Jack County: the Pennsylvanian Aquifer and the Trinity Aquifer. Yet, IESI has performed an analysis that ignores, discounts or misinterprets available information related to the Pennsylvanian aquifer. IESI failed to identify and consider the numerous wells completed into the Pennsylvanian circling the landfill site. This has resulted in a groundwater monitoring system that is inadequately protective of the aquifer from which the majority of the wells in this part of Jack County draw their water. Given this failure, it is not surprising that the City and IESI fail to comprehend why members of Two Bush are opposed to this landfill application.

Throughout the hearing and post-hearing procedures, IESI's and the City's explanations for the deficiencies in IESI's application have consistently been a variation of the following: The Executive Director declared our application technically complete, and we included the information required by the rules (regardless of whether that information was accurate), so we deserve to have our permit granted. What is missing from IESI's and the City's arguments, however, are references to evidence indicating that what is included in the application corresponds to the actual conditions of the proposed landfill site. The reason is that the application does not accurately reflect actual site conditions. And when an important groundwater resource is at risk, as it is in this case, such a misrepresentation is significant and likely to lead to dire results if not corrected. Yet, IESI and the City stubbornly continue to argue that actual conditions are not important, so long as IESI has filled in all of the blanks in its application.

IESI has mischaracterized Two Bush's motives in contesting this application, suggesting that Two Bush is not concerned about environmental protection, but only wishes to defeat this permit irrespective of technical merit. The City similarly dismisses Two Bush's contentions as "NIMBY" arguments. Perhaps if IESI and the City had acknowledged that the neighboring residents have no source of water supply other than water wells, and that many of these water wells draw water from the Pennsylvanian aquifer, they would appreciate the concerns shared by the members of Two Bush. Their concerns stem from the fact that IESI has performed a grossly inadequate site characterization, is completely unaware of or unwilling to recognize the existence of the Pennsylvanian aquifer in the area of the proposed landfill, has failed to appreciate the fact

that nearby residents rely on groundwater from the Pennsylvanian, and has proposed no groundwater monitoring for this important aquifer. These concerns can hardly be described as NIMBY concerns.

In sum, both Two Bush and the ALJ appear to agree that the evidence presented during the hearing reveals that Stratum II consists of both Pennsylvanian and Trinity aquifers. The evidence submitted by IESI supports the finding that groundwater flow in Stratum II is not limited to the north and east, as IESI contends. Rather, the presence of the Pennsylvanian and IESI's own potentiometric surface maps demonstrate that groundwater is likely to move to the west and south as well.

By contrast, there is no evidence in the record that the Pennsylvanian aquifer exists only underneath Stratum III. To the contrary, the evidence supports the finding that the Pennsylvanian is recharged by the Trinity aquifer. In other words, the aquifers are interconnected; they are not separated by an aquiclude.

And finally, because IESI proposes to place monitoring wells only in the northern and eastern boundaries of Stratum II, its groundwater protection system is inadequate. The monitoring wells will not detect contaminants in the Pennsylvanian because the groundwater in the Pennsylvanian flows to the west. Therefore, IESI's application is not adequately protective of human health and the environment, and it should be denied.

## **II. Reply to Exceptions regarding identification of nearby wells**

Both the City and IESI object to the ALJ's findings that IESI failed to identify and evaluate nearby wells. Amazingly, IESI's proposed finding of fact no. 205 states: "The Application further identifies all the wells located within 1 mile of the permit boundary."

IESI argues that the issue of whether it adequately identified and evaluated all water wells turns on the meaning of the word "adequate." According to IESI, the term "adequate" must be determined in light of the TCEQ's regulations, policies, and precedent, which are the ultimate guide to which the Applicant and TCEQ must look. The City makes a similar argument. These arguments can be boiled down to the following: Pay no attention to the actual conditions at the proposed site; actual conditions have no place in the analysis of whether an adequate analysis of nearby water wells was performed.

Instead, IESI and the City argue that the rules and Commission precedent allow an applicant to ignore the fact that several residences surround the proposed landfill site, and there is no public water supply for these residences. They argue that a professional geologist is allowed to apply his seal to assertions and conclusions that have no basis in reality. This simply cannot be what the Commission intended in promulgating its rules, nor what the Legislature intended when promulgating its statutes. This interpretation of the rules certainly is not consistent with the State's policy of protection of groundwater resources and human health and the environment.

The evidence presented in this case overwhelmingly supports the ALJ's Findings of Fact Nos. 124 through 130. Indeed, neither IESI nor the City argues that these findings are untrue. They simply do not want these findings to be made a part of the Order. But that is not a proper rationale for overturning factual findings, especially where, as here, the evidence clearly supports those findings. A short synopsis of that evidence follows.

The information included in the Application regarding water wells was remarkably sparse. The Application identifies only 5 wells, 2 of which are within the permit boundary and unused.<sup>1</sup> An additional 3 wells are mentioned, but no information is provided about them.<sup>2</sup> In fact, these are described as "possible wells."<sup>3</sup>

Mr. Snyder testified that in compiling the water well information, "a diligent attempt was made to identify water wells or water well equipment on properties within one mile of the site."<sup>4</sup> He relied on a water well search firm to make this diligent attempt at identifying water wells, but he could not recall which search firm he used.<sup>5</sup> Nor could he recall whether he provided specific instructions about how to conduct the search for water wells.<sup>6</sup>

Mr. Snyder then testified that he believed that one of his staff members verified the results that were provided by this unknown search firm by checking the Water Development Board database.<sup>7</sup> Finally, Mr. Snyder himself visually inspected the area (one assumes the area he referred to is the area within one mile of the property boundary, but that is not clear from the record), by driving around on roads that were accessible and looking for evidence of an active water well.<sup>8</sup>

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<sup>1</sup> Ex. App.-100, p. 4-6.

<sup>2</sup> *Id.*

<sup>3</sup> Ex. App.-100, p. 4-7; *see also* Figure 4A.5.

<sup>4</sup> Ex. App.-7, p. 9, ll. 2-4.

<sup>5</sup> Tr. V. 2, p. 30, ll. 5-18.

<sup>6</sup> Tr. V. 2, p. 31, ll. 3-9.

<sup>7</sup> Tr. V. 2, p. 31, ll. 18-25; p. 32, ll. 1-5..

<sup>8</sup> Tr. V. 2, p. 32, ll. 20-25.

On cross-examination, Mr. Snyder acknowledged that there were possibly 25 residences located within one mile of the IESI proposed site.<sup>9</sup> He also testified that he did not inquire of the City of Jacksboro whether it provided water service to these residences.<sup>10</sup> In fact, he made no inquiries or assumptions about where these residences acquired their water.<sup>11</sup> As Mr. Snyder explains it, he has “never known for sure how people get their water.”<sup>12</sup> Even if he were to observe a windmill, because he knows of several people who have windmills purely for nostalgic purposes, he would be disinclined to include in an application that a water well possibly exists in that location.<sup>13</sup>

In its written arguments, IESI repeatedly references “windshield reconnaissance” supposedly performed by Mr. Snyder. Such reconnaissance would be appropriate, and could have yielded important information in this case. Mr. Snyder’s “windshield” search did not involve looking past his dashboard, however. Had Mr. Snyder actually peered through his windshield, he would have noticed the existence of windmills, and residences whose water virtually surely came from groundwater wells. He did not perform any search that could be reasonably described as visual reconnaissance in the area.

Dr. Kreitler, on the other hand, testified that he indeed observed “a couple different windmills” when he visited the proposed landfill site.<sup>14</sup> And he admitted that generally, the presence of a windmill indicates to him that a water well might be

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<sup>9</sup> Tr. V. 2, p. 34, ll. 8-12.

<sup>10</sup> Tr. V. 2, p. 34, ll. 17-21.

<sup>11</sup> Tr. V. 2, p. 34, ll. 22-24.

<sup>12</sup> Tr. V. 2, p. 35, ll. 3-5.

<sup>13</sup> Tr. V. 2, p. 36, ll. 13-25; p. 37, ll. 1-3.

<sup>14</sup> Tr. V. 2, p. 176, ll. 10-13.

present.<sup>15</sup> Dr. Kreitler even posited that many of the residents surrounding the proposed landfill site obtained their water from water wells.<sup>16</sup> Yet, he did not question the limited number of water wells identified in the application.

Remarkably, Mr. Snyder averred, under oath, that the application “*accurately and adequately* describe[s] the location of water wells within a one mile radius of the site.”<sup>17</sup> Moreover, he claimed that the information included in the section addressing water wells was within his personal knowledge, even though he did not personally conduct the water well search that identified the 5 water wells located on the Water Development Board database.<sup>18</sup> And he assured that the information in the water well section of the application is “*accurate,*” “*conservative,*” and “*cautious.*”<sup>19</sup>

Were one to assess this evidence, supplied by the Applicant, alone, and without reference to the evidence submitted by Two Bush, one would immediately question whether the water well information is indeed “*accurate,*” “*conservative,*” and “*cautious*” and whether the water well search was indeed “*diligent.*” Mr. Snyder relied upon an unidentified search firm, to which he may or may not have provided specific instructions about how to conduct the search.<sup>20</sup> And he never verified, on his own, the results of this

<sup>15</sup> Tr. V. 2, p. 176, ll. 14-17.

<sup>16</sup> Tr. V. 2, p. 178, ll. 2-5.

<sup>17</sup> Ex. App.-7, p. 13, ll. 18-21.

<sup>18</sup> Ex. App.-7, ll. 3-7.

<sup>19</sup> Ex. App.-7, p. 14, ll. 20-21; p. 15, ll. 1-7.

<sup>20</sup> This calls into question whether the public records search for water wells was actually ever proved. In the case of *In the Matter of BMFS, Inc. for Spring Cypress Landfill Permit No. MSW2249*, SOAH Docket No. 582-96-1760; TNRCC Docket No. 96-1634-MSW; (hereinafter “*Spring Cypress*”), the Applicant failed to call a witness with qualifications necessary to “*prove-up*” the borings performed by the company contracted by the Applicant. Therefore, the borings were not entered into the record for the truth of the matters asserted, but only as documents relied upon by experts in forming their opinions. See *Spring Cypress PFD*, p. 82. Here, too, DESI failed to even identify the search firm that conducted a public records search of water wells. Thus, the results of that search have

search firm. He was never even curious about how the nearby residences obtained their water, and so, he never asked the City whether it provided water to those residences.

By contrast, Dr. Ross reviewed the Water Development Board records and was able to identify wells completed in two different aquifers within one mile of the IESI facility boundary: the Palo Pinto aquifer (within the Pennsylvanian Canyon Group) and the Twin Mountains or Trinity aquifer.<sup>21</sup> She explained that the higher yielding wells are generally associated with the Palo Pinto Limestone (within the Pennsylvanian Canyon Group).<sup>22</sup>

Finally, it is worth noting that Mr. Gale Baker, testifying for the Executive Director, explained that in performing a review of an application, TCEQ staff basically determines whether the applicant has addressed the portion of the rule that requires them to address water wells within the minimum distance from the landfill permit boundary.<sup>23</sup> Staff does not generally verify that the information provided is accurate. Rather, staff relies on the applicant to submit complete and accurate information.<sup>24</sup>

Q(Humphries): I think you told [Ms. Perales] that you don't tell professionals how to obtain the information about the number of wells, you just leave it to them to do that; is that correct?

A(Baker): That's correct.

Q: Do you – **how do you verify that their information is correct?**

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little value as evidence. One cannot even determine whether the search firm conducted a "diligent" search of the records.

<sup>21</sup> Tr. V. 6, p. 171, ll. 14-18.

<sup>22</sup> Tr. V. 6, p. 172, ll. 13-16.

<sup>23</sup> Tr. V. 7, p. 34, ll. 21-24.

<sup>24</sup> Tr. V. 7, p. 35, ll. 10-11.

A: **Basically, we are taking what they are providing us as complete and accurate information as the rule requires the applicant to provide.**<sup>25</sup>

To be sure, the ALJ's findings do not impose an unreasonable burden on applicants, requiring them to canvas neighbors to obtain water well data. The present case is not a case in which the Applicant was unable to identify water wells in the area, even after it performed a diligent water well search. To the contrary, any professional should have been aware of the presence of water wells. Even a layperson might have guessed that nearby residences must have water wells if there is no public water supply. The Applicant in this case simply ignored the facts.

The argument that the ALJ's proposed findings will create an unworkable standard for the landfill industry is likewise far-fetched. Again, this is not a case where the information provided by the Applicant can be described as honest or accurate. Had the Applicant at least acknowledged that water wells are likely to exist because there is no public water supply, then, IESI's and the City's arguments might have a bit more merit. But that is not what occurred here. Mr. Snyder never acknowledged that the nearby residences are likely to have water wells. Mr. Snyder stubbornly characterized his water well analysis as diligent, accurate and conservative, even though he could provide virtually no information regarding the firm that searched the public records. The standard that should apply here is that an applicant should conduct a professional water well analysis and provide accurate information about the existence of water wells.

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<sup>25</sup> Tr. V. 7, p. 34, l. 7 - 17 (Testimony of Gale Baker, TCEQ Geoscientist).

Finally, the City's argument about revoking the Executive Director's determination of technical completeness is nothing more than a red herring. Neither the ALJ, nor protestant, questions the Executive Director's previous finding that IESI's application included information regarding surrounding groundwater wells. This is not simply an issue of the *completeness* of the materials provided, but also an issue of the *accuracy* of the materials provided, which the Commission is not simply allowed to consider, but must consider. A declaration of "technical completeness" is simply a conclusion that facts have been provided, not a judgment that these facts are correct.

The hearing provided an opportunity to go beyond acceptance of IESI's representations, to actually evaluate the accuracy of the information presented by IESI. The evidence presented during the hearing established that IESI's application provided inaccurate information to TCEQ regarding the existence and character of local groundwater wells that IESI knew was contradicted by the obvious facts on the ground.

IESI's and the City's arguments regarding technical completeness places the Commission in an absurd catch-22 never intended by any statute. First, IESI would have the ED's mere decision on technical completeness be treated as a final judgment on the accuracy of the materials in the application, even though the ED at that point has no means to judge the accuracy of the factual information contained in the application. Then, IESI would prohibit the Commission from considering the accuracy of the materials contained in the application after the Commission has had the opportunity to gather information through a contested case hearing that is specifically intended to develop information on disputed questions of fact presented by the application. This

"Heads I win, tails you lose" approach renders the contested case hearing process meaningless.

The administrative law judge properly evaluated the overwhelming evidence in the record to conclude that IESI had grossly under-represented the number of nearby groundwater wells. Evidence establishing the presence of water wells in the vicinity of the landfill included direct testimony from several area landowners regarding their own wells,<sup>26</sup> IESI's own information regarding the location of nearby houses,<sup>27</sup> IESI's own admissions regarding the reasonable expectation that these houses used groundwater,<sup>28</sup> state well reports,<sup>29</sup> a field survey,<sup>30</sup> and a map of area wells compiled by the Texas Water Development Board<sup>31</sup> (which is not hearsay).<sup>32</sup> IESI has the burden of proof, and IESI's witnesses did not dispute the presence of these wells.<sup>33</sup>

IESI may object that actually communicating with residents would compromise the secrecy of its plans, and IESI may feel comfortable implying that rural Texans are violent by nature, but the TCEQ's long-term public interest in ensuring that a permit is based on accurate information outweighs any short-term private interest IESI may have in hiding its intentions from the public.

<sup>26</sup> Ex. P-1 (Testimony of Marjorie Anderson), p. 2; Ex. P-3 (Testimony of Lanna Moxley), p. 1-3; Ex. P-6 (Testimony of Dr. James Henderson), p. 3

<sup>27</sup> TR. V. 2, p. 34, l. 8 - 12 (Testimony of IESI expert Michael Snyder).

<sup>28</sup> TR. V. 2, p. 34, l. 25 - p. 35, l. 3.

<sup>29</sup> Ex. P-8I.

<sup>30</sup> Ex. P-8H.

<sup>31</sup> Ex. P-8E (Figure 14 in Texas Water Development Board Report 308).

<sup>32</sup> All of this evidence is more relevant to the issue of whether IESI adequately identified water wells than the various landfill decisions that the City referred to in its Exceptions. The evidence from those landfill permitting decisions are not included in the record of this case. One cannot even determine whether the identification of water wells was even an issue in each of those cases.

<sup>33</sup> Tr. V. 2, p. 42, l. 8 ("I'm not disputing that they are there. I am just saying that I don't have personal knowledge of it.") (Testimony of Michael Snyder).

As noted in Protestant's exceptions, IESI's failure to identify these wells is not simply a technicality. These wells provided key information regarding the presence and characteristics of the Pennsylvanian aquifer that must be considered in designing a protective groundwater monitoring system at the proposed site.<sup>34</sup> Because IESI did not include these wells, and consider the information they show, IESI wrongly assumed that groundwater flow will be uniformly to the northeast, and would be in the Trinity formation.

**III. Reply to exceptions regarding evaluation of stratigraphy and identification of aquifers**

A review of the City's and IESI's exceptions regarding this issue reveals that both parties, again, fail to acknowledge the actual conditions at the site. As the evidence during the hearing revealed, and as the ALJ acknowledged in several of her findings, Stratum II underneath the proposed landfill site consists of both Pennsylvanian and Trinity Aquifers. Because IESI failed to account for the presence of the Pennsylvanian in Stratum II, it failed to prove the direction of groundwater movement in Stratum II.

The thrust of IESI's exceptions seem to be that what it called the Pennsylvanian Aquifer is not relevant to the protectiveness of the landfill. To be clear, in its application, **IESI characterized the Pennsylvanian as an *aquiclude*, and a *barrier* to groundwater movement.**<sup>35</sup> IESI interpreted the site specific data based on this assumption, and the design of IESI's groundwater monitoring system was based on this assumption.

<sup>34</sup> Tr. V. 6, p. 192 (Testimony of Dr. Lauren Ross); Ex. P-7, p. 13, l. 23-26 (Testimony of Pierce Chandler).

<sup>35</sup> See, e.g. Direct testimony of Michael Snyder at p. 12, l. 19-21 ("These [Pennsylvanian] formations are not known to yield significant quantities of potable groundwater and serve as an aquiclude to the overlying Cretaceous Sands.")

In its latest filings, IESI appears to concede that the Pennsylvanian may be a water-bearing unit, but now, IESI argues that the Pennsylvanian aquifer exists only below Stratum III. Again, IESI fails to recognize the presence of the Pennsylvanian in Stratum II. Were IESI to acknowledge that the Pennsylvanian is present in Stratum II and that it is recharged by the Trinity, it might then realize that proper characterization of the Pennsylvanian Canyon Group is not simply an "academic discussion" that has no effect on the design of the groundwater protection systems.

To be sure, Two Bush will not attempt to contest IESI's site specific data here. There is no need to. The site-specific data is more consistent with Protestant's conclusion that the landfill is underlain by both the Trinity and Canyon groups, than with IESI's theory. A review of IESI's own evidence reveals that the ALJ's findings regarding Stratum II are correct, and IESI simply misread its own data.

The deeper Stratum II sands probably straddle the interface between the Trinity Twin Mountains formation and the Pennsylvanian formation.<sup>36</sup> This interface would then be above the Stratum III aquiclude. IESI assumes a relatively uniform flow of groundwater in Stratum II towards the northeast, consistent with Stratum II being entirely in the Trinity formation. Yet, some of the highest potentiometric readings are located at the southeastern corner of the site.<sup>37</sup> IESI's assumption that groundwater flow is to the east is flatly contradicted by these high potentiometric readings in piezometers installed

<sup>36</sup> Tr. V. 6, p. 180, l. 14 - 19:

Q(Perales): So would Stratum II - would you say that's part of the group formation or layer, or does it include more than one group or formation or layer?

A(Ross): I think if you look at their boring logs, you would have to conclude that it straddles the Twin Mountains and the Pennsylvanian.

<sup>37</sup> Tr. V. 6, p. 191, l. 2 - 5.

on the eastern edge of the site, and the consistently lower potentiometric reading at well D-20 on the southern border of the site.<sup>38</sup> In this manner, IESI's justification for its groundwater monitoring system requires it not only to discard the status of the Pennsylvanian as an aquifer, but also to simply discard the data from boring D-20, one of only five piezometers providing information on Stratum II.

More specifically, Applicant's piezometer data, which was rather sparse, does not support IESI's assumptions. IESI completed only six successful piezometers within Stratum II. The locations of these piezometers are shown on Figure 4H.3 of the application. They are as follows: G-5 is located in the northeast corner; A-5 is in the northwest corner. In the central area, C-10 is located west of central, and D-20 is south-central. Finally, F-15 and F-20 are in the southeast of the landfill site. There are no successful piezometers located in the southwest corner of the landfill site.<sup>39</sup>

As an initial matter, it seems that six piezometers is far too few to glean useful information about groundwater flow in such a complex environment and over a tract of 275 acres. Nevertheless, a review of the data provided by IESI leads one to conclude that IESI's assumptions about groundwater flow are much too simplistic and unsupported by the evidence.

Admittedly, in the north and northeast portions of the landfill site, IESI's assumptions appear to be supported by the piezometer data. G-5 has a low

<sup>38</sup> Tr. V, 6, p. 191, l. 17 - 24.

<sup>39</sup> Although in some figures, A-20 potentiometric surface elevation, this piezometer was in fact dry. See Fig. 4H.3.

potentiometric surface measurement, and so groundwater is likely to flow towards the northeast there.

But a comparison of the data points on the potentiometric surface map, such as on Figure 4H.3, reveals that D-20 also has a relatively low water level, suggesting that groundwater is also likely to flow toward D-20 from higher water levels, such as C-10, F-15, and F-20. In other words, at least in the south-central portion of the site, groundwater flows towards the south and west in Stratum II.

As Dr. Ross explained, the two low points, G-5 and D-20, straddle the line between A-5, F-15, and F-20, meaning that the direction of groundwater flow does not clearly flow only to the northeast.

Moreover, it is unlikely that F-15 and F-20, which are in the eastern section of the landfill site, are the discharge points for groundwater. These two points are located east of D-20. F-15 and F-20 would have shown a lower groundwater level if they were indeed the discharge points.<sup>40</sup>

In short, IESI's potentiometric surface data shows that groundwater is likely to flow to the northeast towards G-5, as assumed by IESI. But it is also likely flowing to the south and west, toward D-20. And IESI failed to account for this.

Finally, it is worth mentioning that parts of the proposed landfill will be excavated into Stratum II.<sup>41</sup> Thus, contrary to IESI's musings, an accurate characterization of the aquifers in Stratum II and the direction of groundwater flow is essential. Were a leak to

<sup>40</sup> Tr. V. 6, pp. 190 thru 192.

<sup>41</sup> See Figure 4C.3.

occur in those parts of the landfill excavated directly into Stratum II, all of the proposed monitoring wells proposed for Stratum IA would provide little comfort.

Similarly, IESI failed to acknowledge the significance of the Pennsylvanian aquifer in this part of Jack County. Recognition that the Pennsylvanian is a regional aquifer, instead of an aquiclude, has significant consequences in evaluating the consequences of granting IESI's application.

In 1988, Philip Nordstrom compiled a report for the Texas Water Development Board entitled, "Occurrence and Quality of Ground Water in Jack County, Texas."<sup>42</sup> While this report would seem relevant, IESI's expert failed to use it in evaluating the presence of regional aquifers, dismissed it as virtually irrelevant since they considered it "local" instead of "site-specific" or "regional."<sup>43</sup> In this report, the wells mapped in Jack County were predominantly completed into the Pennsylvanian aquifer. In fact, the evidence showed wells to the east, west, north, and south of the site completed into the Pennsylvanian aquifer.<sup>44</sup>

The exceptions filed by the City of Jacksboro and IESI continue to mischaracterize the information contained in the available references. The City in its Exceptions has misquoted and misconstrued the Nordstrom report in several respects. The City first repeats a partial quotation [Nordstrom, p. 63] that "overall quality of groundwater for domestic use is fairly poor." But this quotation referred to the Pennsylvanian Canyon

<sup>42</sup> Ex. P-8E.

<sup>43</sup> Tr. V. 2, p. 27, l. 21 - p. 29, l. 22.

<sup>44</sup> See Attachment A to this Brief, Ex. P-8 (Figure 14 from Texas Water Development Board Report 308: Occurrence and quality of groundwater in Jack County, Texas). Protestants note that such information is legally *not* considered hearsay. See also testimony of Pierce Chandler, "I am saying that the fact that there are numerous wells in the Pennsylvanian and all sides of the site, the Pennsylvanian appears to be the aquifer - the aquifer that most of the surrounding area relies on."

Group formations over the entirety of Jack County. The preceding unquoted sentence stated that "About 43 percent of the samples exceeded the upper recommended limit of 1,000 mg/l for domestic purposes." Of course, this means that 57% of the samples were of acceptable quality. And if Nordstrom's Figure 23 is examined, all of the Canyon Group samples taken from wells in the southeastern part of Jack County, near the landfill site, had dissolved-solids content of either 0-500 mg/l or else 501-1,000 mg/l, so that the water from all of these nearby wells were acceptable for domestic use.

This is consistent with what residents in southeastern Jack County already know. Groundwater in this area, supplied mostly by the Pennsylvanian aquifer, is of excellent quality. Had the City inquired of the residents about the quality of their groundwater, the City would have realized this fact.

The City also misquotes Nordstrom that "groundwater from the Canyon Group is not suitable for extensive irrigation practices." The City omitted the qualifier "Generally," at the beginning of Nordstrom's sentence. As before, this analysis by Nordstrom applied to the entire Jack County, while the southeastern portion of the county near the landfill site happens to lie where the minority of Canyon Group water is suitable for irrigation. (On p. 67, Nordstrom reports that based upon residual sodium carbonate, only 62% of the countywide samples were above 2.5 mg/l and unsuitable for irrigation.)

The City then goes on to misquote Nordstrom's quote of Bill Demmis, stating "that because of the poor quality of the groundwater in the Canyon Group, Jack County was settled late or not at all." What was actually said was "several areas within Jack County were settled late or not at all due to poor quality of natural ground water." The

distinction is significant, because southeastern Jack County was not one of the areas with poor quality groundwater, and as a result, it was settled early. Protestants can only wish that Applicant had done proper due diligence when the proposed landfill site was selected, to choose a site that truly had poor groundwater, instead of this site, situated in the recharge zone of the Trinity and Pennsylvanian aquifers.

Finally, the City goes on to assert that "Nordstrom concluded that Pennsylvanian formation water should not be used for domestic purposes or for irrigation purposes." Protestants can locate no such statement from Nordstrom. On the cited page, Nordstrom is discussing the Cisco Group, which is generally not relevant near the landfill.

Protestants would observe that the reason that the Pennsylvanian Canyon aquifer water is of higher quality in southeastern Jack County than it is elsewhere in the County, is because in this part of the county the Pennsylvanian is overlain by the Cretaceous (Trinity aquifer) sediments, from which they may be recharged. This is why it is so serious that Applicant completely ignored the Pennsylvanian aquifer, and neglected to delineate the recharge areas within five miles of the landfill site, and neglected to determine the hydraulic connections which must exist between the Trinity aquifer and the Pennsylvanian aquifer. And this, in essence, is why the ALJ is completely correct in her findings of fact.

The ALJ's Findings of Fact regarding the importance of the Pennsylvanian formation as a source of groundwater in the region, and as to the failure of the Applicant to identify it as a regional aquifer, is well supported in the Record. Nordstrom's Texas Water Development Board report supports Findings 139 and 140. In fact, among the

very few water wells identified by IESI, both of the wells with Tracking Nos. 1957404 and 1957405 were completed into the Pennsylvanian, according to the TWDB Database, although only the former well is so noted in the application.

IESI implies that Protestant's experts Dr. Ross, and Mr. Chandler, approved of Mr. Snyder's reliance of the publication *Aquifers of Texas* as his sole resource in determining regional aquifers. In fact, both of these witnesses stressed that this document was only one of several references that should be consulted in determining the presence of a regional aquifer.<sup>45</sup>

The Commission has never treated Texas Water Development Board's publication *Aquifers of Texas* as limiting the formations eligible to be considered regional aquifers. If this were the case, 30 TAC § 330.56(d)(4) would merely make reference to this document, instead of requesting a range of information related to this determination. The listing of an aquifer in that publication is certainly an indication that that formation is an aquifer, but this does not exclude other formations. The TCEQ has even gone so far as to recently rule that a formation listed in that publication as an aquifer is *not* a regional aquifer.<sup>46</sup> It would be absurd to take the position that an applicant is allowed to question the delineations of this document when it will result in less protection for the environment, but prohibit protestants from supplementing the information in this document to demonstrate the existence of additional aquifers either warranting protection or altering the hydrogeology in an area.

<sup>45</sup> Tr. V. 6, p. 100 (Ross); Tr. V. 5, p. 111 (Chandler).

<sup>46</sup> In the Matter of the Application of Regional Land Management Services, Ltd. for Permit No. MSW-2286; TCEQ Docket No. 2003-0729-MSW.

Likewise, IESI dismisses the presence of the Benson Springs within 1000 feet of the landfill site to a debate of whether this is truly a "spring" or merely a "seep." And it once again argues that because the rules do not specifically require IESI to identify all springs, it is of no consequence that IESI's information regarding springs in its application was inaccurate. But the presence of springs is indeed significant to IESI's groundwater analysis. More to the point, the fact that water is flowing out of the ground under natural conditions provides important information regarding the hydrologic conditions at that location, whether at any particular time it is best called a seep, a spring, or a fountain. This is consistent with the ALJ's observation that "If Applicant's search had been more thorough, Applicant would have gathered valuable information about those aquifers."<sup>47</sup>

For example, IESI makes light of the fact that Mr. Snyder changed his testimony on the stand at the hearing to retract his testimony that no springs existed in Jack County to the opposite claim that springs existed in Jack County, but not in the area of the landfill. This was Mr. Snyder's core testimony on a fundamental issue in the case. Had this indeed been a typographical error, IESI could have, and should have, easily corrected it with an errata to alert the parties that Mr. Snyder did not stand behind this fundamental piece of his testimony. If Mr. Snyder did not notice this "error" until the day of his testimony, then his attention to the details in this case is highly questionable.

In truth, it was not a typographical error, but instead the pre-filed testimony reflected Mr. Snyder's poor review of the relevant references, which Protestant's experts had

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<sup>47</sup> Proposal for Decision, at p. 11.

called him to account for. After this manipulation of his testimony, the remainder of Mr. Snyder's live testimony consisted largely of a bob-and-weave act wherein he denied that windmills might indicate the presence of groundwater wells, he said he didn't know where people got their water, and he made an odd argument that the TCEQ was not interested in well information from Texas Water Development Board if it was contained in studies focused on Jack County since such reports in his mind were "local" instead of "regional" nor "site-specific."<sup>48</sup>

#### IV. PROTECTIVENESS OF GROUNDWATER MONITORING SYSTEM

IESI's has not adequately characterized the underlying geology at the site to design an adequately protective groundwater monitoring system. As discussed above, IESI's assumption that groundwater beneath the entire site will flow to the northeast is inconsistent with the nature of the Pennsylvanian as an aquifer, and inconsistent with the groundwater flow patterns revealed by the site-specific potentiometric readings. IESI repeatedly asserts that its permit should be granted because it is protective of groundwater, even though the information forming the basis of its groundwater monitoring system design was wrong. The ALJ's finding that IESI met its burden of proof with regard to the groundwater monitoring system is a stark *non sequitur* to the ALJ's findings regarding IESI's failure to properly evaluate area groundwater wells, and IESI's total mischaracterization of the Pennsylvanian as an *aquiclude*, when it is in fact an *aquifer*.

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<sup>48</sup> Tr. V. 2, p. 27, l. 21 - p. 29, l. 22.

The potential for groundwater contamination to leave the site by flowing to the west in the Pennsylvanian materials clearly exists, and many residents draw their water from the Pennsylvanian aquifer to the west of the site. Yet, IESI has only no monitoring wells on the western side of the site. With so little monitoring on the western side of the site, it cannot be said that IESI has developed an adequately protective groundwater monitoring system.

**V. Exceptions to ALJ's Recommendation Regarding Transcript Costs**

Protestant disagrees with the ALJ's recommendation to allocate 25% of the transcript costs to the Protestant. The Commission is to consider the following factors in assessing transcript costs:

- (1) the party who requested the transcript;
- (2) the financial ability of the party to pay the costs;
- (3) the extent to which the party participated in the hearing;
- (4) the relative benefits to the various parties of having a transcript;
- (5) the budgetary constraints of a state or federal administrative agency participating in the proceeding;
- (6) in rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
- (7) any other factor which is relevant to a just and reasonable assessment of costs.<sup>49</sup>

In this case, both IESI and the City of Jacksboro are in a superior position to bear the financial cost of the transcript. These entities both have significant budgets dedicated to addressing solid waste issues. TBCAG is a local citizen organization wholly funded by donations from individuals and families. As for participation in the hearing, TBCAG engaged in cross-examination reasonably related to the issues raised in the case in exercising its right as citizens to scrutinize the proposed construction of a new facility

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<sup>49</sup> 30 TAC § 80.23(d)(1)

near their property that will be in existence for sixty years. The City made the discretionary and highly unusual decision to participate in an effort merely to buttress IESI's case. This decision only compounded the transcript costs for all of the parties as a result of the City's repeated friendly cross-examination. It is a poor reflection on the City of Jacksboro that it would delegitimize the right of the public to exercise their due process rights to participate in a permitting decision by the TCEQ. Respect for this right, an effort to avoid a chilling effect on public participation, and recognition of the potential financial benefit that accrues to an applicant from a permit hearing, is the reason why the TCEQ has historically avoided the assessment of transcript fees against protestants.

As for the benefits to the parties of having a transcript, it is important to note that IESI chose the company to create the transcript. Its selection of a poor-quality transcription service only compounded the effort required of the parties. IESI created problems from the start by hiring a court reporter in Jacksboro for one day to cover a two-day hearing, leading to confusion by the reporting service. As for the benefit of the transcript to the parties, the transcript of the hearing was produced much later than normal, and the transcript eventually provided (1) lacked the normal pagination system, (2) lacked the normal line numbering system, and (3) lacked a proper table of contents. If nothing else, TBCAG should not be forced to pay for substandard work that it would not have allowed if TBCAG had been allowed input into the hiring process for the court reporter. Further, the existence of the transcript has enabled the permitting process to move forward, from which IESI stands to gain considerable economic benefit in the form of a long-term income stream from the landfill.

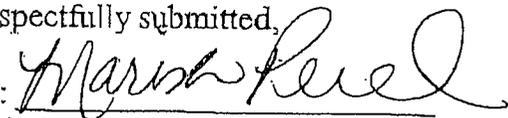
For these reasons, Protestant respectfully prays that transcript costs be assessed 50% to IESI, and 50% to the City of Jacksboro.

**Prayer**

WHEREFORE, PREMISES CONSIDERED, Protestant asks that the Commission deny the permit.

Respectfully submitted,

By:



Eric Allmon

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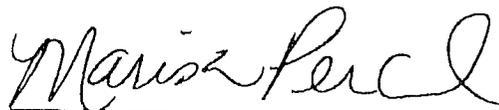
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**CERTIFICATE OF SERVICE**

By my signature below, I certify that on this 5th day of October, 2009, copies of **Two Bush Community Action Group's Reply to Exceptions to the Amended Proposal for Decision** were served upon the parties identified below via facsimile transmission, electronic mail, hand delivery and/or U.S. Postal Mail.



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From: Marisa Perales/Axum Teferra  
Date: October 5, 2009

DOCUMENTS	NUMBER OF PAGES (not including cover pg.)
Protestant Two Bush's Reply to Exceptions to the Amended Proposal for Decision	

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Re: **SOAH Docket No. 582-08-1804; TCEQ Docket No. 2007-1302-MSW;  
Application by IESI TX Landfill, L.P. For MSW Permit No. 2332.**

Dear Ms. Castañuela:

Two Bush Community Action Group ("Two Bush") files the enclosed original and seven copies of its **Reply to Exceptions to the Amended Proposal for Decision**. Please contact me if you have any questions or concerns.

Sincerely,



Marisa Perales

cc: Certificate of Service