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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

IESI TX LANDFILL L.P.'S REPLY TO EXCEPTIONS
TO PROPOSAL FOR DECISION

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
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CHIEF CLERKS OFFICE

Respectfully submitted,

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

I. INTRODUCTION

Five sets of Exceptions have been filed urging the Commission to reject, in accordance with Texas Health and Safety Code § 361.0832, the reasoning used by Administrative Law Judge Sarah Ramos in support of her proposal to deny IESI's Application for a Type I MSW permit¹. As those Exceptions collectively show, the ALJ misinterpreted and misapplied the relevant TCEQ Municipal Solid Waste ("MSW") statutes, rules and policies that govern this Application in a manner that will have adverse and ill-advised statewide ramifications on current and future MSW permits. Because the PFD proposes new standards for evaluating applications, and proposes to change the established TCEQ MSW permitting policies, the Commission has the authority to reject those proposals and grant IESI's Application.

Two Bush Community Action Group ("Protestant") filed a brief that excepts to many of the findings made by Judge Ramos (or the "ALJ") and continues the Protestant's long-running effort to confuse and obfuscate the relevant issues. The Protestant criticizes virtually every technical finding that Judge Ramos made in support of the Landfill, e.g. groundwater flow and direction, identification of site-specific aquiclude, slope stability, overall protectiveness and more, but quite predictably concludes that the ALJ was correct in recommending denial for the reasons she stated. To support those reasons the Protestant, like the ALJ, relies upon unreliable and inadmissible "facts" that are not a part of the record evidence in this case, and joins the ALJ's misinterpretations of the applicable TCEQ rules and policies. The Exceptions submitted

¹ The Exceptions were filed by three parties (the Applicant IESI TX Landfill LP ("IESI"), the City of Jacksboro, and the Executive Director of the Texas Commission on Environmental Quality ("TCEQ")), and two *amicus curiae* (The Lone Star Chapter of Solid Waste Association of North America ("TxSWANA") and the National Solid Waste Management Association ("NSWMA")).

by the Protestant contain half-truths and misleading characterizations of the record evidence, again hoping to confuse the issues and cause a determination to be made on factors other than the protectiveness of this Landfill. IESI will reply to each of the filed Exceptions separately below and in the order presented by the Protestant.

In her Proposal for Decision (“PFD”), the ALJ suggests that “a point of some concern” regarding “the possibility that contaminant could escape from the side of the landfill liner into the IA sands ... could be addressed with monitoring wells screened in those sands” “if the Application were granted.”² As IESI explained in its Exceptions to the PFD, it sets a bad precedent to require an applicant to install additional monitoring wells in areas other than the compliance monitoring zone based on unsubstantiated “concerns” of an imagined “possibility” where the facts show the concern is invalid. The “possibility” leading to this “concern” is essentially that leachate could flow uphill through a carefully engineered sidewall liner and then through sands which are discontinuous where they even exist, which really is no possibility at all. Nonetheless, and partly in response to a suggestion of remand by the Executive Director (based on the confusing recommendation in the PFD), IESI is willing to agree to a permit Special Provision requiring additional monitoring wells screened in Stratum IA. IESI and the City of Jacksboro have been heavily invested in this project for approximately seven years. The personnel resources and hard dollars spent by IESI and the City have been extraordinary. Rather than further pursue litigation of specific narrow facts in further SOAH proceedings, IESI is willing to take on the long term and multi-million dollar obligation to install and monitor for decades additional monitor wells completely encircling the landfill.

As will be discussed in greater detail below in the section of this Reply relating to the Executive Director’s Exceptions, rather than delineate where along the perimeter of the landfill

² Proposal for Decision at p. 30.

those sands should be monitored, the suggested Special Provision contemplates such monitor wells *all around the perimeter of the Jacksboro Landfill*. Surely such a Special Provision would obviate any “possibilities” and “concerns” alluded to in the PFD. If the Commission sees any merit whatsoever in the ALJ’s suggestion of additional monitor wells, the suggested Special Provision will surely address that situation without the need for a remand to SOAH and IESI is prepared to comply with that Special Provision.

II. RESPONSE TO EXCEPTIONS FILED BY PROTESTANT

A. The Applicant properly identified and evaluated nearby wells and springs

1. Water Wells

The Protestant naturally supports the ALJ’s proposed findings that the permit should be denied because of the Applicant’s alleged failure to identify all the water wells that may exist in the one-mile area surrounding the Landfill. So ingrained is the Protestant’s desire to mischaracterize the evidence and confuse the issues that it actually now accuses IESI of failing “to recognize the existence of the Trinity aquifer...”³ The Trinity aquifer is discussed at great length in the Application and was discussed virtually every day at the hearing. This accusation is just a continuation of the practice of accusing IESI of so many failings that perhaps something will stick. Unfortunately for the citizens of Jacksboro, IESI, and the legitimacy of this entire permitting process, some of the Protestant’s arguments were adopted by the ALJ, including the argument that IESI should be required to canvass private property in the area and contact local residents to obtain lay-statements about water wells. The Protestant is not interested in ensuring the Landfill is appropriately designed to be protective of human health and the environment; it is interested only in killing this Application at all costs. For that reason, the Protestant is relying on non-substantive “gotcha” arguments made by a non-geologist expert who in turn relies upon

³ Protestant Exceptions to PFD at p. 3.

double or even triple hearsay from biased lay-persons not called as witnesses. The Commission should overturn the PFD on this issue pursuant to its authority under Texas Health and Safety Code § 361.0832

The underlying suggestion of Protestant seems to be that had all the wells listed on Dr. Ross's double or even triple hearsay chart been identified in the Application, the Applicant would have more fully appreciated the importance of the Pennsylvanian Canyon Group and then, presumably, done something different in the design of the Landfill. The Protestant never identified what would, could or should have been done differently had the additional wells been listed. The answer, of course, is "nothing."

In its zeal, the Protestant conveniently ignores the fact that the Application clearly identified a nearby well completed in the Canyon formation.⁴ Thus the Applicant clearly discloses that there is some water in the Canyon and that it is near the landfill. Even assuming for sake of argument that there is some accurate information contained in Dr. Ross's hearsay water well chart and that there were, for example, ten additional wells in the Canyon group in the vicinity of the site, nothing would change about this Landfill's design. Mr. Mike Snyder testified over and over again that he identified as many wells as possible using the appropriate methods for gathering reliable information and the established standard of care, and then he designed the Landfill to protect the groundwater used by any nearby water well, whether there are five or fifty or more.⁵ He knew there was water in the Canyon near the landfill, and designed the Landfill to protect that water along with every other possible source of water in the area. There is absolutely no merit to the Protestant's claim that IESI "ignored" the "fact" that there may be additional

⁴ App. Ex. 100, Vol. 2, Part III, Attach. 4, p. 4-7.

⁵ See, for example, Transcript Vol. 2, p. 89/line 25 – p. 90/line 21; p. 95/line 25 – p. 96/line 2 Snyder Cross examination.

water wells in the area. The practical reality is that the existence of additional wells does not require any change to the groundwater protection or monitoring system at the site. Furthermore, the ALJ did not recommend denial because some aspect of the groundwater protection and monitoring system design presented a health or safety concern; she recommended denial because she felt the descriptions in the Application were not complete. The Protestant carried on this line of argument based squarely on an assumption that the information contained in the well location “chart” attached to Dr. Lauren Ross’ pre-filed direct testimony is a given “fact” that is reliable and is a part of the record evidence in this case. Relying upon this so-called “evidence,” the Protestant boldly proclaims that “many of the wells near the landfill site identified during the hearing draw their water from the Pennsylvanian” and “many of the nearby wells appear to be completed into the Stratum IA sands.” These are exactly the kind of conclusions that make the use of this type of unreliable hearsay information so dangerous. Both long standing TCEQ policy as well as the even longer standing rules of evidence recognize this danger and specifically do not allow reliance on this type of unreliable hearsay information.

Ironically, the Protestant claims that it just wanted IESI to “honestly characterize the information set forth in the public literature.” As the record evidence shows, IESI did just that when it reviewed the open source documents and then took the extra step to locate wells it could (1) honestly confirm are in existence and (2) define with meaningful and useful data. What IESI did not do, and was appropriately not required to do by TCEQ’s rules, policy and precedent was ask a neighbor to ask some other neighbors about their water wells, and then ask a non-geologist to incorporate this information into an otherwise reliable characterization of water wells prepared by a licensed professional geologist.

The Applicant, the City, and the two *amicus curiae* all discuss in detail the actual harm that adoption of the ALJ’s newly created standard for water well identification would impose on

pending and future landfill applications in the State of Texas. The Executive Director acknowledges that the Applicant met the applicable standard of care, and that there is no reason to hold the Applicant in this case to a higher standard of care than other permit applicants. Accordingly, adopting the ALJ's PFD would be seen as an indication that the TCEQ has created a new general policy for retroactive application to pending projects. This new standard would not only be unnecessary, it could be dangerous and, in the case where an Applicant is forced to include inaccurate information, it could lead to mischaracterization of groundwater and thus improper design of a landfill. In this case, the Protestant could not show, and the PFD does not propose to find, any problems with the landfill's design and operation resulting from the failure to include such hearsay information in the Application. In other cases, use of such data to design a landfill could lead to improper design considerations. The Commission should overturn the PFD on this issue pursuant to its authority under Texas Health and Safety Code § 361.0832.

2. Springs

The Protestant has made no arguments on this issue. IESI refers the Commissioners to its arguments in IESI's Exceptions, as well as the discussions in the Exceptions filed by the other Parties and *amicus curiae* in this matter.

B. Water Recharge

The Protestant did not address this issue other than to simply say it agrees with the ALJ's findings regarding the alleged failure of IESI to address the impact of dewatering operations at the landfill on underlying aquifers. The brevity of this argument is telling. The theme of groundwater availability, however, is woven throughout the Protestant's Exceptions. No statutes, rules or regulations are cited by the Protestant in support of the ALJ's conclusions, likely because no statutes, rules or regulations exist that could support the ALJ's conclusions. As addressed in IESI's Exceptions, and those filed by the City of Jacksboro, the Commission did not

refer this issue to SOAH, nor does it have jurisdiction to deny a solid waste disposal application based on concerns about the possibility of effects on groundwater availability. As discussed by IESI, the City, and in the *amicus curiae* in their respective filings, the ALJ's consideration of groundwater *quantity*, as opposed to *quality*, in this context creates a brand new standard for MSW permit applicants that is not reflected in any applicable statute or TCEQ rule, and ignores the long-standing "rule of capture" that has repeatedly been affirmed by the Texas Supreme Court.

For the purpose of designing a landfill that is protective of groundwater quality (rather than availability), areas of recharge to *regional* aquifers are to be identified pursuant to TEX. ADMIN. CODE 330.56(d)(4)(I). The Applicant identified areas of recharge to the Twin Mountains (Trinity) aquifer and thus complied with the regulations for discussion of regional aquifers.⁶ There is no basis anywhere in the statutes, regulations or referred issues to require the Applicant to discuss the impact of the landfill on recharge zones for any and all water sources anywhere in the area.

Consideration of IESI's Application is not the forum to overturn years of TCEQ precedent in MSW permitting matters, nor is it a proper method for challenging Texas' long standing rule of capture. The Commission should overturn the ALJ's findings and conclusions that address this issue and adopt proper findings and conclusions, as outlined in the Exceptions provided by IESI and the City.

⁶ App. Ex. 100, Vol. 2, Part III, Attach. 4, p. 4-6.

C. The Application properly identifies and describes the “regional” aquifer and protects the groundwater quality.

The crux of the Protestant’s argument is that the Applicant failed to properly describe and evaluate the so-called Pennsylvanian aquifer and thus did not design a proper groundwater monitoring system. IESI is unclear which proposed findings of fact the Protestant is referring to. In any event, both IESI and the City fully explained in their Exceptions the reasons why the Applicant did not define the Pennsylvanian formation, and particularly the Canyon Group within the Pennsylvanian formation as a “regional aquifer.” The small amounts of water that exist in the Canyon Group are erratic and discontinuous, so much so that the water cannot be accurately mapped, and the Canyon Group is not mentioned as either a “major” or “minor” aquifer in *Aquifers of Texas*, which is undeniably the leading authority in providing regional information responsive to the rule.⁷ IESI did not state in the Application that there is no water anywhere in the Canyon Group; it did not describe the Canyon as a *regional* aquifer because the Canyon is not a regional aquifer. In its Exceptions, the Protestant did not address the regional aquifer issue other than to say it agreed with the ALJ’s conclusion. Yet the Protestant’s own expert witness, Pierce Chandler, apparently agrees that the Pennsylvanian is not a “regional aquifer.” Mr. Chandler testified under oath that the so-called “regional” aquifers are the major and minor aquifers listed in the publication *Aquifers of Texas*. Protestant appears to be saying that it supports the ALJ’s rejection of Mr. Chandler’s concurrence with the Applicant’s and Executive Director’s experts on this point.

Rather than deciding disputes over nomenclature, the true and relevant issue for the consideration of the Commissioners is the design of the groundwater monitoring system, which

⁷ 30 TEX. ADMIN. CODE §§ 330.2(6) and 330.56(d)(2)(B).

of course is based on site specific conditions. The ALJ agreed with the agency's Executive Director and found that IESI's site specific investigation met the applicable regulatory standards. The site specific investigation showed that there was a thick, consistent layer of impermeable material (mostly shale and clayey shale) underneath the proposed landfill. Even the Protestant's witness, Dr. Ross, agreed that the data supported this conclusion.⁸ The Applicant's expert, Mr. Snyder, further confirmed based on oil well drillers logs submitted by Dr. Henderson (an expert witness for the Protestant) that the confining layer, which was correctly described as an aquiclude in the Application, extended well beyond the boundary of the proposed site.⁹ In its exceptions the Protestant incorrectly suggests that the ALJ had concluded the confining formation was an aquifer. The Protestant seems determined to confuse the issue, or misses the point entirely.

The ALJ most certainly did not find that "the Pennsylvanian" was an aquifer present underneath the site. She merely concluded that the Canyon Group within the Pennsylvanian formation should have been identified in the Application as a "regional" aquifer based on apparent groundwater use elsewhere in the county. IESI has addressed in its Exceptions why the ALJ's conclusion was against the great weight of the evidence and contrary to Commission policy and therefore should be rejected pursuant to Texas Health and Safety Code § 361.0832. The ALJ specifically stated that "[w]hile Applicant did not adequately identify regional aquifers, its methods for evaluating the particular site were standard and reasonable" (emphasis added).¹⁰ IESI's groundwater monitoring system is based on a thorough and comprehensive site investigation that proved the existence of a confining aquiclude beneath the site, established the

⁸ Transcript Vol. 6, p. 106, Ross Cross Examination.

⁹ Transcript Vol. 8, pgs. 148-149, Snyder Rebuttal.

¹⁰ Proposal for Decision at p. 29.

uppermost aquifer and all relevant characteristics of that aquifer, and proved the direction of groundwater flow. Based on this actual scientific data IESI designed the groundwater monitoring system.

Further, the Protestant's concerns about potential contamination of the Stratum IA sands are unsupportable. As the ALJ found, the Applicant properly evaluated the Landfill site for groundwater protectiveness. The PFD correctly notes that the groundwater at the Landfill site will naturally move to Stratum II. Finally, the PFD confirms the non-correlatable nature of the Stratum IA sands across the site, the lack of significant groundwater in those sands, and the substantial excavation of those sands during future construction of the landfill.

The Protestant seizes upon the ALJ's suggestion that there may be a potential for contamination to escape through the sidewall liner and find its way into the Stratum IA sands. It is first necessary to note that the sidewall liners are designed with a drain system and any water that may percolate to a sidewall will naturally flow to the sumps at the bottom of the landfill and be removed by the leachate collection system. There is simply no driving force to push that water through the sidewall. Nevertheless, the Applicant certainly did consider that unlikely avenue of contamination. The Application did not propose monitoring the Stratum IA sands because the site-specific investigation, coupled with the Landfill construction and design, shows that those sands are erratic, discontinuous, contain poor quality water, will largely be excavated during the construction of the Landfill, and will otherwise be protected. In the extremely unlikely event of a sidewall failure, anything escaping will migrate to the Stratum II layer where it will be detected in the proposed monitoring system.¹¹ There is absolutely no evidence to the contrary, and the ALJ has agreed that the Applicant's site-specific investigation and groundwater flow characterization were adequate.

¹¹ Proposal for Decision pp. 29-30; Transcript Vol. 2, p. 93, Snyder cross examination.

Even the ALJ suggests that any “concern” about the “possibility” of contamination reaching the Stratum IA sands could be sufficiently addressed with the inclusion of additional groundwater monitoring wells screened into those sands. IESI believes such additional groundwater monitoring wells are wholly unnecessary and will substantially increase the cost of the facility’s groundwater monitoring system. Nonetheless, IESI is willing to install such monitor wells as discussed further below in the Reply to the Executive Director’s Exceptions.

The Protestant claims that allowing the Applicant to include additional monitoring wells would “defeat the entire purpose of the hearing process” and, therefore the Commission should not allow the concern to be addressed. Again, this shows that the Protestant is not really interested in whether the Landfill design will be protective of human health and the environment, but rather is just looking for any means to defeat the Landfill. As will be discussed in greater detail below, the TCEQ is fully authorized to issue permits with special provisions. There is absolutely nothing peculiar about a contested case resulting in a permit with a special provision.

D. Subsurface Investigation Report

The subsurface investigation was addressed at length in the Application, in the Applicant’s pre-filed direct testimony and again at the hearing. The Applicant properly relied on a soil boring program approved by the Executive Director.¹² The team of professionals included Mr. Stamoulis, Mr. Snyder and Mr. Adams. The results of their work are presented, in accordance with the applicable TCEQ regulations, in boring logs and in the textual discussion in the Application. Dr. Kreitler, an expert geologist and hydrogeologist, reviewed the subsurface

¹² Transcript Vol. 5, p. 119/line 0 through p. 120/line 11, Cross Examination of Chandler; *see also*, App. Ex. 100, Vol. 2, Part III, Attach. 4 at 4 - 8 through 4-14; App. Ex. 7, Snyder Direct Testimony, p. 15/line 12 through p. 16/line 12.

investigation and confirmed that it was proper.¹³ Judge Ramos, while critical of the format of the boring logs, found that the Applicant properly conducted its subsurface investigation.

In its Exceptions Two Bush essentially argues that Judge Ramos should have rejected the sworn testimony of Mr. Snyder and Mr. Adams and should have found that the subsurface investigation is invalid or inadequate because of excessive reliance on wash borings. Two Bush goes on to repeat the same spoliation and *Daubert* arguments it raised for the first time in the Closing briefs. Those arguments are not applicable in this context nor are they timely raised. The *Daubert* argument in particular seems to say that if Two Bush had made a proper pretrial discovery motion to exclude expert testimony, the motion would have been granted and so the trier of fact – and now the Commissioners – should pretend the pretrial motion was actually made and should grant it retroactively. Judge Ramos correctly rejected this argument when it was made in the Closing briefs. The Commissioners should do the same.

The spoliation argument is equally frivolous and untimely. Two Bush argues that Mr. Snyder, based on his 25 years of experience with landfill proceedings, including employment with the TCEQ predecessor entities, should have known that the draft boring logs were relevant and material to the case. But Mr. Snyder surely also knew that there is no requirement in the regulations or elsewhere that he keep drafts of every page of the Application. Was Mr. Snyder required to keep all of his phone records showing that he talked to Mr. Stamoulis every day, and on many occasions several times a day;¹⁴ or every note he may have made of a conversation, or

¹³ The Protestant's argument that Dr. Kreidler violated "the Rule" by discussing his rebuttal testimony with Mr. Snyder and Mr. Adams is a mischaracterization of Dr. Kreidler's testimony. Dr. Kreidler testified in his pre-filed direct testimony that he believed that a substantial number of cuttings had been used in the subsurface investigation. During cross examination, he corrected that statement. During rebuttal, he acknowledged that in the months between the time he filed his pre-filed direct testimony and the evidentiary hearing he spoke with Mr. Snyder and Mr. Adams. Despite the efforts by the Protestant's counsel to infer that Dr. Kreidler violated "the Rule," Dr. Kreidler actually testified as to conversations following his pre-filed testimony. There was nothing improper about those conversations. Transcript Vol. 8, p. 228/line 25 through p. 231/line 25.

¹⁴ Transcript Vol. 2, p. 74, Snyder Cross Examination.

every notation he made on drafts of each map or page of text in the Application? Of course not, and neither was he required to keep every draft of each boring log, including the initial field notes. The applicable regulation requires that certain information be submitted on the logs. The field logs are simply drafts of the final logs that were submitted with the Application. Mr. Adams testified that the company policy is and has been to destroy initial field notes when coming up with the final versions of the logs.¹⁵ There is no requirement to maintain drafts of the logs any more than to maintain drafts of every other page and every other attachment to the Application.

Furthermore, the fraudulent motive that Two Bush wants to imply clearly does not exist. Both Mr. Snyder and Mr. Adams testified under oath that wash borings or cuttings were taken only in certain, narrowly prescribed circumstances. Mr. Stamoulis would have to contact Mr. Snyder to get approval for wash borings.¹⁶ Protestant asserts that neither Mr. Adams nor Mr. Snyder actually observed all of the boring and, therefore, the only way they could know whether or not wash boring was used was by looking at the field logs. What Protestant disingenuously fails to mention, however, is that Mr. Adams personally observed every square inch of cored sample brought to the lab.¹⁷ The text of the Application describes the sampling boring and sampling procedure.¹⁸ This information was verified at the hearing by two experienced and credible professionals.¹⁹ Ultimately Two Bush's entire criticism of the boring and sampling process rests on the notion that Mr. Snyder and Mr. Adams prepared and submitted a false Application and further perjured themselves at the hearing. Yet they provide no evidence to

¹⁵ Transcript Vol. 1, p. 221 lines 17 - 24 Adams Redirect.

¹⁶ Transcript Vol. 2, p. 98/line 20 through p. 99/line 19, Snyder Re-direct.

¹⁷ Transcript Vol. 1, p. 214/lines 3 - 8, Adams Re-direct.

¹⁸ App. Ex. 100, Vol. 2, Part III, Attach. 4, App. 4B.

¹⁹ *See, generally*, Transcript Vol. 2, pgs. 97 - 102, Snyder Redirect and Vol. 1, pgs. 207 - 222, Adams Redirect.

support such a serious allegation. They base this accusation only on an inference drawn by one of their witnesses only from the fact that Mr. Snyder and Mr. Adams did not repeat on the boring logs themselves the description of the boring methods which was clearly provided elsewhere in the text of the Application. Protestant could point to no requirement that the description be repeated in that fashion and provides no other evidence questioning these professional's veracity. They assert that these two men, one a licensed professional engineer and the other a licensed professional geoscientist both of whom work with the TCEQ regularly, risked their careers, their reputations and their livelihood by falsifying an application and lying under oath. That notion is both outrageous and absurd.

E. As the ALJ found, the Applicant met its burden of proof on surface water protection.

The Protestant complains that the ALJ should have found that the Applicant failed to meet its burden of proof on the issue of demonstration that natural drainage patterns will not be significantly altered. The Protestant's argument in support is essentially a regurgitation of arguments the Protestant made at the hearing that were rejected by the ALJ in the PFD. In essence, the Protestant is asking the Commission to re-examine the record and make its own, independent evaluation of the record evidence on a factual and technical issue. This sort of evaluation is not appropriate under the standard of review set forth in Tex. Health & Safety Code § 361.9832.

Without becoming too entrenched in an inappropriate re-hashing of the evidence, IESI will briefly address the Protestant's substantive arguments. The evidence showed that the Applicant utilized the U. S. Army Corps of Engineer's HEC-HMS model to evaluate the effect of the proposed Landfill on natural drainage patterns.²⁰ This analysis complies with (1) the

²⁰ App. Ex. 100, Vol. 2, Part III. Attach. 6A, at 6A-3 to 6A-4 (including all attachments and exhibits referenced thereto); Transcript Vol. 1, p. 24/line 23 through p. 25/line 6, p. 30/lines 20 – 22, Welch Cross Examination.

literal reading of the relevant TCEQ rule;²¹ the TCEQ's Guidance document *TCEQ Guidelines for Preparing a Surface Water Drainage Plan* which addresses that rule;²² and the method historically utilized and accepted by the staff of the TCEQ²³ and previously approved in prior adjudications relating to proposed municipal solid waste landfills.²⁴ The fact that the Protestant was able to locate a witness who was willing to testify that he would have used the more simplistic "rational method" model (which does not allow for consideration of key site-specific parameters)²⁵ does not negate the overwhelming evidence that the Applicant used an appropriate method (indeed, the most appropriate method and the method suggested by the TCEQ's guidance document). This is not the first time an ALJ has rejected the conclusions suggested by the Protestant's witness, Mr. Larry Dunbar. His espoused method was specifically rejected as "an incorrect application of Commission rules and an inappropriate use of hydrologic modeling techniques"²⁶ and as "resulting in an unequal and invalid comparison"²⁷ in a prior landfill permit hearing. In fact, the record is devoid of any credible evidence that the Rational Method should have been used to analyze natural drainage patterns.

The Protestant is pre-occupied by a portion of the Application indicating that the Applicant included information showing peak flow rates calculated utilizing the Rational Method (in addition to the peak flow rates, volume, and velocity calculated using the HEC-HMS method) for predevelopment conditions. The Protestant complains that the Applicant just relied upon the higher peak flow rate between the two. This assertion is simply not true. Nor is it true that the

²¹ 30 TEX. ADMIN. CODE § 330.55(b)(5)).

²² App. Ex. 4; Transcript Vol. 1, p. 102/line 10 through p. 105/line 16, Welch Cross Examination.

²³ Transcript Vol. 1, p. 36/line 25 through p. 37/line 6, p. 98/line 4 through p.100/line 7, Welch Cross Examination.

²⁴ App. Ex. 24, Proposal for Decision, *In Re: Application of Regional Land Management Services*, p. 40 through p. 44.

²⁵ Transcript Vol. 1, p. 142/lines 15 – 25, Welch Cross Examination.

²⁶ *Id.* at p. 40.

²⁷ App. Ex. 25, Proposal for Decision, *In Re: Application of Juliff Gardens*, p. 36.

permit engineer, Mr. Kenneth Welch, changed his opinion about the “compatibility” of the two methods. Mr. Welch repeatedly testified that the HEC-HMS method resulted in more appropriate, accurate, and reliable results for both predevelopment and post-development conditions.²⁸ He further explained that the Rational Method and the HEC-HMS model results are “generally compatible”, but can produce different results that are inappropriate to compare.²⁹ As Mr. Welch repeatedly testified, he included the Rational Method results because he was of the opinion that the regulations required him to provide that information and the TCEQ asked him to put it in the Application.³⁰ He did not, however, use that information to analyze the landfill’s affect on drainage patterns. It is a complete fabrication to assert that the Applicant just relied upon the higher peak flow rate.

Protestant repeatedly points out that the Rational Method and the HEC-HMS methods for determining peak flow rates result in different values. Of course they result in different values – they are different methods. The Rational Method is simplistic and of little use in complex analysis while the HEC-HMS is complex and precise. The Applicant compared the predevelopment HEC-HMS analysis to the post-development HEC-HMS analysis. That comparison showed there would be no significant impact on natural drainage patterns. Protestant would have the TCEQ compare a predevelopment Rational Method analysis to a post-development HEC-HMS analysis. All credible experts, including the Executive Director’s staff expert and decision makers in prior cases, have consistently deemed Protestant’s approach to be incorrect.

²⁸ Transcript Vol. 1, p. 119/line 19 through p.120/line 25, p. 42/line 10 through p.44/line 24; p. 36/lines 4 – 12, p. 147/lines 1 - 15, Welch Cross Examination.

²⁹ Transcript Vol. 1, p.77/lines 15 – 21, p. 78/lines 9 – 13, Welch Cross Examination.

³⁰ Transcript Vol. 1, p. 34/ lines 8 – 10, Welch Cross Examination; p. 103/line 10 – p. 104, Welch Re-Direct Examination.

As the ALJ found after weighing all the testimony and evidence put before her, the Applicant's engineers and hydrologists used the appropriate TCEQ prescribed methods to characterize the predevelopment and post-development drainage patterns and relied upon the most appropriate, reliable, and accurate results. Those results showed there will be no significant alteration of natural drainage patterns, and so the ALJ appropriately found that the Applicant met its burden of proof on this issue.

F. The Applicant's Geotechnical evaluation was adequate.

The Protestant disagrees with the ALJ's findings with respect to the adequacy of the geotechnical evaluation. In support, the Protestant argues that the ALJ should have ignored the testimony of Mr. Adams; instead she should have adopted the musings of the Protestant's expert that were based on assumptions that have no basis in fact and are not in the record evidence. For example, the Protestant continues to be critical of the geotechnical evaluation because it did not analyze the potential for block failure on the intermediate slopes. As Mr. Adams testified, the reason the potential for block failure was not analyzed is because the situation that could create a block failure will not occur at this site.³¹ IESI was not required to invent conditions that could never occur and then analyze those non-existent conditions. In any event, the Protestant improperly asks the Commission to step outside the scope of its review of the PFD as set forth in Texas Health and Safety Code § 361.0832 to re-weigh the evidence and come to a different conclusion. This is not the Commission's role at this point in the proceeding.

³¹ Transcript Vol. 1, p. 172/line 1 – p. 173/line 17, Adams Cross Examination; Vol. 9, p. 43/line 6 – p. 45/line 19, Adams Redirect.

G. The Applicant's Site Operating Plan properly addresses scavenging and vectors.

The Protestant's argument concerning "vectors and scavenging" may be an interesting academic discussion, but it has nothing to do whatsoever with the issue of whether the Applicant met its burden of proof in this matter.

The Protestant argues that the term "scavenging" as used in the TCEQ MSW rules³² refers not only to human scavenging, but also animal scavenging. It is IESI's position that the TCEQ has historically interpreted "scavenging" to refer only to human scavengers, while the TCEQ rule addressing vector control deals with animals.³³ IESI is aware that the Commission's decision adopting Judge Ramos' PFD in *Tan Terra*³⁴ would seem to hold otherwise, but IESI believes that this was perhaps an anomaly that Judge Ramos herself means to correct in this case.

Whether animal control is addressed as "vector control" or as "scavenging" or any other term, however, is not determinative. What is important are the provisions for control of vectors in the Site Operating Plan. As the PFD states, the Site Operating Plan includes adequate measures for the control of vectors. There is no evidence in the record whatsoever that the Site Operating Plan is inadequate. There certainly are no grounds for the Commission to overturn the PFD on this issue.

III. RESPONSE TO EXCEPTIONS FILED BY THE EXECUTIVE DIRECTOR

With respect to the identification of wells, IESI is in total agreement with the Executive Director. IESI used the methods and standard of care appropriate and required by TCEQ rules and precedent. Further, there is no reason to require the Applicant to go beyond those methods

³² 30 TEX. ADMIN. CODE §330.116.

³³ 30 TEX. ADMIN. CODE § 330.126.

³⁴ TCEQ Docket No. 2004-0743-MSW; SOAH Docket No. 582-05-0868.

in this case. IESI has previously discussed these issues at length above, in its Exceptions to the PFD, and previously filed Briefs and will not repeat those discussions here.

Similarly, IESI is in full agreement with the Executive Director's discussion with regard to the identification of springs. First, there is indeed no TCEQ regulation which requires an Applicant to identify springs to the extent and for the purposes claimed or implied by Protestant and the PFD. Second, there is no evidence in the record that the artificially impounded stock tank on Mr. Benson's adjacent property is the result of a spring. All geologic and hydrogeologic evidence in the record would instead lead to the conclusion that the source of water for this stock tank is, at most, a seep out of the side of the adjacent hill. The issue of springs was discussed at length previously and will not be repeated here. As the Executive Director concludes, "the Applicant has adequately characterized springs in the area, for the purpose of landfill design and groundwater characterization."³⁵

In summary, the Executive Director asserts that IESI has met its burden of proof with respect to groundwater protection and requests that the matter be remanded to SOAH to determine whether additional monitor wells are needed. Presumably, this is due to the "inconsistency" observed by the Executive Director, in that the PFD found that IESI properly characterized the site specific hydrogeology and proposed an adequate groundwater protection plan and yet, at the same time, made the following statement with regard to the Stratum IA sands:

A point of some concern is the possibility that contaminants could escape from the side of the landfill liner into the IA sands. However, if the Application were granted, this point could be addressed with monitoring wells screened in those sands.³⁶

³⁵Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and Order, pp. 3 – 4.

³⁶ Proposal for Decision at p. 30.

IESI agrees with the ALJ that, without a doubt, the TCEQ has the authority to place a Special Provision in a permit requiring additional monitor wells in the Stratum IA sands. In addition, IESI agrees that the TCEQ has authority to remand this matter back to SOAH for additional consideration of the installation of groundwater monitor wells in the Stratum IA sands.

However, if this matter were to be remanded back to SOAH for this limited purpose, there could only be three possible results:

1. SOAH could propose that no additional monitor wells in Stratum IA are appropriate; or
2. SOAH could propose that additional monitor wells in Strata IA sands are appropriate along portions of the landfill perimeter (e.g., west/southwest); or
3. SOAH could take the most extreme approach and propose that additional monitor wells in Stratum IA are appropriate all around the perimeter of the landfill.

IESI is confident that any such remand would result in Option 1 above (no additional monitor wells) consistent with the Applicants' and Executive Director's prior technical review and evidence. The ALJ already effectively concludes as much in her PFD. However, IESI is also mindful of the time and expense that would be involved for all the Parties for such a remand. The City of Jacksboro needs this landfill but certainly not the expense associated with a remand. Similarly, the Executive Director surely has better things to do with its staff time and resources. Finally, IESI does not and never has objected to providing an unquestionably protective landfill. In light of these considerations, IESI is reluctantly willing to accept a Special Provision requiring monitor wells in Stratum IA *all around the perimeter of the landfill* placed and designed according to TCEQ rules and the requirements established during the record of this proceeding for other monitoring wells. By inclusion of such a Special Provision, the Commissioners will be absolutely assured that Stratum IA is monitored and protected. With the

Applicant suggesting and agreeing to this extreme result, there can be no valid reason to pursue a remand to SOAH.

IESI has included as "Attachment A" to this Reply the details for 28 additional wells around the perimeter of the Site to be screened in Stratum IA. These monitor wells are placed and designed according to TCEQ regulatory standards and policies for such monitor wells as described in the record of this proceeding. Should the Commissioners elect to incorporate into the permit this substantially more stringent groundwater monitoring obligation on IESI, the Attachment provides the language IESI would suggest be included in the permit at Section X., entitled "Special Provisions." Included in Attachment A are Figures that use the same format as those from the Application, but instead show the new monitor wells into the Stratum IA sands. Those documents are labeled Special Provision Table 1 and Special Provision Figure 1. As is shown in Attachment A, IESI is agreeing to screen 28 additional monitoring wells in full compliance with TCEQ rules and design standards at 25 locations (3 locations will have two wells, each screened at a different depth) all around the perimeter of the Jacksboro Landfill. Surely, nothing could be more protective of Stratum IA than this approach.

Although this approach would certainly address even the most far-fetched concerns espoused by Protestant, IESI is confident that they will object since the environmental protection jurisdiction and goals of TCEQ are not aligned with the ultimate objectives of Protestant (i.e., defeat the permit irrespective of technical merit). The Protestant has already claimed in its Exceptions and will certainly continue to assert that the TCEQ can not issue such a permit with a Special Provision due to "finality" concerns. Such claims are simply and clearly not valid and virtually every permit issued by the TCEQ contains Special Provisions.

In a fact situation less favorable than presented in this case, the Third Court of Appeals upheld the decision of the Texas Department of Health to issue a municipal solid waste landfill.³⁷ In that case, a Type I municipal solid waste landfill permit was issued following a contested evidentiary hearing. The issued permit had a Special Provision requiring the applicant to revise the liner design submitted in its application, and to submit to the agency documentation of its plan to make that alteration, before any excavation at the site.³⁸ The protestant argued that the permit was not “final” because of the Special Provision and because it denied the protestant its rights to a full hearing on the application.³⁹ The court began by recognizing the long-established principle that “an agency permit may contain special provisions that do not preclude its review as a final agency order.”⁴⁰ The critical distinction is between: (1) a permit with a provision that imposes further, future agency action – which is not a final permit; and (2) a permit with a provision that does not require future agency approval - which is a final permit.⁴¹ In the *North Alamo* case, the language required action by the applicant and compliance with the permit Special Provision, but did not require further action by the agency; therefore, the permit was final. The Court further found the protestant’s argument regarding a fair hearing invalid.⁴² The court noted that the protestant had participated in the contested evidentiary hearing, had itself voiced concerns, and that the revisions to the liner design directly responded to those concerns. That, the court said, was ample opportunity to participate, and no additional hearing was necessary. Finally, the court confirmed that the Texas Solid Waste Disposal Act, § 361.087(3)

³⁷ See, *North Alamo Water Supply Corp. v. Tex. Dept. of Health and Browning-Ferris, Inc.*, 839 S.W.2d 448 (Tex. App. – Austin 1992, writ denied).

³⁸ *Id.* at 450.

³⁹ *Id.*

⁴⁰ *Id.* citing *Walker Creek Homeowners Ass’n v. Tex. Dep’t of Human Resources*, 581 S.W.2d 196, 198 (Tex. Civ. App. 1979, no writ).

⁴¹ *Id.* at 450-451.

⁴² *Id.* at 451-452.

specifically allows for the agency to issue permits with special provisions. That statute remains substantively unchanged to this day.

Based on the *North Alamo* decision (as well as the other Texas court decisions concerning finality of agency decisions),⁴³ it is clear that the TCEQ can issue IESI a permit in this matter with a Special Provision that IESI include in its Landfill design the monitoring wells provided for in the plan in Attachment A. Such a permit would be a final permit requiring no further action by the Commission and would certainly and completely address any concern of Protestant or the ALJ with respect to monitoring Stratum IA.

The Executive Director's Exceptions to the PFD supports IESI's request that the PFD be overturned and IESI be granted its permit, but with the added suggestion that the matter be referred back to SOAH to take evidence on the limited question of "whether additional groundwater monitoring wells should be installed at the site." IESI respectfully asserts that a remand is not necessary because, although IESI does not agree that any additional groundwater monitoring wells are necessary, IESI nevertheless is agreeing to their installation via a Special Provision in the permit. Accordingly, there is no need for an ALJ to hear evidence on the need for those additional wells. Attachment A describes the additional monitoring wells IESI is proposing in sufficient detail that the Commission could easily adopt a Final Order granting the permit

⁴³ See also, for example, *Pistocco v. TNRCC*, 2000 Tex. App. Lexis 1094 (Tex. App. – Austin 2000) (upholding the granting of a municipal solid waste permit amendment; holding that special provisions added to the permit amendment did not render it "not final" because the special provisions do not require additional action by the Commission; holding that the protestants were not entitled to an additional evidentiary hearing); *City of Houston and Civil Serv. Comm'n v. Vitek*, 849 S.W.2d 882 (Tex. Civ. App. – Houston [14th Dist.], 1993) (noting that a final agency decision is one that leaves nothing open for future consideration, and merely because an order is "conditional" does not fail to make it final).

IV. RESPONSE TO EXCEPTIONS FILED BY THE CITY OF JACKSBORO

IESI is in full agreement with the Exceptions filed by the City of Jacksboro.

V. RESPONSE TO EXCEPTIONS FILED BY THE AMICUS CURIAE LONE STAR CHAPTER OF THE SOLID WASTE ASSOCIATION OF NORTH AMERICA AND SOLID WASTE ASSOCIATION OF NORTH AMERICA

IESI is in full agreement with the briefing filed by the *amicus curiae* in this matter. As discussed in both of the *Amicus Curiae* briefs, it is critical that the Commission's rules governing the permitting and operation of MSW facilities be interpreted reasonably and predictably. The PFD purports to review the Executive Director's determination of administrative and technical completeness, improperly includes a water rights determination, and creates new interpretations of the Commission's rules that will impose new standards on future applicants. Accordingly, IESI shares the concerns of the two *amicus curiae* that the adoption of the PFD will have serious state-wide ramifications that will threaten all future facilities and potentially expansion applications.

VI. SUMMARY

Throughout this proceeding, Two Bush Community Action Group has sought to obfuscate the relevant and appropriate facts, law, and policy applicable to the Jacksboro Landfill. Realizing that IESI and the City of Jacksboro went to extreme lengths to properly locate, design, and propose an exemplary Type I municipal solid waste landfill according to applicable TCEQ regulations and policies, it sought to fabricate new and ill-conceived requirements and policies and then fault IESI for not adhering to those requirements and policies. Within the PFD, the ALJ effectively finds that the Jacksboro Landfill is designed to be protective of the environment according to standard and accepted methods but then suggests that the Commission adopt new and different policies on certain very limited issues. While the ALJ is certainly free to bring such policy issues to the attention of the Commission, the Commission is specifically

empowered by the Health and Safety Code and the Texas Government Code to reject changes to its long standing policy and precedent. This is especially true where the current policies are the result of over thirty years of regulatory development and have been successfully applied to countless Type I landfills in Texas. One of the suggested new policies would even overturn the “rule of capture” which is one of the most basic and long standing policies in Texas jurisprudence. IESI urges the Commissioners to reject these suggested new policies and issue the requested permit.

With respect to the Executive Director’s suggestion that the matter be remanded to SOAH to determine if additional monitor wells are needed in the Stratum IA, IESI believes that such a remand is not necessary and the record supports issuance of the permit as requested. TPDFD does not recommend denial of the permit due to any issue associated with monitoring Stratum IA. Instead, she merely observed that any lingering concern could be addressed with additional monitor wells. It must be remembered that the standard of proof for an applicant is to show by a preponderance of the evidence that the landfill is properly designed. The standard is not “beyond any lingering doubt in the mind of a protestant no matter how unreasonable.” Nevertheless, IESI is willing to undertake the costly commitment to install monitor wells in Stratum IA around the *entire perimeter* of the Jacksboro Landfill. Even if the Commissioners believe Stratum IA should be monitored, therefore, there is no reason to remand this proceeding.

VII. PRAYER

For the reasons expressed in this Reply as well as the Exceptions to the Proposal for Decision filed by IESI, the City of Jacksboro, the Executive Director, the Lone Star Chapter of the Solid Waste Management Association of North America, and the Solid Waste Management Association of North America, IESI respectfully prays that the Commissioners to modify the ALJ's PFD as more specifically delineated in IESI's previously filed Exceptions and issue the requested permit.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing document was served on the following counsel of record via _____ email; _____ certified mail; X First Class mail; _____ facsimile; X hand delivery; _____ overnight, receipted delivery on June 11, 2009.



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CHIEF CLERKS OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

ATTACHMENT A

X. SPECIAL PROVISION

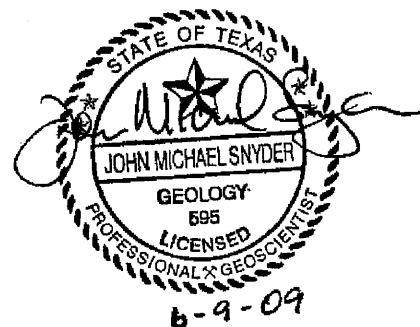
In addition to the groundwater monitoring wells in Attachment 5 that monitor groundwater in the uppermost aquifer (Stratum II), 28 additional monitoring wells shall be installed within the Stratum I and I-A interval as shown in Special Provision Figure 1 and as described in Special Provision Table 2. The wells will be installed in accordance with the monitoring well details described in Part III, Attachment 5 and will be sampled in accordance with the Groundwater Sampling and Analysis Plan in Attachment 11 and in accordance with 30 TEX. ADMIN. CODE §§ 330.401 through 303.415 and §§ 330.419 through 330.421.

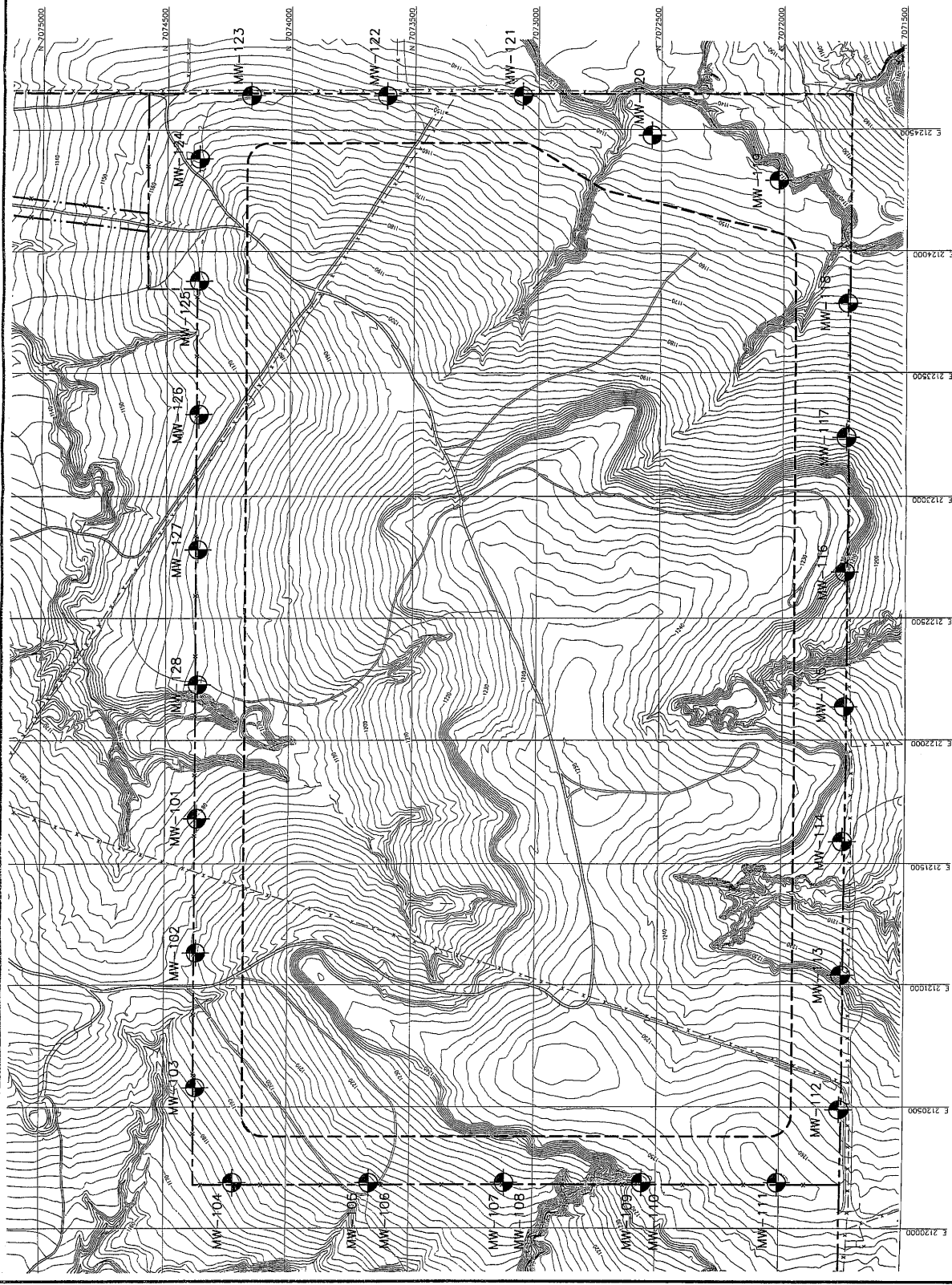
Special Provisions – Table No. 1

PROPOSED MONITORING WELLS				
MONITORING WELL NO.	GROUND ELEVATION (ft msl)	TOTAL DEPTH (ft bgs)	SCREENED INTERVAL (ft msl)	
			FROM	TO
MW-101	1184	34	1160	1150
MW-102	1198	30	1178	1168
MW-103	1185	25	1170	1160
MW-104	1180	22	1168	1158
MW-105	1200	24	1186	1176
MW-106	1200	50	1170	1150
MW-107	1220	35	1195	1185
MW-108	1220	55	1175	1165
MW-109	1242	52	1200	1190
MW-110	1242	72	1180	1170
MW-111	1264	59	1215	1205
MW-112	1252	62	1200	1190
MW-113	1222	47	1190	1175
MW-114	1212	47	1175	1165
MW-115	1208	43	1175	1165
MW-116	1214	49	1175	1165
MW-117	1191	41	1160	1150
MW-118	1156	21	1145	1135
MW-119	1142	17	1135	1125
MW-120	1138	23	1125	1115
MW-121	1141	21	1130	1120
MW-122	1150	40	1120	1110
MW-123	1158	38	1130	1120
MW-124	1166	31	1140	1135
MW-125	1172	42	1140	1130
MW-126	1162	27	1145	1135
MW-127	1170	25	1155	1145
MW-128	1170	20	1160	1150

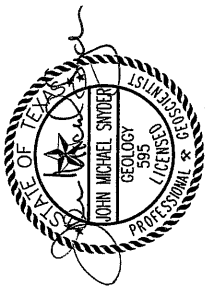
Notes:

1. Well to be drilled by Texas licensed driller.
2. Installation and well development to be supervised by qualified geologist or engineer.
3. Fluids introduced into borehole must be treated clean water.
4. Steamclean procedures should be used for all equipment that enters boreholes such as tremie pipes or drill pipe.
5. Well development should continue until pH, specific conductance and temperature have stabilized.
6. All depths and elevations are estimated based on site characterization information in Attachments 4 and 5.





NOTES:
 1. EXISTING CONTOURS FLOWN BY NORTH TEXAS
 AERIAL SURVEYS, FLOWN JANUARY 9, 2004.
 2. MONITORING WELL INSTALLATION PER SEQUENCE
 SHOWN IN ATTACHMENT 1



6-9-09

**STRATUM I-A
 GROUNDWATER MONITORING WELL
 LOCATIONS**

**IESI TX LANDFILL LP
 JACKSBORO LANDFILL
 PERMIT APPLICATION**

BIGGS & MATHESON
 ENVIRONMENTAL
 CONSULTING ENGINEERS
 1100 WEST 11TH STREET
 DALLAS, TEXAS 75204
 817-583-1144

DESIGN	JMS	DATE	06/09	SPECIAL PROVISION	
DRAWN	SJC	SCALE	GRAPHIC		
CHECK	JMS	DWG	FIG5A-1	FIG5A-1	FIGURE 1

ISSUED FOR INFORMATION ONLY

REV	DATE	DESCRIPTION	DESIGNED BY	CHECKED BY	DATE