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DEQ Hearings Coordinator  
DOCKET NO. \_\_\_\_\_

BEFORE THE DEPARTMENT OF HEALTH AND WELFARE

STATE OF IDAHO

DEBORAH B. FORD, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 IDAHO DEPARTMENT OF HEALTH )  
 AND WELFARE, )  
 )  
 Respondent. )  
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Docket No. 0102-98-16

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND PRELIMINARY ORDER**

This a contested case proceeding before the State of Idaho, Board of Health and Welfare, related to Agency action by the Idaho Department of Health and Welfare, Division of Environmental Quality ("Department"). This case presents a challenge by Petitioner of Department approval for a land farming operation on private property known as the Dave Lewis Site for the treatment of petroleum contaminated soil. The Petitioner in this case was represented by Michael Waldrup of the Featherston Law firm of Sandpoint, Idaho. The Department was represented by Jay Andrew Helmlinger, Deputy Attorney General. The contested case hearing in this matter on April 13, 1999, at the Division of Environmental Quality office in Coeur d'Alene, Idaho. During the course of the hearing, testimony of witnesses was received and documentary evidence by way of exhibits and photographs were admitted. A transcript of the testimony has been prepared and the

original, together with the original exhibits and photographs admitted during the course of the hearing, are on file with the hearings coordinator, the Department. Following the hearing, counsel filed closing arguments pursuant to verbal order of the Hearing Officer rendered at the conclusion of the hearing. In addition to closing arguments, counsel for the Petitioner, on May 18, 1999, wrote a letter to the Department hearings coordinator, to the Attorney General's Office, and to the undersigned Hearing Officer purporting to present hearsay testimony from Mr. Waldrup based upon a telephone conversation between Mr. Waldrup and Greg Rayner of the US Army Corp of Engineers. That communication of May 18, 1999, is not admitted into this record and the contents of that communication are disregarded by the Hearing Officer. On May 24, 1999, the Attorney General's Office responded to Mr. Waldrup's letter and expressed concerns regarding the communication. Based upon the order striking the May 18 communication and ordering that it not be a part of this record, no further action or discussion of the record is necessary. The matter is now fully submitted and is ready for entry of Findings of Fact, Conclusions of Law and Preliminary Order.

#### FINDINGS OF FACT, CONCLUSIONS OF LAW

1. On September 10, 1998, an application for land farm operations was submitted to the Idaho Division of Environment Quality ("DEQ") of the Department. The application form was submitted on a Department form and identified pertinent information as to tank owner/operator, site from which contaminated soil originated, legal description of land farming site, area of land for land farming, site slope, distance to surface water, distance to nearest building, and other information. The site for the September 10, 1998,

application for the proposed land farm operations was what is known in this record as the Dave Lewis Site. This is a site approximately 5 acres in size which in close proximity to another land farm operations site known as the Doyle Reader Site. The Doyle Reader Site is not the subject of this contested case proceeding based on prior order of the Hearing Officer dismissing any claim as to the Doyle Reader Site.

2. The purpose of the land farming operations for petroleum contaminated soils (PCS) is to manage and treat petroleum contaminants in or on soil through the use of biological, physical and chemical processes. The goal is to immobilize, transform, and degrade the concentrations of pollutants in the soil so that the PCS, after proper treatment is appropriate and suitable for other uses. The Department has adopted, by way of informal guidelines entitled "Information Series No. 7", certain procedures for land treatment of PCS. These guidelines were admitted into evidence as Respondent's Exhibit A. The Hearing Officer concludes that Exhibit A is not law, is not a rule or regulation of the Department, and does not have the force of law. The Information Series No. 7 is an internal document to be utilized by the Department in a general sense when presented with an application for land treatment of PCS. The entire process of land treatment of PCS arises out of the Department's general authority under the Idaho Environmental Protection and Health Act, Idaho Code § 39-101 et seq. and from the Department's duty to promote compliance with water quality standard and ground water rules adopted by the Department. There are no express statutes dealing with PCS treatment by land farming and consequently there are no express legal standards either by statute or by Department rule which are applicable to this case. The Information Series No. 7 was prepared by the

Department to provide guidance to applicants, the general public, and to the Department staff as to the method and manner to be utilized in evaluating applications for land farming treatment.

4. The evidence in this case indicates that the Department drafted the guidelines to address health and environmental concern that were recognized to be part of any land farming operation.

5. The Department approval of the land farm application for the Dave Lewis Site was provided verbally on September 14, 1998, by Brian Painter. Mr. Painter is the environmental hydrologist at the Coeur d'Alene regional office of DEQ. He has served in this capacity for approximately nine and one-half years and before that was employed as a professional hydrologist for CH2MHill. Mr. Painter was stipulated by Petitioner's counsel as an expert and therefore qualified to render opinion evidence in the case. Based upon the stipulation from counsel, Mr. Painter's education, background, training, and experience were dispensed with by way of direct testimony.

6. Mr. Painter is familiar with the Dave Lewis Site acquired from prior visits to the adjacent Doyle Reader Site and from available mapping information. The Dave Lewis Site is separated from Petitioner's residential parcel by a 100 foot easement strip. The land farm operation was to occur on the south portion of the Dave Lewis Site. Mr. Painter gave verbal approval for the land farm treatment on September 14, following his review of the application and based upon his review of and expertise in utilizing the Department guidelines.

7. On October 16, 1998, Mr. Painter, by way of Respondent's Exhibit K, issued written approval for the land farming application on the Dave Lewis Site.

8. Between the verbal approval of September 14 and the written approval of October 16, 1998, the Petitioner in this case had objected to the Department, to the US Army Corp of Engineers, to the US EPA, to local planning and land use authorities, to her legislative representative, and to others complaining about the land farm operations at the Dave Lewis Site. Following the objections from Petitioner, the Department staff repeatedly inspected the Sites, observed the operation, observed the Petitioner's property and prepared file notes of the observations and inspections and the course and scope of the operations.

9. The Petitioner in this case contends that the Dave Lewis Site is unsuitable for land farm operation in that it contains seasonal wetlands which will allow for movement of the pollutants and result in hazzards to humans and wildlife in the vicinity.

10. The record in this case indicates that prior to approval of the Dave Lewis Site the property had been inspected by the engineering consultant for the PCS operation accompanied by representatives of the US Army Corp of Engineers. Exhibit Y reflects that as of September 10, 1998, the US Army Corp, based upon an on-site inspection, had concluded that the Dave Lewis Site did not contain wetlands subject to jurisdiction of the Army Corps under Section 404 of the Clean Water Act. Thereafter, by letter dated December 29, 1998, the Corps acknowledged that its initial conclusion may have been in error and indicated that it planed to visit the Site in the spring of 1999 to revisit the issue and determine the extent, if any, of wetlands on the property. The record in this case does

not reflect any follow up determination by the US Army Corps of Engineers under the Clean Water Act or other applicable authorities which would render the Dave Lewis Site unsuitable for land farming operations or which would preclude land farming as a matter of federal law. The nature, role and extent of the authority of the federal government, through the US Army Corps of Engineers, is beyond the scope of this hearing. Moreover, the Clean Water Act and its implementing regulations have clear lines of authority and enforcement with respect to both administrative and judicial remedies in the event of a violation of any superceding federal act. If the Army Corps has as of this date, or in the future decides that the land farming operation violates controlling federal law, then it has a wealth of administrative and judicial remedies at its disposal which may be invoked. Those remedies and enforcement activities are not the business of the Department and are beyond the scope and subject matter of this hearing.

11. The record in this case shows that there has been extensive testing of the property and of the soils in the Dave Lewis Site for contaminants and for monitoring of nearest ground water and other bodies of water. There is no evidence in this record to suggest that any of the pollutants contained within the land farm operation have migrated or have posed any risk hazzard of any sort either to the Petitioner or to any other person or property. The record does indicate that on November 20, 1998, the United States Environmental Protection Agency, Region 10, expressed its opinion with respect to the land treatment operation. Respondent's Exhibit N indicates that on October 16, 1998, US EPA staff visited land treatment site accompanied by DEQ staff and others. The purpose of the visit was to determine whether there were any issues which may warrant

involvement on behalf of the U.S. EPA regarding the operation and to assess whether the Department procedures set forth in the guidelines had been followed. The U.S. EPA concluded that there were no observable conditions which could threaten public health or the environment based on Site specific characteristics such as contaminant concentrations, distance to nearest buildings, and distance to surface water. Parenthetically, the U.S. EPA concluded that the Department followed established procedures for selecting a suitable land treatment site and for conducting site operations.

12. The Petitioner offered extensive photographic evidence showing the Dave Lewis property and the Petitioner's property primarily during periods of spring runoff during which time water from precipitation or runoff was accumulating on the ground. From these photographs it is contended that the Site is unsuitable for land farming due to what is asserted to be a high water table. However, from the period of late fall until approximately June, there is no active land farming occurring of the PCS soils in any event. The period of land farming begins in the late spring or summer and continues into the fall. The farming operation calls for spreading the petroleum contaminated soils into and across the Site and exposing PCS to open air and sunlight. Through this process, petroleum contaminants will volatilize from the PCS. After a period of managing the pollutants, the PCS becomes relatively free of petroleum hydrocarbons and becomes suitable for reuse such as fill dirt or road base. The land farming operation generally calls for treatment for only 1 season, in this case from October 1998 into October of 1999. In the event testing discloses that the desired level of treatment has not been reached, then the operation can continue into a second year. The evidence in this case is that the Department is optimistic that the

operation can be completed during the first season. At the expiration of the treatment period, no further PCS is placed into the site and no additional remediation will occur on the site. The approval process is a one time only concept and once the treatment has completed, the land could be developed for other purposes.

13. The standing water exhibited in the Petitioner's photographic exhibit do not constitute "surface water" for purposes of applying the Department's guidelines Information Series No. 7. The guideline provides that the Department will require certain minimum site characteristics including minimum distance to nearest surface water of 100 feet and minimum distance to nearest ground water of 100 feet. As testified to by Department witnesses, the term "surface water" as used in the guidelines relates to a recognized body of water such as a lake, stream, pond or river. The water depicted in the photographed exhibits is standing water with a source only of precipitation or runoff which remains standing because the soil underneath it lacks the permeability to quickly allow the standing water to drain. The evidence in this case is that the Dave Lewis Site is greater than the Department required minimum distance to nearest surface water. Likewise, the evidence is completely lacking to suggest there has been any spread of any contamination beyond or outside of the Dave Lewis Site. The March 18, 1999, water sample, taken by DEQ staff from a point selected by Petitioner, indicated contaminant levels below any detectable limits. The record reflects that there has been no spread of petroleum contamination to any of the standing water, to any adjacent surface water, or to any ground water.

14. During the period from late fall to spring, when there is generally more precipitation and a greater likelihood of standing water, the PCS is piled, covered and

burmed. As noted above, there is no active treatment operation during these months. Petitioner urges the Hearing Officer in this contested case proceeding to consider alternative treatment methods which may be available to suitable to the Site. However, it is concluded that it is not necessary to reach this issue, even assuming any such issue would be appropriate in this proceeding, for purposes of this preliminary order.

15. The Petitioner also complains that the Department, in approving the Dave Lewis Site, allowed for a kind and type of use which violates local land use planning and zoning ordinances. Again, this issue is one left to the local planning and zoning authority for investigation and enforcement. It is believed that DEQ has no jurisdiction under any circumstances to involve itself into the local land use planning process. If the operation at the Site violates local land use ordinances, then it would be up to the local authorities to instigate appropriate enforcement remedies. The file indicates that the Petitioner did attempt to avail herself of the land use authorities in the Sandpoint area. The record indicates that DEQ officials did review the matter with Sandpoint Mayor, City Attorney, Public Works Director and Planning Director. The file indicates that DEQ fully explained to Petitioner and to City officials that the DEQ approval process was in no way to be a substitute for city approval and that the City could approve sites or disapprove them based on the City's ordinances enforcement concepts. On the day of a meeting on the subject, the City of Sandpoint evidently issued some type of cease and desist order to the Site operators prohibiting any further dumping of PCS onto the property. Approximately 5 days later, the City officials concluded that the City had no regulatory mechanism in place to deny the land farm operation on the property and the City wrote a letter to the operators

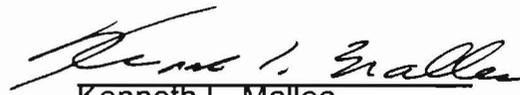
nullifying the cease and desist order. Based on this record, it must be concluded that the City planning authorities themselves did not have sufficient basis to become involved in the operation. Moreover, it is concluded that the Department has no legal duty or policy requiring DEQ to contact local planning and zoning officials or to issue approvals based upon local land use planning ordinances or regulations.

16. It is found and concluded that there is insufficient reason for the Board to revoke or amend the Department's approval in this case.

PRELIMINARY ORDER

IT IS HEREBY ORDERED that the Department approval issued for land farm operations at the Dave Lewis Site should not be revoked or amended.

Dated This 16<sup>th</sup> day of June, 1999.

  
Kenneth L. Mallea  
Hearing Officer

NOTIFICATION OF PROCEDURE FOR PETITION FOR  
REVIEW OF PRELIMINARY ORDER UNDER I.C. § 67-5245

This Preliminary Order will become a final Order without further notice unless a petition for review of a preliminary order is filed with the Department at the following address within 14 days after the date of this preliminary order.

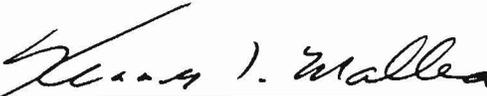
Paula Saul  
Department of Health and Welfare  
Division of Environmental Quality  
1410 N. Hilton, 2<sup>nd</sup> Floor  
Boise, ID 83706-1255

The basis for review must be stated in the petition.

Upon receipt of a petition for review, the Department shall allow all parties to file exceptions to the preliminary order, to present briefs on the issues, and may allow parties to participate in oral argument. The Department shall:

- a. Issue a final order in writing within 56 days of the receipt of final briefs or oral argument, whichever is later, unless the period is waived or extended with the written consent of all parties or for good cause shown;
- b. Remand the matter for additional hearing; or
- c. Hold additional hearings.

Dated This 16<sup>th</sup> day of June, 1999.

  
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Kenneth L. Mallea  
Hearing Officer