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M E M O R A N D U M

Div. of Environmental Quality
Community Programs

DATE: May 31, 1995
TO: Barry N. Burnell
FROM: Kate Crawford
Deputy Attorney General 
RE: Authority to revoke subsurface sewage permit

Introduction

In preparing language for a revision of the subsurface sewage rules, the Technical Guidance Committee for Individual and Subsurface Sewage Disposal (Committee) seeks to include language establishing unequivocally DEQ's authority to revoke a subsurface sewage permit. While Idaho Code § 39-105(3)(a) grants DEQ the authority to issue a subsurface sewage permit, it is silent as to DEQ's authority to revoke such permits. You asked this office to look into the question of whether the authority to issue a permit implicitly includes the authority to revoke the permit. After answering that question affirmatively, this memo also addresses the related question of what conditions should be included in the revised rule to allow DEQ to execute a valid permit revocation.

Discussion

A review of the case law clearly establishes that authority to grant a permit implicitly includes the authority to revoke the permit. Generally, a showing of "good cause" is required to justify a permit revocation. In addition, the courts sometimes require the revocation to be supported by notice and the opportunity for a hearing.

As written, the Committee's proposed rules §§ 01.03.005.10 and 17 provide that non-conformance with the applicable rules is "cause" for revocation of a permit. Section 01.03.005.17. also gives the permittee a right to notice of a permit revocation and the basis for the revocation. The proposed rule does not, however, address a right to a hearing.

While the case law does not make clear whether a hearing is required in this case, to avoid potential due process claims down

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the road, it is recommended that you add language to the proposed rule providing the permit holder a right to request a hearing upon revocation of a subsurface sewage permit. Should you decide to include hearing language in the proposed rule, we suggest that you might want to model it after IDAPA § 16.01.17.920., which sets forth a procedure for the revocation of land application permits. I hope that this addresses your concerns. If you need anything else, please let me know.

KBC/pmm