

## Scoping Meeting Comments


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**From** Douglas Waterman <dwaterman@hbhslaw.com>

**Date** Wed 7/31/2024 10:53 AM

**To** Matthew Beeter <Matthew.Beeter@deq.idaho.gov>; Amanda Henderson <Amanda.Henderson@deq.idaho.gov>

**Cc** Susan Hamlin <Susan.Hamlin@deq.idaho.gov>; Ashley Newbry <anewbry@cityofcaldwell.org>; Robb MacDonald <rmacdonald@cityofcaldwell.org>; Mark Hilty <mhilty@hbhslaw.com>; Bruce Mills <bmill@cityofcaldwell.org>

 1 attachment (5 MB)

Comments to IDEQ - July of 2024.pdf;

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Good afternoon, Matthew and Amanda,

These comments are being provided as requested during the scoping meeting that occurred on July 18, 2024.

Thank you for your consideration.

Best,

**Douglas Lloyd Waterman**

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July 30, 2024

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*Via email (as requested in ZBR and Street Sweeping Scoping Meeting)*

*Re: City of Caldwell – Street Sweepings*

To Matthew Beeter, Amanda Henderson, and the Idaho Department of Environmental Quality:

This firm, Hilty, Bower, Haws & Seable, PLLC, represents the City of Caldwell as the City's appointed City Attorney. I am writing to provide written comments during the scoping process for ZBR Review of Solid Waste Management Rules, specifically, I am writing to provide written comments on the issue of whether rulemaking would be necessary for the Idaho Department of Environmental Quality to engage in the regulation of street sweepings as *per se* solid waste (as the term is defined in IDAPA 58.01.06.005.43).

On behalf of the City of Caldwell, this firm has previously provided analysis of the issue of street sweepings and whether they fall within current definitions of "solid waste."<sup>1</sup> Those communications included a letter to Susan E. Hamlin in the Office of the Attorney General on

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<sup>1</sup> "Solid Waste. Any garbage or refuse, sludge from a waste water treatment plant, water supply treatment plant, or air pollution control facility and other discarded material including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations and from community activities, but does not include solid or dissolved materials in domestic sewage, or solid or dissolved material in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source," IDAPA 58.01.06.005.43.

May 16, 2022 (the “HMH Letter”). A copy of that communication is attached for your ease of reference.

The purpose of this letter is to provide comment, as requested during the scoping meeting that occurred on July 18, 2024, at 1:30PM via Microsoft Teams (the “Scoping Call”). These comments consist of (a) a confirmation that the City of Caldwell continues to hold that street sweepings are not currently solid waste, *per se*, (b) to restate the fact that DEQ is prohibited by state law from regulating street sweepings as proposed; and, (c) to provide initial commentary on the Idaho Department of Environmental Quality Street Sweepings Management Review of Regional Street Seeping Practices prepared by Tetra Tech (the “White Paper”).

### **I. Street Sweepings are not Categorically Solid Waste**

As in our prior communications (*see* HMH Letter), the City maintains that street sweepings are not solid waste, *per se*, as the term is defined in IDAPA 58.01.06.005.43 (and, more significantly, in Idaho Code § 39-7403(50)). As was noted in the Scoping Call by Mr. Beeter, the current test for whether something is a solid waste or not is based upon the use it is put to, i.e. the “verb” associated with it (to refer to Mr. Beeter’s presentation explicitly). The consequence of deviating from that test is, as DEQ noted, to venture into a world where types of solid waste must be listed out, and the list could be practically infinite. This point is precisely what the City of Caldwell attempted to communicate in its prior correspondence concerning the position taken by DEQ. Street sweepings cannot be considered *categorically* a solid waste.

The appropriate focus for an analysis of whether any particular item or material is a “solid waste” hinges upon whether that item or material is, in fact, “garbage,” “refuse,” or “discarded.” The definitions of solid waste found in Idaho Code § 39-7403(50), in IDAPA 58.01.06.005.43, and in *Dep’t of Env’t Quality v. Gibson, 166 Idaho 424 (2020)*, all focus on the status of a material, not its substance. None of the three preceding sources list types of materials as being within the definition of solid waste, but, rather, say that materials, generally, are solid waste once discarded. For example, in *Gibson*, “[t]he leaves and grass clipping [were] solid waste subject to DEQ regulations *because they [were] discarded materials,*” not because they were leaves and grass clippings. This aligns perfectly with DEQ’s “verb” test, as articulated by Mr. Beeter during the Scoping Meeting. Items are not waste by virtue of their specific component parts, but they become waste when the possessor thereof engages in some *act* of disposing or discarding the item.

Under the current DEQ rules, the position cannot reasonably be taken that a material can be identified as being solid waste simply by identifying its constituent parts. Previously, in a communication to our office on this issue on October 4, 2021 (the “Hamlin Letter”) the Idaho Attorney General asserted that street sweepings are solid waste because they consist of rock, sand, salt, leaves, plastic, broken glass, small pieces of metal, motor oil, petroleum contaminated soil, asphalt shards. However, such a materials-based approach to determining whether an item is solid waste (a) is inconsistent with the definition in the Idaho Code and IDAPA, and (b) would create immediate and obvious problems in its application. For example, there are a significant number of vehicles driving on Idaho’s roadways that consist of, and contain in part, rocks, leaves, plastic, broken glass, pieces of metal, motor oil, petroleum products, asphalt, etc. If those vehicles get permanently deposited or placed in an open field, that would be an improper disposal of solid waste. If those vehicles get permanently deposited or placed at the appropriate recycling facilities or landfills, that would be an appropriate disposal of solid waste. If those vehicles get deposited or placed in a parking lot while their owners go into a place of work or a grocery store, with the intent of returning and continuing to drive them, they are not discarded at all. Those vehicles obviously aren’t solid waste because they haven’t been “discarded.” If DEQ takes a categorical approach, identifying solid waste by enumerated constituents, as compared with the “verb” approach identified during the scoping meeting, it will abandon the only currently accepted definition of solid waste in Idaho.<sup>2</sup> DEQ does not have the statutory authority to modify the definition of solid waste.

The foregoing problems with a categorical definition, or a definition that focuses on constituent parts of a material to determine if it is solid waste, appears to have been foreseen by the federal government and Idaho’s legislature alike, which is why, in Idaho and in RCRA, solid waste is defined as a material *discarded*, not as specifically enumerated materials. In short, under the current state code and IDAPA, it is the City of Caldwell’s position that street sweepings are not solid waste, *per se*. If DEQ desires to regulate street sweepings as a categorical solid waste, it

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<sup>2</sup> While Mr. Beeter did list a number of verbs that were purportedly associated with solid waste, the only actual verb in the definition of solid waste is “discarded.” Incorporating other verbs like “placed” or “deposit” into the definition makes it nonsensical. When an individual “places” down their coffee cup between sips, their coffee cup doesn’t become solid waste. When they discard their coffee cup in the garbage tin after it is emptied, then the coffee cup is solid waste.

would need to engage in rulemaking to do so. However, as articulated below, DEQ does not have the necessary authority to adopt such rules.

## **II. State Law Prohibits Rulemaking that Categorize Street Sweepings as a Solid Waste**

Ultimately, even if DEQ were to promulgate a rule adopting the standards outlined in the DEQ's previous publications on street sweepings (Stakeholder Discussion and Fact Sheet as described in the attached HMH Letter), that rule would be *ultra vires* under DEQ's grant of authority by the Idaho Legislature.

Idaho Code § 39-7404 provides, in part, "The [Idaho Board of Environmental Quality] may not promulgate any rule pursuant to this act that would impose conditions or requirements more stringent or broader in scope than the referenced RCRA regulations of the United States environmental protection agency or the provisions of this chapter." According to the prior communications to our office in the Hamlin Letter, "[i]n 1992, [the United States environmental protection agency] reviewed Idaho's solid waste program, including the SWFA and including Idaho's definition of solid waste, and determined that the program adequately implements the requirements of RCRA Subtitle D." Until 2019, as previously acknowledged by DEQ, no guidance had been provided related to street sweepings in Idaho. Therefore, at the time of the EPA's approval of DEQ's program for solid waste in 1992, EPA was apparently content with the lack of regulation applicable to street sweepings under the RCRA.

The position that RCRA, as administered by the EPA, does not require the regulation of street sweepings as solid waste is all but confirmed by the fact that there were states contacted during our survey (as set out in the HMH Letter) that specifically *did not* regulate street sweepings.<sup>3</sup> If the regulation of street sweepings was a mandatory part of RCRA, that should be evidenced by every state regulating street sweepings. From the survey conducted in 2022 by our office, we identified at least three states that expressly exempt street sweepings from solid waste regulations with the apparent blessing of the EPA.

To demonstrate this point, by 1992, when Idaho's solid waste rules were reviewed by the EPA, Ohio and Nevada had both adopted state statutes including street dirt and refuse specifically within their definition of "solid waste." Indiana's Code on solid waste was adopted in 1996, *after Idaho*, and it addresses street cleanings specifically. Therefore, the EPA approved many states'

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<sup>3</sup> Arizona, Arkansas, and Kansas.

solid waste regulations which expressly included street sweepings within the definition of solid waste, and the EPA also approved many other states' statutes which *did not* include street sweepings within the definition of solid waste. Based upon the status of street sweeping regulation across the United States, both at the time the EPA was reviewing solid waste programs and now, it is clear that the regulation of street sweepings as solid waste was not, and is not, a requirement of RCRA. Any rule regulating street sweepings as solid waste under the current Idaho Code would "impose conditions or requirements more stringent or broader in scope than the referenced RCRA regulations," and would be *ultra vires*.

If DEQ takes the position that, despite the non-regulation by certain states, street sweepings are solid waste for the purpose of regulation in Idaho, Idaho Code § 39-7404 would then require DEQ to adopt the minimum regulatory framework necessary under the RCRA. Again, there are examples from other states that set forth a regulatory framework for street sweepings that is less onerous than what has been circulated by DEQ to date. For example:

**Minnesota** - The Minnesota Stormwater Manual provides that "street sweepings not collected from spill sites, hazardous waste cleanup sites or other contaminated areas are not considered hazardous material and do not require testing".<sup>4</sup> Additionally, there are a number of uses for street sweepings, such as compost, recycling, fill dirt, winter application, etc.

- For **composting and recycling**, the manual provides, "Once street sweeping materials have been screened to remove all debris and solid waste, large trash debris can be disposed at a permitted solid waste facility while recyclable material such as paper, plastic, and metal (e.g., aluminum cans) can be taken to a recycling facility. The organic matter that is screened, such as leaves and twigs, can be used as compost. The compost must be properly cured or aged before being reused to ensure the degradation of pathogens and low and medium molecular weight organic compounds. If uncured compost is applied to soils it will continue to decompose, which results in a loss of nitrogen necessary for plant growth.
- For fill dirt, subgrade material, and aggregate in concrete and asphalt, the manual provides, "Once street sweeping material is screened for removal of recyclable materials, organic materials, and trash, the remaining sand can also be used for fill dirt and subgrade material in commercial and industrial development projects, road restoration or construction projects."
- For winter application, the manual provides, "Street sweeping material that has been screened for solid waste can be mixed with a new salt/sand mixture for winter application to roads, parking lots or sidewalks as anti-skid material. There is no need for MPCA approval for this use."

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<sup>4</sup> See [https://stormwater.pca.state.mn.us/index.php?title=Disposal\\_options\\_for\\_street\\_sweeping\\_materials](https://stormwater.pca.state.mn.us/index.php?title=Disposal_options_for_street_sweeping_materials)

The significance of this guidance is three-fold. First, Minnesota does not require categorical testing of street sweeping materials. Second, Minnesota distinguishes between street sweeping material and solid waste (describing the removal of solid waste and debris from the street sweeping materials). Lastly, certain categories of continued application of street sweeping materials require no approval from the Minnesota Pollution Control Agency.

**Florida** – Florida’s Administrative Code Chapter 62-701 governs solid waste Management Facilities. Section 62-701.220 General Applicability provides that the chapter “applies to all solid waste and each solid waste management facility in this state, with the following exceptions:”

(g) The collection and processing of soil, rocks, vegetative debris, asphalt, and similar materials normally associated with and actually from construction and routine maintenance of roads, as defined in Section 334.03(24), F.S., when such materials are beneficially used or reused by the generator as part of a road construction or maintenance project. Street sweepings, ditch scrapings, shoulder scrapings, and catch basin sediments are included in this exemption provided that any significant amounts of solid waste, such as tires, furniture, white goods, and automobile parts, are removed prior to use or reuse. This exception does not apply when materials are contaminated by a spill or other unusual event. Storage of these materials at transfer stations or off-site waste storage areas is addressed in subparagraph 62-701.710(1)(c)5., F.A.C.”

*Id.* Section 62-701.710(1)(c)5. Provides, “Facilities used solely for the temporary storage of road maintenance byproducts, which include street sweepings, ditch scrapings, shoulder scrapings, and catch basin sediments, provided:

- a. Materials that require screening, as well as separated Class I wastes, shall be stored so that leachate and litter are controlled. Examples would include storage in covered roll-offs, storage on an impervious surface and under roof, or storage indoors;
- b. Unscreened materials that will not be beneficially used shall be disposed of as soon as practical but shall be stored for no longer than three months unless a longer storage time is approved by the Department;
- c. Class I wastes that are separated from the material shall be disposed of at a permitted facility at least weekly; and
- d. Screened materials, or materials that do not require screening, shall be stored for no longer than six months unless a longer storage time is approved by the Department.

The significance of these regulations is two-fold: That street sweeping and processing is expressly **exempt** from the solid waste regulations when they are used or reused, and that, as in Minnesota, there is a distinction drawn between street sweepings and the solid waste that may also be gathered during the street sweeping process.

**Massachusetts** – The REUSE AND DISPOSAL OF STREET SWEEPINGS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, POLICY # BAW-18-001 issued by Minnesota's Department of Environmental Protection provides the following in relation to the reuse of street sweepings,

**5.2 Use as Fill in Public or Private Ways and Parking Lots.** Street Sweepings may be used for fill in public and private ways and parking lots **without prior approval from MassDEP** only when the following additional restrictions and conditions are observed:

- The Street Sweepings have not been collected from Urban Center Roads (see definition);
- Any collection, storage, or preparation for use of the Street Sweepings shall be in accordance with Sections 4.1 and 4.2 of this policy.
- The Street sweepings have been screened to remove all debris and solid waste and all debris/solid waste screened from the sweepings shall be disposed at a permitted solid waste facility (see Section 8);
- The Street Sweepings are kept above the level of the groundwater;
- The Street Sweepings are not used in designated "No Salt Areas";
- The Street Sweepings are not used within the 100 foot buffer zone of a wetland or within wetland resource areas including bordering vegetative wetlands and riverfront areas;
- The Street Sweepings are not used within 500 feet of a ground or surface drinking water supply;
- In public ways the Street Sweepings are used under the paved road surface or, except in residential areas, as fill along the side of the road within the public way;
- In private roadways or in residential areas the Street Sweepings are used only under the paved road surface; and
- In parking lots the Street Sweepings are used only under the paved parking surface.

The guidance provides a similar framework for reuse as anti-skid materials. The significance of these regulations are two-fold: That there is a distinction between street sweepings and solid waste, and that no departmental approval is required prior to said reuse.

### **III. Initial Comments on White Paper**

Our office received the White Paper at the time of the Scoping Meeting. Without waiving any right to further objection or commentary, we wanted to provide some preliminary notes on the document. First, the White Paper acknowledges that many states do not regulate street sweepings. Second, the White Paper acknowledges that many of the states that do regulate street sweepings have a regulatory framework less stringent than that proposed by DEQ in prior publications. Third, we provide some general comments.

**1. Many States do not Regulate Street Sweepings as Solid Waste.**

**a. North Dakota**

The White Paper states that “[t]he state of North Dakota has no regulations, guidance, or programs specific to the management of street sweepings.” The White Paper then goes on to say that street sweepings are considered to be “inert material” with no permitting required for collection points, citing North Dakota Administrative Code 33-20-02.1-01. That administrative code was repealed in 2020, and the body of regulations contained therein was transferred to Title 33.1. The specific reference to street sweepings is in North Dakota Administrative Code 33.1-20-02.1-01 and simply provides that “A solid waste management permit is not required for the following activities or facilities: ... b. A collection point for parking lot or street sweepings;”. The White Paper then goes on to provide that street sweepings are allowed for beneficial reuses by Guideline 38 – Beneficial Use of Inert Waste. That guidance document appears to be specific to Inert Waste resulting from **construction and demolition** projects. Ultimately, the most significant conclusion from the white paper is the citation to a call with Ted Popke, which call was cited for the statement, “The state of North Dakota has no regulations, guidance, or programs specific to the management of street sweepings.” Nothing in the White Paper demonstrates that North Dakota Department of Environmental Quality regulates or manages any street sweepings, in-fact.

**b. Montana**

The White Paper states, “[t]he state of Montana has no official regulations or guidance applicable to management of (sic) disposal of street sweepings,” and supports this statement by a citation to a call with Tim Stepp. The White Paper also provides, “Whether to dispose or reuse street sweepings in Montana is a decision made **at the municipal level** and appears to be driven by regulations defining whether the sweepings are considered **hazardous or non-hazardous** and other requirements specific to the landfill excepting (sic) the material.” (*emphasis added*). The description of North Dakota’s street sweeping management appears to consist solely of a determination as to whether the sweepings are hazardous or non-hazardous, rather than treating them as solid waste.

**c. Nevada.**

The White Paper states, “[t]he state of Nevada has no regulations or guidelines pertaining to street sweepings.” White Paper provides a citation to “Anonymous 2023” for all assertions about a statewide program. The White Paper then provides a description of how Las Vegas handles its street sweepings, but Las Vegas is not a statewide solid waste regulatory agency, so the significance of this citation is unclear.

**d. Oregon.**

The White Paper identifies that Oregon regulates street sweepings, and the state has engaged in **rulemaking** as the means of undertaking the same.

**e. South Dakota.**

An email with Steven Kropp is cited, but not quoted, for the assertion that street sweepings are treated and managed in the same manner as sump wastes. The Sump Waste Disposal Guidelines cited have no apparent applicability to street sweepings whatsoever. Nothing in the White Paper actually appears to support the assertion that sweepings are treated like sump waste, or that treating them as such is appropriate or required.

**f. Washington.**

The White Paper identifies that Washington regulates street sweepings, and the state has engaged in **legislation** as the means of undertaking the same.

Ultimately, the majority of the states surveyed have not adopted specific regulations for street sweepings. Of the states surveyed, there is a blend of actual approaches, but the simple assertion that in the states within the vicinity of Idaho, “street sweepings are considered as solid waste and must be handled in a manner consistent with regulations applicable to other solid waste” is patently overbroad and inaccurate, based solely on the content of the White Paper itself.

**2. *Some of the States Surveyed that do Regulate Street Sweepings as Solid Waste or Otherwise Have Lower Regulatory Burdens than Articulated in the Fact Sheet and Stakeholder Discussion.***

**a. North Dakota**

According to the White Paper, North Dakota categorizes street sweepings as inert, and reduces regulatory burdens accordingly, a position explicitly disclaimed in prior communications from DEQ, the Attorney General, and the Stakeholder Discussion. Assuming North Dakota's solid waste program has been reviewed by the EPA for compliance with the RCRA, what is being proposed by DEQ is an attempt to "promulgate [a] rule ... that would impose conditions or requirements more stringent or broader in scope than the ... RCRA regulations," which is prohibited by Idaho Code § 39-7404.

**b. Montana**

According to the White Paper, determinations about the reuse of street sweepings are made at the municipal level, and are governed by whether the sweepings are hazardous or non-hazardous. This is clearly a lower level of regulation than that previously proposed by DEQ. Assuming Montana's solid waste program has been reviewed by the EPA for compliance with the RCRA, what is being proposed by DEQ is an attempt to "promulgate [a] rule ... that would impose conditions or requirements more stringent or broader in scope than the ... RCRA regulations," which is prohibited by Idaho Code § 39-7404.

If the foregoing programs are RCRA compliant, DEQ is prohibited by state law from adopting any management program that is more onerous than the foregoing. The survey our office conducted of additional states provides additional evidence that the program proposed by the Fact Sheet and Stakeholder Discussion documents previously circulated by DEQ would violate the explicit limitations of Idaho Code § 39-7404.

### **3. General Comments on White Paper**

- a.** The broad assertion that disposal at municipal solid waste facilities is the least expensive option is an overstatement of the findings in the White Paper. Additionally, the proposition generally ignores transportation costs for disposal, as well as environmental impact from trucks transporting material, when compared with the reduced impact of on-site screening.
- b.** As a general proposition, street sweeping is one of the primary safeguards to protect stormwater systems. It is counterproductive to implement burdensome and expensive regulations on street sweeping materials.
- c.** As stated above, the Conclusions and Recommendations section overstates the current position taken by neighboring states concerning street sweepings in that it concludes “States and municipalities in the vicinity of Idaho ... regulate street sweepings as solid waste,” when several states do not regulate street sweepings at all.
- d.** The White Paper necessarily recommends a complete cessation of any street sweeping where material is simply swept off rural roads and into roadside barrows. While this is not a practice Caldwell engages in, the statewide consequence of treating all street sweepings as categorically solid waste would likely significantly impact many rural highway jurisdictions.
- e.** The practice of chip sealing on roadways involves laying down gravel chips, and then street sweeping in the following weeks to remove (and ultimately reuse) the excess gravel chips from that process. The natural consequence of the White Paper is that all such activity would need to be changed, with the swept chips being treated as solid waste. This has the potential to negatively impact every highway jurisdiction in the entire state, both practically and financially.

In sum, we reserve the right to provide further comment on the White Paper, having had a very limited time to review it and its sources. Additionally, to the extent that written communications from various states are cited in the White Paper, it seems appropriate that those actual written communications would be provided along with the White Paper. The ultimate consequence of the White Paper is a reaffirmation of the positions that the City of Caldwell has already taken on the issue of street sweeping.

## CONCLUSION

DEQ requested written comments following the Scoping Meeting. That is the purpose of this letter. Ultimately, (a) street sweepings are not solid waste, *per se*; (b) DEQ does not have the authority under Idaho Code to categorizes street sweepings as solid waste, *per se*, both because that change would substantively deviate from the statutory definition of solid waste and because DEQ is prohibited from being more restrictive than RCRA; (c) DEQ's proposed regulatory framework is not the minimally intrusive, minimally onerous regulatory framework, as required by the Idaho Code, and as evidenced by the regulatory frameworks adopted by other states.

Please reach out if you have any questions or concerns.

Very truly yours,

~~HILTY, BOWER, HAWS & SEABLE, PLLC~~



DOUGLAS L. WATERMAN

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May 16, 2022

Susan E. Hamlin  
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Re: *City of Caldwell – Street Sweepings*

Via email: [susan.hamlin@deq.idaho.gov](mailto:susan.hamlin@deq.idaho.gov)

Dear Susan:

I write to respond to your letter dated October 4, 2021, a copy of which is attached hereto as Exhibit A (the “Hamlin Letter”). The purpose of this letter is to respond to the legal analysis provided in response to Caldwell’s requests for the same.

## I. INTRODUCTION

### *a. Brief Summary of Hamlin Letter*

Your letter asserts that the City’s focus on whether street sweepings are “garbage,” “refuse,” or “discarded” is inconsistent with applicable Idaho Code, the IDAPA, and court precedent.<sup>1</sup> You provide examples of other jurisdictions which regulate street sweepings, asserting that “Washington, Oregon, Utah, Nevada, Montana, Wyoming, Alaska, South Dakota, Indiana, Massachusetts, Minnesota, Florida, Ohio, and Connecticut,” have “legally concluded” that street sweepings are solid waste.<sup>2</sup> Further, you assert that Caldwell’s street sweepings are solid waste because they consist of the following materials: “trash, rock, sand, salt, leaves, plastic, broken glass, small pieces of metal, motor

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<sup>1</sup> Hamlin Letter, Page 2.

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

oil, petroleum contaminated soil, asphalt shards, litter, and debris.”<sup>3</sup> You assert that street sweeping is an “industrial activity.”<sup>4</sup>

You provide analysis of *Department of Environmental Quality v. Gibson*, 166 Idaho 424 (2020), attempting to apply the holding therein to the facts present here. You also provided an analysis of whether Caldwell’s street sweepings are inert under the applicable IDAPA and whether Caldwell’s current activity constitutes “Recycling” of solid waste.<sup>5</sup>

***b. Brief Summary of Responses***

The City maintains that the appropriate focus for an analysis of whether any particular item or material is a solid waste hinges upon whether that item or material is, in fact, “garbage,” “refuse,” or “discarded.” The definitions of solid waste found in Idaho Code § 39-7403(50), in IDAPA 58.01.06.005.43 and in the cited case, *DEQ v. Gibson*, all focus on the status of a material, not its substance. None of the three preceding sources list types of materials as being solid waste, but, rather, say that materials, generally, are solid waste once discarded. For example, in *Gibson*, “[t]he leaves and grass clipping [were] solid waste subject to DEQ regulations *because they [were] discarded materials*,” not because they were leaves and grass clippings.<sup>6</sup>

Concerning the examples of other jurisdictions which regulate street sweepings, a review of the regulation of street sweeping in twenty-eight states found your generalized assertion that sweepings are solid waste to be an inaccurate oversimplification.<sup>7</sup> For example, in Nevada<sup>8</sup> and Indiana<sup>9</sup>, specific state code provisions have been adopted applying solid waste rules to street sweepings. In Minnesota,<sup>10</sup> Montana,<sup>11</sup> and Texas,<sup>12</sup> specific rules have been adopted through the

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<sup>3</sup> *Id.* at Page 4.

<sup>4</sup> *Id.* at Page 5.

<sup>5</sup> *Id.* at Pages 8 through 10.

<sup>6</sup> *Gibson*, 166 Idaho at 461 (emphasis added).

<sup>7</sup> The examples provided in the Hamlin Letter overlap with these twenty-eight states except that no information was found by our office concerning street sweeping regulations in Oregon or South Dakota.

<sup>8</sup> NRS 444.490.

<sup>9</sup> IC13-11-2-205.

<sup>10</sup> Minnesota Administrative Rules 7035.0300

<sup>11</sup> Montana Administrative Rules 17.50.503

<sup>12</sup> Texas Administrative Code Title 30, Part 1, Chapter 330, Subchapter A, Rule §330.3

rulemaking process to regulate street sweepings as solid waste. While there are states that regulate street sweepings as solid waste without any formal code or rulemaking expressly authorizing the same, it appears that those states are in the minority.

Concerning the assertion that Caldwell's street sweepings are solid waste because they consist of specific materials, as noted above, whether something is a solid waste is determined based on the useful lifespan and disposition of the materials, not the type of material or its constituents. For the purpose of comparison, consider the standards for whether something is hazardous waste, which are concerned with the material itself.<sup>13</sup>

Your assertion that street sweeping is an "industrial activity" is inconsistent with the applicable Idaho Code.<sup>14</sup>

The cited case law, *Department of Environmental Quality v. Gibson*, 166 Idaho 424 (2020), is clearly distinguishable from the present instance.

Lastly, Caldwell's street sweepings are not "Inert," and Caldwell is not technically "Recycling," as both are terms applicable to solid waste. Caldwell's street sweepings are not solid waste, and, therefore, whether the sweepings would qualify as inert or the current processing would qualify as recycling is irrelevant.

## II. ANALYSIS

- a. The City maintains that the appropriate focus for an analysis of whether any particular item or material is a solid waste hinges upon whether that item or material is, in fact, "garbage," "refuse," or "discarded."

The definitions of solid waste found in Idaho Code § 39-7403(50), in IDAPA 58.01.06.005.43 and in the cited case, *DEQ v. Gibson*, all focus on the status of a material, not its substance. None of the three preceding sources list types of materials as being defined as solid waste, but, rather, say that materials, generally, are solid waste once discarded. For example, in *Gibson*, "[t]he leaves and grass clipping [were] solid waste subject to DEQ regulations because they [were] discarded materials," not because they were leaves and grass clippings. The analysis of whether

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<sup>13</sup> IDAPA 58.01.05.000 et seq.

<sup>14</sup> Idaho Code § 39-7403(22)

something is a solid waste is determined based on the useful lifespan and disposition of the materials. By way of comparison, consider the standards for whether something is hazardous waste. Those standards are concerned with the material itself and whether that material, by its constitution, presents a hazard.

The position taken by the IDEQ and the AG's office is that materials can be identified as being solid waste by their component parts. The AG asserts that street sweepings are solid waste because they consist of rock, sand, salt, leaves, plastic, broken glass, small pieces of metal, motor oil, petroleum contaminated soil, asphalt shards. However, such a materials-based approach to determining whether an item is solid waste would create immediate and obvious problems in its application. For example, a cell phone with a cracked screen contains plastic, broken glass, small pieces of metal, petroleum products, and probably some dirt as well. A materials-based approach to determining what constitutes solid waste would require a person to dispose of their cellphone prematurely, simply because it has been damaged. A fish tank can consist of, and also can contain, rock, sand, plastic, glass, metal, and petroleum products. If things consisting of those materials are "debris" and, therefore, "solid waste by any definition,"<sup>15</sup> then the fish tanks themselves would be solid waste, or would at least contain an accumulation of solid waste. The foregoing problem appears to have been foreseen by the federal government and state government alike, which is why, in Idaho and in RCRA, solid waste is defined as a material *discarded*, not as specifically enumerated materials.

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<sup>15</sup> Hamlin Letter, Page 5.

**b. Survey of Other Jurisdictions Which Regulate Street Sweepings.**

DEQ claims that a list of states and municipalities have “concluded” that street sweepings are solid waste. This is a mischaracterization. Of the state jurisdictions listed<sup>16</sup>, many have *specifically regulated* street sweepings either through legislation or rulemaking. See the following table:

STATE	INFORMATION	SPECIFIC STATUTE OR RULE	TREAT AS SOLID WASTE IN-FACT
AK	Street sweepings are not specifically regulated by Statute or Rule, but appear to be regulated in-fact as solid waste within the state.	⊘	✓
AZ	Spoke with Michelle Ogburn, SW Unit Manager, who said that street sweepings are presumed inert and not regulated for that reason.	⊘	⊘
AR	Spoke with Jennifer Parslow with the Solid Waste Licensing Program who said street sweepings were not regulated because they were not categorized as solid waste.	⊘	⊘
CT	Guidance documents indicate that, under Connecticut General Statutes, street sweepings are a type of solid waste that may be put to beneficial reuse. See C.G.S.A. § 22a-209f.	⊘	✓
FL	Street sweepings are regulated and may be beneficially reused pursuant to Florida’s administrative code, Chapter 62-701.	✓	✓
GA	Spoke with Pete Stevens with the Solid Waste Division. He stated that street sweepings are solid waste once they are discarded, not when they come up off of the roadway. Additionally, street sweepings are specifically excluded from regulation as “recovered material” for reuse. Whether they can be reused depends on their specific composition.	⊘	✓
IL	Spoke with an individual with the IEPA. Said the question had not arisen to their knowledge, but generally thought IL would treat street sweepings as solid waste as soon as they were removed from the roadway.	⊘	✓

<sup>16</sup> It appears that, generally, Cities aren’t an enforcement authority unless that authority is delegated in some way. It is unclear why DEQ listed the names of cities that treat street sweepings as solid waste.

IN	Specific code amendment has been adopted to include “street cleanings” in the definition of solid waste. See IC 13-11-2-205.	✓	✓
IA*	Iowa allows street sweepings to be applied in a number of ways outside of any testing or regulated recycling process. Could not find any specific rulemaking or statute.	⊘	✓ *
KS	Spoke with Mindy Bowman, P.E., Solid Waste Permits Section Chief. She did not believe that street sweepings were regulated but wanted to double check. She never followed up.	⊘	⊘
KY	Spoke with Danny Anderson, Manager, Solid Waste Branch. He was not certain whether street sweepings were regulated, and he talked about beneficial reuse. The specific question asked (SW when discarded v. SW when recovered) seemed unfamiliar to him.	⊘	✓
MD	Street sweepings are specifically listed as a category of solid waste that must be addressed, at least for the purpose of projecting future solid waste generation. See Md. Code Regs. 26.03.03.03.	⊘	✓
MA*	No specific statute or rulemaking addressing street sweepings, but a policy has been adopted. Additionally, said policy allows for use as fill in public and private ways, allows for use as an additive to restrictive use compost, and, most significantly, as anti-skid material. See Reuse and Disposal of Street Sweepings Department of Environmental Protection Policy # BAW-18-001.	⊘	✓ *
MN	Administrative rules specifically include street sweepings in definition of “Refuse.” See Minnesota Administrative Rules 7035.0300 DEFINITIONS, Subpart 89.	✓	✓
MT	Specific administrative rule that includes street sweepings within Waste Group II, which includes decomposable and mixed solid waste. See Administrative Rules of the State of Montana 17.50.503.	✓	✓
NV	Specific code adopted including “street refuse” in the definition of solid waste. See Nevada Revised Statutes 444.490.	✓	✓
NC	Spoke with Jason Watkins with solid waste permitting. Currently, street sweepings are managed based on policies based on reuse or disposal method. They are currently working on formal rulemaking for these policies.	⊘	✓

ND*	Only specific rulemaking excludes street sweeping collection points from solid waste management permit requirements. Allows street sweepings to be reused.	✓	✓ *
OH	Specific code including “street dirt” in the definition of solid waste. See ORS 3734.01.	✓	✓
OK*	Specific rule exempting street sweeping collection points from permitting as solid waste facilities. See OAC 252:515-3-2.	✓	✓ *
SC	Call from Marty Lindler who asserted only that sweepings are regulated as solid waste in South Carolina.	⊘	✓
TX	Rulemaking by Texas Commission on Environmental Quality includes “street cleanings” in definition of “municipal solid waste.” See 33 TAC §330.3.	✓	✓
WA	Street waste is a defined term within the Washington State Administrative Code governing solid waste. See WAC 173-350-100.	✓	✓
WI*	Street sweepings may be treated as low hazard waste and reused, but the exemption must be applied for. See 289.43(8), Wis., Stats.; NR 500.08(5), Wis. Adm. Code	⊘	✓ *
WY	Spoke with Jodi Weikart, Solid Waste Permitting Manager, street sweepings are specifically regulated <i>once discarded</i> . No permitting would be required for continued use for chip sealing, traction control, etc... Permit would be required for use as clean fill.	✓	✓
* Some states do have specific rules and do regulate street sweepings, but only for the purpose of specifically exempting street sweepings from categories of regulation. This is articulable as “regulation,” but whether it is regulation or exemption is arguable.			

Based on the survey of the foregoing states, three specific trends emerge:

- (A) The vast majority (21/25) of the states surveyed regulate street sweepings as solid waste, at various levels of specific regulation and with various exemptions.
- (B) Just over half (11/21) of the states that do regulate street sweepings do not have specific rulemaking or statutory authority for doing so.
- (C) Of the eleven states that regulate street sweepings without specific statutes or rules, seven out of eleven (7/11) either expressed that the question was a novel one, or had some guidance (written or verbal) that sweepings are exempt as solid waste, are the kind of materials that

can be kept at an exempt facility, or are the types of materials that can be reused with minimal review by DEQs/EPAs.

c. Analysis of the Multi-State Survey

First, in general, states that desire to regulate street sweepings as solid waste have acknowledged that regulation requires statutory/regulatory authorization, as evidenced by the fact that specific laws or rules have been adopted to provide for the regulation of street sweepings in those states. Second, it would appear that the regulation of street sweepings as solid waste is not a mandatory component of minimum compliance with RCRA.

1. *Nearly Half of the States that Regulate Street Sweepings Have Adopted Specific Statutes or Rules to Do So.*

The Hamlin Letter states,

Furthermore, the City of Caldwell's position that street sweepings are not a solid waste is inconsistent with the *conclusions* and management of street sweepings by other states, including, but not limited to, Washington, Oregon, Utah, Nevada, Montana, Wyoming, Alaska, South Dakota, Indiana, Massachusetts, Minnesota, Florida, Ohio, and Connecticut; municipalities, including but not limited to: Salt Lake City, UT; Kenmore, WA; Seattle, WA; Tacoma, WA; Helena, MT; Bozeman, MT; City of Waterton, SD; City of Boise through the Ada County Highway District; and the federal government. The above listed states and municipalities are just examples of those that have *legally concluded* and manage street sweepings as a solid waste. While some jurisdictions may provide broader flexibility or conditional exemptions applicable to the management, storage, and disposal of street sweepings, to date we have yet to find a jurisdiction where they are officially not considered solid waste.

Hamlin Letter, Page 2 (*emphasis added*). As an initial matter, of the fourteen states listed above, nine have specific statutes or rulemaking to apply solid waste rules to street sweepings in some way. Rather than these nine states evidencing some *conclusion* that street sweepings are solid waste, those nine states evidence the following: **regulation requires some underlying legislative authority, either**

through the adoption of state code or at least through the rulemaking process. If those nine states had "concluded" that street sweepings were solid waste under the plain definition, not specific rules or statutes would have been necessary. Additionally, each of the cities listed (with the exception of the City of Boise) are found within the states in the immediately preceding list, and there is no obvious persuasive weight to their treatment of street sweepings. Lastly, the Hamlin Letter lists the "federal government" as a jurisdiction that has "legally concluded: that sweepings are solid waste." This appears to be inaccurate, which will be discussed in further detail later in this letter.

What is apparent from the table above, and from the states listed in the Hamlin Letter, is that the majority of the states that regulate street sweepings as solid waste do not do so under the same solid waste definition in Idaho's code or administrative rules. The City of Caldwell's position that street sweepings are not solid waste under the current definitions in Idaho is, in fact, supported by the code, regulations, and practices of the majority of the states listed in the Hamlin Letter and also the majority of the states surveyed as set forth in the table above.

2. *The Level of Regulation of Street Sweepings Proposed by the State of Idaho is Above that Reasonably Necessary to Comply with RCRA and is an Attempt to Avoid Compliance with the Rulemaking Process.*

Idaho Code § 39-7404 CONSISTENCY WITH FEDERAL LAW - - STATUS OF APPENDICIES. Provides, in part, "The [Idaho board of environmental quality] may not promulgate any rule pursuant to this act that would impose conditions or requirements more stringent or broader in scope than the referenced RCRA regulations of the United States environmental protection agency or the provisions of this chapter."

Idaho Code § 67-5201(19) and (2) define "Rule" and "Rulemaking" as,

(19) "Rule" means the whole or a part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, or prescribes:

- (a) Law or policy; or
- (b) The procedure or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule, but does not include:

- (i) Statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public; or
- (ii) Declaratory rulings issued pursuant to section 67-5232, Idaho Code; or
- (iii) Intra-agency memoranda; or
- (iv) Any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule.

(20) "Rulemaking" means the process for formulation, adoption, amendment or repeal of a rule.

Idaho Code § 67-5250(2) provides in part, "Agency guidance' shall include memoranda, manuals, policy statements, interpretations of law or rules, and other material that are of general applicability, whether prepared by the agency alone or jointly with other persons. *The indexing of a guidance document does not give that document the force and effect of law or other precedential authority. (emphasis added).*

In general, Idaho Code § 67-5201, *et. seq.* provides for the exclusive process by which rulemaking may be undertaken for the adoption of rules in the state of Idaho. The Hamlin Letter provides, "In 1992, EPA reviewed Idaho's solid waste program, including the SWFA and including Idaho's definition of solid waste, and determined that the program adequately implements the requirements of RCRA Subtitle D."

On April 16, 2019, Matthew Beeter sent an email with three attachments to various individuals at ITD, ACHD, Caldwell, Post Falls, Coeur d' Alene, and others. One of said attachments was a "Draft Street Sweeping Fact Sheet" (the "Fact Sheet") and also a "Stakeholder Discussion of the Idaho DEQ Street Sweepings Fact Sheet" (the "Stakeholder Discussion"). Said Fact Sheet is attached hereto as Exhibit B and said Stakeholder Discussion is attached hereto as Exhibit C. The following are excerpts from those documents:

Street Sweepings are considered a *solid waste* unless they are contaminant-free *or re-used*.

This fact sheet was developed after review of the relevant regulatory framework and *similar*

*programs from other states. It is intended to provide statewide consistency in DEQ's messaging regarding the management of sweepings. **The regulatory focus of this fact sheet is on removing the material from the definition of solid waste by avoiding disposal or the "discarding" of the material, if possible.***<sup>17</sup> The focus is not on applying a risk-based analysis, or how "clean" the material is.

Stakeholder Discussion, Page 1 (*emphasis added*).

The purpose of this fact sheet is to (1) to provide statewide consistency in DEQ messaging on this issue, (2) describe how to properly manage street sweepings after they are removed from a sweeper truck, and (3) provide persons managing sweepings with regulatory flexibility by offering re-use options instead of disposal of the material as a solid waste.

Stakeholder Discussion, Page 1.

Unless they are properly re-used or processed to be uncontaminated, street sweepings are "solid waste" as the term is defined in Idaho Code 39-7403(50) and IDAPA 58.01.06.005.44.<sup>18</sup>

*Id.*

On April 26, 2021, at 3:09PM, an email was sent by Emily Montague to Jeremiah Thomas and Taylor Enos, with the subject: "RE: City of Caldwell Street Sweeping." A copy of that email is attached hereto as Exhibit D. That email acknowledged that the "Street Sweeping Fact Sheet" was DEQ's "first guidance on [the] topic [of street sweepings]."

The purpose of this history is to demonstrate that DEQ is attempting to engage in rulemaking without going through the necessary process for the adoption of new rules. The need for rulemaking on this issue appears to be acknowledged by a majority of the jurisdictions reviewed. Additionally, rulemaking to accomplish the purposes set forth in the fact sheet and Hamlin Letter would be prohibited by the limitation found in Idaho Code § 39-7404.

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<sup>17</sup> It is worth noting that the Stakeholder Discussion and Fact Sheet seem to acknowledge what is not being acknowledged by DEQ and the Hamlin Letter at this point: disposal is the test for whether material is solid waste, and avoiding disposal/discarding removes the material from the definition of solid waste.

<sup>18</sup> Again, this appears to be an acknowledgment that re-use can remove a material from the definition of solid waste.

A rule is “an agency statement of general applicability that has been promulgated in compliance with [the law] and that implements, interprets, or prescribes ... Law or policy; or ... The procedure or practice requirements of an agency.”<sup>19</sup> The requirements for the adoption of rules are set forth in Idaho Code § 67-5201, *et. seq.*

Specifically excluded from the definition of rules are: statements concerning internal management and not affecting private rights; declaratory rulings issued pursuant to section 67-5232, Idaho Code; intra-agency memoranda; and, written statements of interpretation of a rule or to the documentation of compliance with a rule.<sup>20</sup>

DEQ has acknowledged that no prior interpretation or policy existed on street sweepings prior to the issuance of the Fact Sheet.<sup>21</sup> The Fact Sheet’s stated purpose is to, “The purpose of this fact sheet is to (1) to provide statewide consistency in DEQ messaging on this issue, (2) describe how to properly manage street sweepings after they are removed from a sweeper truck, and (3) provide persons managing sweepings with regulatory flexibility by offering re-use options instead of disposal of the material as a solid waste.” While the first stated purpose is arguably to produce “Agency guidance,” i.e. policy statements, interpretations of law or rules, and other material that are of general applicability,<sup>22</sup> the second and third stated purposes do not reasonably fall within those categories. Specifically, the Fact Sheet and Stakeholder Discussion speak to providing a “streamlined re-use process,” using data to “broadly characterize” street sweepings as waste, the implementation of specific testing requirements for street sweepings, storage and screening requirements, and new, specific reuse categories that do not exist in the current Idaho Code or IDAPA.<sup>23</sup> This is more than guidance on how to manage street sweepings under the current regulatory framework, it is the creation of new processes, testing requirements, and a new “Regulatory Framework.”<sup>24</sup> If DEQ wants to appropriately accomplish the second and third purposes of the fact sheet, it must do so through the rulemaking process as set forth in Idaho Code.

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<sup>19</sup> Idaho Code § 67-5201(19).

<sup>20</sup> Idaho Code § 67-5201(19).

<sup>21</sup> See Email from Matthew Beeter, sent on April 16, 2019.

<sup>22</sup> Idaho Code § 67-5250(2).

<sup>23</sup> See Fact Sheet and Stakeholder Discussion.

<sup>24</sup> Stakeholder Discussion, Second Section Headings, Page 1.

However, even if DEQ were to promulgate a rule adopting the standards outlined in the Stakeholder Discussion and Fact Sheet, that rule would be *ultra vires* under the grant of authority to DEQ. Idaho Code § 39-7404 provides, in part, “The [Idaho board of environmental quality] may not promulgate any rule pursuant to this act that would impose conditions or requirements more stringent or broader in scope than the referenced RCRA regulations of the United States environmental protection agency or the provisions of this chapter.” According to the Hamlin Letter, “[i]n 1992, [the United States environmental protection agency] reviewed Idaho’s solid waste program, including the SWFA and including Idaho’s definition of solid waste, and determined that the program adequately implements the requirements of RCRA Subtitle D.” Until 2019, as acknowledged by DEQ,<sup>25</sup> no guidance has been provided related to street sweepings in Idaho. Therefore, at the time of EPA’s approval of DEQs program for solid waste in 1992, EPA was content with the level of regulation applicable to street sweepings. In response, DEQ may argue that the reason EPA approved Idaho’s program for solid waste without specific reference to street sweepings is because street sweepings are already included within the definition of solid waste. However, this is clearly untrue from a plain reading of the definition, and is further supported by the many states who have specifically regulated street sweepings. The position that EPA was not concerned with the regulation of street sweepings as solid waste in 1992 is all but confirmed by the fact that there are presently states that specifically *do not* regulate street sweepings.<sup>26</sup> If the regulation of street sweepings was a mandatory part of RCRA, that should be evidenced by every state regulating street sweepings, in fact, and every state having specific code listing street sweepings as solid waste.

To demonstrate this point, by 1992, when Idaho’s solid waste rules were reviewed by the EPA, Ohio and Nevada had both adopted state statutes including street dirt and refuse specifically within their definition of “Solid Waste.” Indiana’s Code on solid waste was adopted in 1996, *after Idaho*, and it addresses street cleanings specifically. Therefore, the EPA approved many states’ solid waste regulations which did not include street sweepings within the definition of solid waste, and the EPA also approved many other states’ statutes which *did not* include street sweepings within the

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<sup>25</sup> See Beeter Email.

<sup>26</sup> Arizona, Arkansas, and Kansas.

definition of solid waste. Based upon the status of street sweeping regulation across the United States, both at the time the EPA was reviewing solid waste programs and now, it is clear that the regulation of street sweepings as solid waste was not, and is not, a requirement of RCRA. Any rule regulating street sweepings as solid waste under the current Idaho Code would “impose conditions or requirements more stringent or broader in scope than the referenced RCRA regulations,” and would be *ultra vires*.

The level of regulation of Street Sweepings proposed by the State of Idaho is above that level which is reasonably necessary to minimally comply with RCRA. Also, it is an attempt by DEQ to avoid compliance with the rulemaking process. Lastly, nearly half of the States that regulate street sweepings have adopted specific statutes or rules to do so.

**d. Your assertion that street sweeping is an “industrial activity” is inconsistent with the applicable Idaho Code.**

Idaho Code does not define an “Industrial Activity,” but does define “Industrial solid waste.”<sup>27</sup> That definition provides the following list of activities which produce Industrial solid waste:

[W]aste resulting from the following manufacturing processes: electric power generation; fertilizer and agricultural chemicals; food and related products and byproducts; inorganic chemicals; iron and steel manufacturing; leather and leather products; nonferrous metals manufacturing/foundries; organic chemicals; plastics and resins manufacturing; pulp and paper industry; rubber and miscellaneous plastic products; stone, glass, clay and concrete products; textile manufacturing; transportation equipment; and water treatment.

Street sweeping is in no way a manufacturing process, i.e. no electrical power, fertilizer, chemicals, metals, plastics, pulps, or other products are being created or built. Street sweeping is an act of collection, and street sweepings are not waste “resulting from [a] manufacturing process.” It is unclear from the Hamlin Letter why the sweeping activity is referred to as an industrial activity, and there is no apparent justification for the classification of street sweepings as an industrial waste.

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<sup>27</sup> Idaho Code 39-7402(22)

- e. The cited case law, *Department of Environmental Quality v. Gibson*, 166 Idaho 424 (2020), is clearly distinguishable from the present instance.

#### FACTS OF THE CASE

The following facts of the case are relevant to the present issues: Southwest of the Boise Airport, Black Diamond Composting (owned and operated by David Gibson) had a facility operated as a composting site.<sup>28</sup> Fees were charged for types of materials deposited there. Landscapers, lawn-care professionals, farmers, and municipal agencies delivered grass clippings, leaves, stale hay, and straw to the facility. Boise City and the Ada County Highway District were among those who deposited materials there. Gibson combined the materials with dirt and allowed them to decompose.<sup>29</sup>

DEQ notified Gibson that he was violating of DEQ's Solid Waste Management Rules.<sup>30</sup> Gibson asserted that his facility was not subject to regulation by DEQ or its Solid Waste Management Rules and continued his operations.<sup>31</sup> DEQ filed a complaint against Gibson under the Environmental Protection and Health Act.<sup>32</sup> DEQ sought a permanent injunction requiring Gibson to submit an application and plan to comply with the Solid Waste Rules.<sup>33</sup>

A part of Gibson's defense was the claim that the deposited materials were not solid waste.<sup>34</sup> The district court focused, in part, on "whether the grass clippings and leaves were 'discarded material' subject to DEQ regulation as 'solid waste.'<sup>35</sup> The district court determined that the grass clipping and leaves constituted "solid waste" under the Solid Waste Management Rules, and Gibson appealed.<sup>36</sup> The Supreme Court listed one of the issues on appeal as follows: "Did the district court

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<sup>28</sup> *Dep't of Env't Quality v. Gibson*, 166 Idaho 424, 430 (2020), reh'g denied (May 7, 2020)

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 431.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

properly conclude that grass clippings and leaves were “solid waste” under the Environmental Protection and Health Act and subject to the Solid Waste Management Rules?”<sup>37</sup>

#### THE COURT’S ANALYSIS

The Court held that, “The grass clippings and leaves are “solid waste” under the common definition of the term.”<sup>38</sup> The Court distinguished the Gibson case from a relevant prior case, *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004):

In *Safe Air for Everyone*, farmers in northern Idaho would accumulate and then burn the straw and stubble from trimming their bluegrass crops. Looking to the decisions of sister circuits and definitions of the word “discard,” the *Safe Air for Everyone* court reasoned that it would “strain” the everyday usage of the term “discard” if it were interpreted to encompass materials “retained for immediate reuse.” Synthesizing applicable case law, the court set out a three-part test to evaluate whether something is “solid waste” under the RCRA:

1. whether the material is “destined for beneficial reuse or recycling in a continuous process by the generating industry itself”;
2. whether the materials are being actively reused, or whether they merely have the potential of being reused; [or]
3. whether the materials are being reused by its original owner, as opposed to use by a salvager or reclaimer.

Because the farmers used the grass residue in a continuous cycle to the benefit of their original producers, the *Safe Air for Everyone* court held that “the bluegrass residue is not discarded, abandoned, or given up, and it does not qualify as ‘solid waste’ under the RCRA, based on its statutory definition of ‘solid waste’ as ‘discarded material.’” Based on the foregoing test, the District Court concluded that the leaves and grass clippings in Gibson were solid waste.

*DEQ v. Gibson*, 166 Idaho 444 - 445.

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<sup>37</sup> *Id.* at 432.

<sup>38</sup> *Id.* at 443.

The Court agreed with the district court. Specifically, it found that “The leaves and grass clipping (sic) [were] solid waste subject to DEQ regulations because they [were] discarded materials. These materials were not the byproduct of Gibson's operation ‘retained for immediate reuse.’”<sup>39</sup>

That Gibson may have desired the leaves and grass clippings discarded by ACHD and the City of Boise did not change whether the leaves and grass clippings constituted discarded material under the Act.<sup>40</sup> “Those who brought the leaves had no more use for them, and would have taken them to a landfill if not for Gibson's facility, and, thus, ACHD and Boise City discarded the leaves in the ordinary sense of the word.”<sup>41</sup>

#### DISTINGUISHED FROM THE PRESENT INSTANCE

The City of Caldwell is not discarding the street sweepings when it stockpiles them at a City facility. Alongside the street sweepings are other stockpiled materials, including chip sealing aggregate, asphalt millings, boulders obtained for rip-rap/bank stabilization, pipe for projects, sand for traction control and icy road conditions, equipment, tree cuttings for landscape bark creation, etc. The placement of them in the materials yard is not an act that can reasonably be characterized as an act of discarding or throwing away. In *Gibson*, Boise and ACHD brought leaves and grass clippings to the Gibson facility and paid a fee to dispose of them. They had no further use for them and wanted to get rid of them. The Court found that the leaves and grass clippings were solid waste, “Because they [are] discarded material.”<sup>42</sup> The Court did not find that the materials were solid waste because of their constituent parts.

As stated in our previous correspondence, the issue of when a material becomes “discarded” for purposes of solid waste regulations has been litigated on multiple occasions. In *No Spray Coalition, Inc. v. City of New York*, the United States Court of Appeals, Second Circuit, held that “pesticides are not being ‘discarded’ when sprayed into the air with the design of effecting their intended purpose: reaching and killing mosquitos and their larvae.” The Court said it had previously “indicated that material is not discarded until after it has served its intended purpose.” *Id.* The

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<sup>39</sup> *Id.* at 445.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 445.

United States Court of Appeals, Ninth Circuit, in *Ecological Rights Foundation v. Pacific Gas and Electric Company*, 713 F.3d 502 (9th Cir. 2013), said, “The plain meaning of ‘discard’ is to cast aside; reject; abandon; give up.” *Id.* at 515 (*internal citations omitted*). The court said, under RCRA, “Material is not discarded until after it has served its intended purpose. *Id.* at 515 (*internal citations and quotations omitted*). In short, under both Gibson and other applicable case law, materials must be “discarded” prior to becoming solid waste.

Caldwell has not discarded its street sweepings and does not consider them worthless, useless, or unwanted. Caldwell has in the past and will in the future apply them to useful purposes. IDEQ acknowledges that there are uses for street sweepings such as backfill for commercial and industrial development projects, aggregate in concrete/asphalt, and subgrade fill.<sup>43</sup> Further, IDEQ acknowledges that street sweepings can be “[mixed] with new salt/sand mixture for winter use on roads, parking lots, or sidewalks.” *Id.* Storage of useful materials for future application does not constitute “discarding” the materials because, in the words of Ecological Rights Foundation, *supra*, the material is still “wanted by the consumer.” By accumulating street sweepings, Caldwell avoids the need to reacquire similar materials at unnecessary taxpayer expense.

**f. The street sweepings are neither “inert” nor “recycled” under the applicable IDAPA.**

Caldwell’s street sweepings may well be inert, however, the regulation of inert waste, and the allowance for recycling of solid waste, as categories under the applicable IDAPA, do not apply to Caldwell’s street sweepings because they are not solid waste. These definitions and regulations apply to material that has already been designated as solid waste. Even if the materials which make up Caldwell’s street sweepings were inert, in-fact, and even if the current street sweeping processes would qualify as an appropriate method or recycling, Caldwell’s street sweepings cannot be *inert* nor can they be *recycled* because they are not *solid waste*.

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<sup>43</sup> See IDEQ’s Street Sweepings Fact Sheet.

## CONCLUSION

Thank you for the continued conversation concerning this issue. The City of Caldwell proposes that the next step in working to resolve this issue be a meeting between the Attorney General's office and Office of the City Attorney.

Please reach out if you have any questions or concerns.

Very Truly Yours,

HAMILTON, MICHAELSON & HILTY, LLP



MARK HILTY



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

October 4, 2021

***SENT VIA U.S. MAIL AND ELECTRONIC MAIL TO [mhilty@nampalaw.com](mailto:mhilty@nampalaw.com)***

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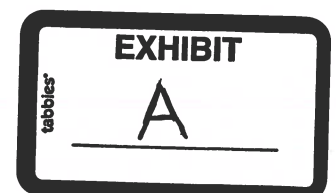
***Subject: City of Caldwell – Street Sweepings***

Dear Mr. Hilty:

My client, the Department of Environmental Quality (DEQ), has asked that I respond to your letter to Matthew Beeter, DEQ Solid Waste Program Manager, dated March 4, 2021, regarding the City of Caldwell's street sweeping activities. As you are aware, DEQ and the City of Caldwell have been discussing Caldwell's handling, storing and disposing of street sweepings and the application of the Solid Waste Management Rules, IDAPA, 58.01.06 for several years. As part of that discussion, your March 4th letter questions whether street sweepings are a solid waste as defined in the Solid Waste Management Rules. DEQ maintains that street sweepings are regulated as solid waste and are providing this legal analysis to explain why that is the case. We hope it answers any questions you may have.

1. Background

It is our understanding that the City of Caldwell maintains approximately 250.6 center lane miles of roadway. Roadway maintenance includes maintaining drains, street and traffic signs, bridges, signal lights, and alleys; as well as activities such as sweeping of streets, chip-sealing roadways, winter plowing, and sanding. Street sweepings from the Caldwell Street Department are stored and or used as fill material at City owned locations in close proximity to the Caldwell Rotary Pond Park off Pond Lane in Caldwell. The act of sweeping the street, in simple terms, is removing debris and pollutants on streets, parking lots, and sidewalks to improve the appearance and safety of public roadways and prevent pollution of waterways. Street Sweepings often contain trash, rock, sand, salt, leaves, plastic, broken glass, small pieces of metal, motor oil, petroleum contaminated soil, asphalt shards, litter, and debris.



The issue regarding the City of Caldwell's management of its street sweepings first came to DEQ's attention in 2018 through a citizen complaint alleging that the City was dumping street sweepings into waterways. DEQ reached out to the City to discuss the issue. DEQ explained the regulatory framework applicable to the disposal, management and storage of street sweepings, the Solid Waste Management Rules and best management practices applicable to street sweepings. Over the past three years, DEQ followed up with emails, letters, meetings, and voicemails to assist the City of Caldwell with compliance options for managing street sweepings in a manner consistent with Solid Waste Management Rules and protective of public health and the environment. DEQ also provided the City with other public entities' street sweeping management plans to show examples of compliance with the Solid Waste Management Rules.

## 2. City's Legal Position

Your letter to DEQ asserts that "*Caldwell's Street Sweepings are Not Solid Waste Because they are Not Garbage, Refuse or Discarded Materials.*" (See Hilty's letter to Matthew Beeter dated March 4, 2021) You state that street sweepings do not fit into the legal definition for solid waste and cite to Idaho Code § 39-103(13), IDAPA 58.01.06.44, 42 USC § 6903(27), 40 CFR 258.2 and Merriam-Webster's dictionary for the definition of solid waste. You reason that because street sweepings are not "garbage", "refuse", or "discarded," it therefore does not fit the definition of solid waste and thus does not need to be managed under DEQ's regulations.

Your legal position regarding street sweepings and the definition of solid waste is inconsistent with Idaho Code, Idaho's Administrative Rules, court precedent, and the State of Idaho's interpretation of solid waste definition. The sections below will provide an explanation of DEQ's position. Furthermore, the City of Caldwell's position that street sweepings are not a solid waste is inconsistent with the conclusions and management of street sweepings by other states, including, but not limited to: Washington, Oregon, Utah, Nevada, Montana, Wyoming, Alaska, South Dakota, Indiana, Massachusetts, Minnesota, Florida, Ohio, and Connecticut; municipalities, including but not limited to: Salt Lake City, UT; Kenmore, WA; Seattle, WA; Tacoma, WA; Helena, MT; Bozeman, MT; City of Waterton, SD; City of Boise through the Ada County Highway District; and the federal government. The above listed states and municipalities are just examples of those that have legally concluded and manage street sweepings as a solid waste. While some jurisdictions may provide broader flexibility or conditional exemptions applicable to the management, storage, and disposal of street sweepings, to date we have yet to find a jurisdiction where they are officially not considered solid waste.

## 3. Idaho Solid Waste Regulatory Authority

It may be helpful to understand how DEQ became vested with the authority to regulate solid waste in Idaho. DEQ is a regulatory agency created by the Idaho Environmental Protection and Health Act (EPA). Idaho Code §§ 39-101, *et seq.* In 1972, the Idaho Legislature tasked DEQ's predecessor with formulating and approving rules and regulations regarding "solid waste disposal." 1972 Idaho Sess. Laws 1017-18; 1018-26. Specifically, Subsection 5.3.m provided

DEQ with the “supervision and administration of a statewide solid waste disposal plan including the enforcement of rules and regulations for minimum sanitary standards for the storage, collection, incineration, composting, grinding, disposing or other processing of solid wastes ...” *Id.* at 1022

In 1976, Congress passed the Resource Conservation and Recovery Act (RCRA) to create a national framework for the proper management of hazardous and non-hazardous solid waste. 42 U.S.C. § 6901 *et seq.* The RCRA uses a bifurcated approach to solid waste, with one subtitle dealing with hazardous waste (Subtitle C, 42 U.S.C. §§ 6921 - 6939e), while the other subtitle only deals with nonhazardous waste (Subtitle D, 2 U.S.C. §§ 6941-6949a). Whereas Subtitle C regulates hazardous waste “from cradle to grave,” Subtitle D regulates nonhazardous wastes less rigorously. Subtitle D is to be largely state-administered upon the Agency’s approval of the state’s solid waste management plan. *See Sierra Club v. U.S. E.P.A.*, 992 F.2d 337, 339 (D.C. Cir. 1993); see also *Env’tl. Def. Fund v. E.P.A.*, 852 F.2d 1309, 1310 (D.C. Cir. 1988); 42 U.S.C. § 6941.

In 1979, the Environmental Protection Agency issued basic criteria for Subtitle D sanitary landfills and guidelines for the approval of state Subtitle D waste-management plans. See 40 CFR 256 and 257. Those regulations ban the open dumping of waste and set out regulatory baselines—such as designs, locations, financial assurances, clean-up assurances, and closure requirements for the operation of municipal and industrial waste landfills. 40 CFR 239 to 258.

In 1992, the Idaho Legislature enacted the Idaho Solid Waste Facilities Act (SWFA). SWFA was enacted to, in part, establish “solid waste disposal standards and procedures ... and a facility approval process for the State of Idaho, the political subdivisions thereof, and any private solid waste disposal site owner.” 1992 Idaho Sess. Laws 973. Idaho Code. § 39-7404 defined SWFA’s function was to bring Idaho into compliance with Subtitle D of the RCRA and authorizing the state to enact and carry out a solid waste program including authority to develop regulations necessary to ensure compliance with the RCRA and SWFA. In 1993, EPA reviewed Idaho’s solid waste program, including the SWFA and including Idaho’s definition of solid waste, and determined that the program adequately implements the requirements of RCRA Subtitle D.

DEQ still holds these grants of regulatory authority. DEQ has its broad grant of authority to promulgate “rules as may be necessary to deal with problems related to ... solid waste disposal ...” Idaho Code § 39-105(2). Pursuant to the legislation authorizing the rulemaking, DEQ promulgated the Solid Waste Management Rules. The purpose of the Solid Waste Management Rules is to implement an open dumping prohibition, set standards for solid waste facilities, other than municipal solid waste landfills, and provide supplemental requirements to the Idaho Solid Waste Facilities Act for commercial solid waste facilities. The rule requires state authorization prior to disposal of a solid waste, and by establishes standards applicable to all solid waste and solid waste management facilities in Idaho, except as specifically excluded in the rule. These rules apply to owners and operators of currently authorized solid waste facilities, those that are seeking authorization, and those that are operating without authorization.

As noted above, EPA promulgated its own rules under RCRA, 40 CFR 257 and 258, applicable to open dumps and waste management facilities. These rules apply in states and on tribal lands whose solid waste programs have not been approved by EPA. While these rules are not directly enforceable in states with approved solid waste programs, RCRA provides citizens with the ability to sue violators and states directly when they are not following or implementing RCRA requirements. As a result, and as a condition for obtaining EPA program approval, state regulations including definitions of solid waste, are all very similar if not identical to federal definitions found in RCRA and the Code of Federal Regulations.

#### 4. Definition of Solid Waste

The crux of the dispute regarding regulatory authority over the City of Caldwell's street sweepings is whether street sweepings are solid waste as defined in Idaho law. Idaho laws clearly define solid waste. The Idaho Code defines solid waste in the Idaho Environmental Protection and Health Act, Idaho Code § 39-103(13) as follows:

(13) "Solid waste" means **garbage, refuse, radionuclides and other discarded solid materials, including solid waste materials resulting from industrial, commercial and agricultural operations and from community activities** but does not include solid or dissolved materials in domestic sewage or other significant pollutants in water resources, such as silt, dissolved or suspended solids in industrial waste water effluents, dissolved materials in irrigation return flows or other common water pollutants. (*Emphasis added.*)

The Idaho Code further defines the disposal of solid waste as the "collection, storage, treatment, utilization, processing or final disposal of solid waste." Idaho Code § 39-103 (14)

The Solid Waste Management Rules define the managing, the disposal, and treatment of solid waste. It defines solid waste in IDAPA 58.01.06.005.43 as follows:

"Any **garbage or refuse**, sludge from a waste water treatment plant, water supply treatment plant, or air pollution control facility and **other discarded material** including **solid, liquid, semi-solid**, or contained gaseous **material resulting from industrial, commercial, mining, and agricultural operations and from community activities**, but does not include solid or dissolved materials in domestic sewage, or solid or dissolved material in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923)." (*Emphasis added.*)

According to both of these definitions, the City of Caldwell's street sweepings are a solid waste. The act of sweeping the streets is an activity conducted by the City of Caldwell to clean and collect trash, rock, sand, salt, leaves, plastic, broken glass, small pieces of metal, motor oil, petroleum contaminated soil, asphalt shards, litter, and debris (collectively referred to as debris)

from the streets. This debris is solid waste by any definition. The City must empty the sweeper truck of this semi-solid material consisting of trash, leaves, and other materials resulting from this industrial activity. As a solid waste, it must be managed at facilities that are approved under the Solid Waste Management Rules. In part, this is to allow DEQ to review the site characteristics and the proposed design features so that the risk of soil, ground water, and surface water contamination can be minimized.

Furthermore, the act of street sweeping is also mandated by an MS4 storm water discharge general permit. The City of Caldwell's MS4 Permit IDS028118 addresses storm water control measure requirements, one of which is maintenance of street sweepings (Sections 3.5.3, 3.5.4, and 3.5.5). As required in the permit, the City of Caldwell must develop a Stormwater Management Plan to implement control measures for pollution prevention which include the management of the street sweepings. Having appropriate management of the street sweeping material, including both management and disposal, is necessary to achieve permit compliance. It is mandated because uncollected street sweepings cause pollution to waterbodies and removing them lowers pollution levels. One of the intents for enacting the Solid Waste Management Rules is to prevent pollution of Idaho's surface and ground water.

#### 5. Idaho Supreme Court Decision Regarding Solid Waste

A recent Idaho Supreme Court decision is relevant to the issue at hand regarding the collection of street sweepings. In *Dep't of Env't Quality v. Gibson*, 166 Idaho 424, 461 P.3d 706, 726–28 (2020), reh'g denied (May 7, 2020), the Idaho Supreme Court addresses the definition of solid waste. In March 2015, the DEQ brought a civil enforcement action under the Environmental Protection and Health Act against David Gibson and VHS Properties for operating a composting facility without complying with state regulations. The question of what activities fall within the Solid Waste Management Rules, along with the definition of solid waste itself, were front and center in this case. Gibson argued that his activities were not regulated because the material in question would ultimately be reused. DEQ disagreed and argued that the material in question needed to be managed in a manner consistent with rules and code in order to ensure the activity was protective of the environment. The district court determined that Gibson was operating a Tier II Solid Waste Processing Facility without DEQ's prior approval in violation of the Solid Waste Management Rules. The district court assessed a civil penalty and issued an injunction. Gibson appealed, raising numerous issues including DEQ's authority to regulate compost under the Solid Waste Management Rules. The Supreme Court ruled in favor of DEQ, affirmed the judgment of the district court, awarded costs and partial attorney fees to DEQ upon concluding that Gibson's arguments were without a reasonable basis in law or fact.

#### 6. Street Sweepings Are Discarded Materials

*DEQ v. Gibson* is relevant for our analysis of Caldwell's street sweepings. The Idaho Supreme Court held that discarded materials such as leaves and grass clippings were solid waste subject to DEQ regulations. Factually, like street sweepings, the leaves and grass clippings in *Gibson* were

not the byproduct of Gibson's operation "retained for immediate reuse," but rather a waste that entities were trying to get rid of. That Gibson may have desired the leaves does not change whether the leaves and grass clippings constituted discarded material thus considered a solid waste. This argument that Gibson makes is similar to the argument that the City of Caldwell is trying to make, that the street sweepings are desirable to the City because they want to use it for fill. Those who brought the leaves to Gibson had no more use for them and would have taken them to a landfill if not for Gibson's facility, and, thus, discarded the leaves in the ordinary sense of the word. Street sweepings, even though the City wants to use what they collected from the street for another purpose, like the leaves in *Gibson*, are discarded material.

The Supreme Court's logic regarding the definition of Solid Waste is helpful to this analysis of solid waste. The court states:

The Grass Clippings and Leaves Are "Solid Waste" Under the Common Definition of the Term

Under the Environmental Protection and Health Act, solid waste is defined in part as "garbage, refuse, radionuclides and other discarded solid materials ...." I.C. § 39-103(13). The district court, relying on *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1037 (9th Cir. 2004), looked to the plain definition of the term "discarded" and determined that leaves and grass clippings are solid waste under the EPHA, even though the *Safe Air for Everyone* court held that grass residue remaining after a Kentucky-bluegrass harvest was not "solid waste" within the meaning of the Resource Conservation and Recovery Act. *Id.*

In *Safe Air for Everyone*, farmers in northern Idaho would accumulate and then burn the straw and stubble from trimming their bluegrass crops. *Id.* at 1038. Looking to the decisions of sister circuits and definitions of the word "discard," the *Safe Air for Everyone* court reasoned that it would "strain" the everyday usage of the term "discard" if it were interpreted to encompass materials "retained for immediate reuse." *Id.* at 1042. Synthesizing applicable case law, the court set out a three-part test to evaluate whether something is "solid waste" under the RCRA:

1. whether the material is "destined for beneficial reuse or recycling in a continuous process by the generating industry itself";
2. whether the materials are being actively reused, or whether they merely have the potential of being reused; [or]
3. whether the materials are being reused by its original owner, as opposed to use by a salvager or reclaimer.

*Id.* at 1043. Because the farmers used the grass residue in a continuous cycle to the benefit of their original producers, the *Safe Air for Everyone* court held that "the bluegrass residue is not discarded, abandoned, or given up, and it does not qualify as

‘solid waste’ under the RCRA, based on its statutory definition of ‘solid waste’ as ‘discarded material.’” *Id.* at 1045. Based on the *Safe Air for Everyone* analysis, the district court here concluded that grass clippings and leaves are solid waste, but reasoned that, at some point in their decomposition, they break down to create compost or humus which is not solid waste because Gibson had a use for that substance.

Gibson argues that the district court erred in failing to rule the RCRA, 40 CFR 261.4(b)(2), and 40 CFR 261.2(e) exclude organic recyclable substances from ‘solid waste.’ He claims that the RCRA excludes “organic substances” used as a direct ingredient to produce a product that is a substitute for commercial products. He also argues that the district court misapplied *Safe Air for Everyone* because the only difference between the current case and the bluegrass farms, is that Gibson is not the “original owner” of the organic residue. He also claims that there is no longer a requirement that Gibson be the “original owner” because the Environmental Protection Agency has promulgated rules that specifically exclude recycled material. DEQ responds by stating that looking to the intent of the original possessor to determine whether something is discarded is consistent with Idaho case law and other federal authorities. DEQ emphasizes that Gibson is not “the original owner,” so his reliance on the federal case law addressing the RCRA is misplaced because such cases reason that materials were not “discarded” when used on the same premises by the same person for a useful purpose.

We agree with the district court. **The leaves and grass clipping are solid waste subject to DEQ regulations because they are discarded materials. These materials were not the byproduct of Gibson’s operation “retained for immediate reuse.”** Rather, both the ACHD and Boise City testified that each organization took the leaves and clippings to Gibson’s facility to get rid of them. Boise City paid a modest fee to do so and both organizations testified that neither had use for the leaves or clippings. That Gibson may have desired the leaves does not change whether the leaves and grass clippings constituted discarded material under the Act. Those who brought the leaves had no more use for them, and would have taken them to a landfill if not for Gibson’s facility, and, thus, ACHD and Boise City discarded the leaves in the ordinary sense of the word.

*Dep’t of Env’t Quality v. Gibson*, 166 Idaho 424, 461 P.3d 706, 726–28 (2020), reh’g denied (May 7, 2020) (*emphasis added*).

The *Gibson* court correctly applied the following concept: the original owner’s intent to re-use a material is a factor in determining whether a solid waste has been generated. However, it is not the only consideration. In the case of Caldwell’s street sweepings, the following factor must also be considered: Caldwell’s street sweepings are not “material destined for beneficial reuse or recycling in a continuous process.” A significant amount of trash and leaves must be removed from the sweepings before any reuse or recycling can occur, and the fines that remain from the screening operation remain contaminated with some level of unknown heavy metals, petroleum products, and other wastes. Even after all these wastes are separated, any useable material must

be supplemented with other product to make it on-specification for reuse. Only at that point can this portion of the sweepings become unregulated product rather than solid waste. All previous activity is considered solid waste processing, which must occur at a facility approved under the Solid Waste Management Rules.

The processing that the City wishes to pursue is directly analogous to the composting process. The original leaves and grass are considered solid waste until the material reaches the point at which it can be re-characterized as a product, at which time DEQ loses its jurisdiction over the material. It doesn't matter, in the case of composting, whether the original owner or another party is undergoing the composting activity. The leaves and grass are solid waste once they are "generated" and remain so until the material becomes compost. It is irrelevant that a material has the potential for reuse or recycling if it cannot be continuously reused, since almost any material can be characterized as such. The City's position that street sweepings are not solid waste is inconsistent with the Idaho Supreme Court decision in *Gibson*.

#### 7. Street Sweepings Are Not Inert

Finally, let me address a legal issue that the City of Caldwell did not make in the March 4<sup>th</sup> letter, but for a complete review of this issue is important to address. A common position taken by those arguing against regulation under the Solid Waste Management Rules is that a waste is not covered under the Rules because they are "inert" under that definition in the Rules.

In the Solid Waste Management Rules, IDAPA 58.01.06.005.18, "Inert Waste" is defined as:

"Noncombustible, nonhazardous, and non-putrescible solid wastes that are likely to retain their physical and chemical structure and have a de minimis potential to generate leachate under expected conditions of disposal, which includes resistance to biological attack.

'Inert waste' includes, but is not limited to, rock, concrete, cured asphaltic concrete, masonry block, brick, gravel, dirt, inert coal combustion by-products, inert precipitated calcium carbonate and inert component mixture of wood or mill yard debris."

A finding that a waste is inert is significant because, while still considered Solid Waste, the Rules do not apply to "inert wastes" unless the wastes are mixed with more than incidental quantities of regulated waste (IDAPA 58.01.06.001.03.b.i.). However, street sweeping waste is not inert under this definition for the following reasons:

- a. While the street sweeping waste is unlikely to characterize as a RCRA hazardous waste, it can have contaminants that are hazardous and deleterious, or exceed regional screening levels (RSLs) or Water Quality standards. The Solid Waste Program must read the word "nonhazardous" as having this broader meaning in order to ensure that contaminated soils and other common waste materials deemed between RCRA hazardous and the various cleanup levels (RSLs for instance) are still regulated under the Rules and not considered "inert."

- b. Neither the chemical components nor the putrescible contents are likely to retain their physical and chemical structure. The putrescible components are not resistant to biological attack.
- c. Street sweeping waste creates leachate. Sweepings are mixed with water in order to get them into the sweeper truck. The semi-solid waste sweepings are, in large part, leachate.
- d. The street sweeping waste contains putrescible leaves and other organic materials, and at certain times of the year leaves make up the majority of the waste. Large volumes of leaves are commonly regulated under the Rules and may only go to a municipal solid waste (MSW) landfill, authorized non-MSW landfill, or to an authorized compost facility.
- e. Street sweeping waste contains more than incidental amounts of trash. In some jurisdictions, testing has shown that trash can make up more than 40 percent of the waste by volume. There are also more than incidental amounts of leaves.
- f. Street sweeping waste not only contains more than incidental quantities of trash and leaves, they consist entirely of regulated waste until the contamination noted above is removed or proven to be below RSLs. So even after removal of leaves and trash, the material must be sampled prior to unrestricted use. This is consistent with other waste programs that involve site clean-ups or determining when a cleanup is complete.

Street sweepings also are known to contain heavy metals, degraded tire compounds, petroleum and hydrocarbons such as polycyclic aromatic hydrocarbons (PAHs) and carcinogenic PAH's. While Idaho has not conducted its own study, data from studies conducted in other jurisdictions indicate that waste sweepings typically have contamination levels that are below RCRA hazardous waste regulatory limits, so in almost all instances, street sweeping waste can be managed as solid waste and not hazardous waste.

#### 8. Caldwell's Street Sweeping Process is Not Recycling

The term "reuse" is not used or defined in the rules, however the terms "recycling" and "recycling center" are defined in the Solid Waste Management Rules. Recycling is defined as "The reclamation of solid waste and its subsequent introduction into an industrial process by which the materials are transformed into a new product in such a manner that the original identity as a product is lost." IDAPA 58.01.06.005.36. A Recycling Center is defined as "a materials recovery facility that receives recyclables, then sorts, bales, loads, or physically alters the material and transports the commodities to markets." IDAPA 58.01.06.005.37. Being deemed "recycling" is significant because the Rules do not apply to "recycling centers." An example of recycling is melting down of aluminum cans or similar situations. The City's activities are not considered recycling because the City's process does not transform the material into a new product such that the original identity of the material is lost. What the City proposes to do with the collected street sweepings is to separate and salvage or process solid waste into the leaves, trash, and the remaining fines/gravel/dirt (contaminated soils). According to the Rules, a solid waste "site" is one used for "any solid waste management activity, including, but not

limited to storage, transfer, processing, separation, incineration, treatment, salvaging, or disposal of solid waste.”

DEQ is working on a program to pre-approve the use of the fines/gravel/dirt in non-residential ways and a potential use may be proposed to DEQ so long as the fines/gravel/dirt has undergone analytical testing to identify contamination levels. It is possible that the results of analytical testing performed in accordance with an approved sampling plan may result in DEQ approval for unrestricted use. Many states have written policies allowing specific manners of reuse of street sweeping waste so that municipal entities can avoid the cost associated with landfill disposal. DEQ intends to promulgate a similar policy. Under such a policy, DEQ would allow certain uses of the solid waste on a case-by-case basis with DEQ approval and conditions.

#### 9. Caldwell Management of Street Sweepings

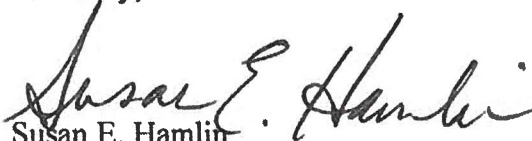
Finally, DEQ has received the City’s Street Sweepings Processing Summary information sheet about current operations in the City of Caldwell. DEQ appreciates the City’s efforts to begin to screen the street sweepings. This is a good first step to properly managing these wastes in an environmental sound manner. However, the placement of the street sweepings on the site near Rotary Pond Park creates a solid waste disposal site. As referenced above, disposal of solid waste is defined as the “collection, storage, treatment, utilization, processing or final disposal of solid waste.” Idaho Code § 39-103 (14). Furthermore, Caldwell’s screening operations constitutes a processing, separation, and/or salvaging of solid waste, as discussed above, which needs to be approved under the Solid Waste Management Rules. If the City intends the site only as a staging area for future disposal, it would be considered a solid waste transfer station, as defined in the Rules, which also needs approval by DEQ.

#### 10. Conclusion

We hope this letter clarifies some of the confusion regarding the application of the Solid Waste Management Rules to your client’s street sweeping activities. Please let me know if you have further legal questions regarding street sweeping waste. DEQ is eager to work with the City to explore options and identify reasonable solutions for this matter.

I invite your client to contact Matthew Beeter, Solid Waste Program Manager, at (208)373-0121 or [matthew.beeter@deq.idaho.gov](mailto:matthew.beeter@deq.idaho.gov) so that DEQ may continue to assist the City of Caldwell on this matter.

Sincerely,

  
Susan E. Hamlin  
Deputy Attorney General

- c: Jess Byrne, Director, Department of Environmental Quality
- Aaron Scheff, Administrator, DEQ Boise Regional Office
- Michael McCurdy, Administrator, Waste Management & Remediation Division
- Matthew Beeter, Solid Waste Program Manager
- Dean Ehlert, Assessment & Compliance Bureau Chief
- Taylor Enos, Water Quality/Solid Waste Engineer



# Street Sweepings Fact Sheet

## What are Street Sweepings?

Street Sweepings consist mainly of sand and gravel that is swept up during the routine cleaning of roads and parking lots. Street Sweepings may also contain leaves, grass, soil, and other miscellaneous solid waste and litter. The Idaho Transportation Department and many county and municipal road departments throughout Idaho conduct periodic street sweeping activities. Some private companies also provide street, sidewalk, and parking lot sweeping services.

Street Sweepings do not include materials removed from drainage structures or stormwater collection systems such as catch basins (see **Catch Basin Cleanings** on the next page). Street Sweepings also do not include materials generated during the cleanup of oil or other hazardous material spills. Special management is required for material related to spill cleanups. Personnel should be provided adequate training to identify circumstances that require special management and the procedures to be followed (see **Standard Operating Procedures** below).

Street Sweepings often contain low levels of chemicals associated with roadway use and maintenance, like automotive fluids, metals, and paint, as well as contaminants from fertilizers and animal waste. During the winter, Street Sweepings may contain snow/ice traction materials, such as salt or cinders.

Responsible management of Street Sweepings protects Idaho's environment by reducing the amount of contaminants that are washed into the storm sewers and eventually into our creeks, rivers, and lakes.



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## Management of Street Sweepings

### **Standard Operating Procedures**

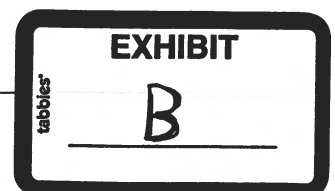
Standard Operating Procedures should be established for the operation and maintenance of street sweeping equipment, including frequency of sweeping, equipment cleaning, storage and disposal of debris, pollution prevention, recognition of spills or illicit discharges, and record keeping. Employees should receive routine training on these procedures. Street Sweepings should be visually checked for contaminants, staining, and odors, both prior to collection and during management activities.

### **Storage**

Street Sweepings may be stored temporarily before disposal or reuse. Street Sweepings should either be stored in a covered area (for example, a salt storage structure) or placed on an impervious surface and covered to control dust and minimize erosion. A perimeter barrier, such as a berm or sand bags, can be helpful for preventing stormwater run-on. In certain cases, transfer site authorization may be required. Speculative accumulation is not allowed.

### **Screening**

Trash, leaves, and other litter and debris should be removed from the Street Sweepings by screening. If feasible, recyclable and compostable materials should be sorted for recycling and composting. The remaining material that does not pass through the screen should be disposed of at a permitted solid waste landfill.



## Testing

Street Sweepings should be tested for contaminants to establish a general analytical profile for determining appropriate disposal and/or reuse options. A sampling and analysis plan that describes the sampling procedures and analyses to be conducted should be prepared and submitted to DEQ for review. Analytical results should be compared to the appropriate regulatory standards (for example, EPA's Regional Screening Levels, Idaho's Risk-Based Cleanup Standards, and/or area-specific background metals concentrations).

Limited testing has been conducted within Idaho to date. DEQ is continuing to collect, review and evaluate state-specific information on the constituents that are commonly found in Street Sweepings. Depending on the results of DEQ's evaluation, testing requirements may be modified, or even eliminated, in the future; however, until that time, testing is needed. Sampling and analysis plans may propose a future reduction in sampling frequency if the analytical results routinely indicate that pollutants are below regulatory standards. All data should be submitted to DEQ. Contact DEQ for assistance with sample and analysis planning.

## Options for Disposal or Reuse

### Disposal

Screened Street Sweepings may be disposed of at a permitted solid waste landfill or C&D landfill. Contact your local solid waste landfill for its waste acceptance criteria. Because landfill space is limited, disposal can be costly, and Street Sweepings have been shown to have other beneficial uses, reuse may be a better option.

### Reuse

There are several options to make beneficial reuse of screened and tested Street Sweepings. Additional options can be proposed to DEQ for consideration and approval.

- Mix with new salt/sand mixture for winter use on roads, parking lots, or sidewalks.
- Use as an approved daily cover at a permitted solid waste landfill.
- Use as backfill for commercial or industrial development projects.
- Use as aggregate in concrete or asphalt.
- Use as subgrade fill under concrete or asphalt-paved roads, parking lots, sidewalks, median strips, or road shoulders.

## Catch Basin Cleanings

Catch basin cleanings are the materials that accumulate in, and are removed from, stormwater catchment systems. Catch basin cleanings typically consist of sand, leaves, and other debris, are often wet, and tend to have higher levels of pollutants and organic content than Street Sweepings. They are also more likely to have been impacted by spills or polluted runoff. For these reasons, catch basin cleanings should always be tested prior to disposal or reuse.

Dry catch basin material may be disposed of at a permitted solid waste landfill. Idaho's landfills cannot accept material with free draining liquids. Contact your local solid waste landfill for its waste acceptance criteria.

For additional information, contact

Matt Beeter, Solid Waste Program Manager  
1410 N. Hilton Road  
Boise, ID 83706  
208-373-0121  
[matthew.beeter@deq.idaho.gov](mailto:matthew.beeter@deq.idaho.gov)

# Stakeholder Discussion of the Idaho DEQ

## Street Sweepings Fact Sheet

Recently DEQ has been made aware of a number of sites being used to store or dispose of street sweepings in a manner inconsistent with Idaho's solid waste rules. Street Sweepings are considered a solid waste unless they are contaminant-free or re-used. This fact sheet was developed after review of the relevant regulatory framework and similar programs from other states. It is intended to provide statewide consistency in DEQ's messaging regarding the management of sweepings. The regulatory focus of this fact sheet is on removing the material from the definition of solid waste by avoiding disposal or the "discarding" of the material, if possible. The focus is not on applying a risk-based analysis, or how "clean" the material is. Also, the focus is on management of the sweepings after removal from the sweeping equipment, so the overlap with most MS4 storm water permits is minimal: the proper training of employees in recognizing spills and concentrated contaminants, and diverting those materials so as not to contaminate the standard sweepings.

### Regulatory Framework

Unless they are properly re-used or processed to be uncontaminated, street sweepings are "solid waste" as the term is defined in Idaho Code 39-7403(50) and IDAPA 58.01.06.005.44. Sweepings contain materials such as sand, salt, leaves, broken glass, small pieces of metal, and other litter and debris removed from streets, parking lots, and sidewalks. While it may not seem that the earth-like materials contained in street sweepings pose a threat to the environment, these sweepings are not as "clean" as one might think. Street sweepings usually contain low levels of metals such as arsenic, chromium and lead. It is also not uncommon to find compounds associated with asphalt and motor oils in street sweepings. As a result, these materials can impact the environment and should be properly managed and disposed. It is costly and difficult to prove that sweepings can be used as clean fill.

Street sweepings are not "inert" as that term is defined in IDAPA 58.01.06.005.19 due to the fact that the dirt/sand/gravel mixture contains some or all of the materials identified above. However, preliminary data from sweepings in Idaho, as well as data used to establish policies in other states, indicate that when sweeping activities are performed by trained personnel who can identify abnormal street materials and spills, and sweepings are managed properly subsequent to being swept up, sweepings can be safely re-used in specified ways.

The purpose of this fact sheet is to (1) provide statewide consistency in DEQ messaging on this issue, (2) describe how to properly manage street sweepings after they are removed from a sweeper truck, and (3) provide persons managing sweepings with regulatory flexibility by offering re-use options instead of disposal of the material as a solid waste. The following discussion on the "initial phase" and "final phase" relates only to the re-use of sweepings material. So long as further data collection supports it, DEQ wants to provide a streamlined re-use process where costly analytical testing is not required and DEQ approval for the specified re-uses is not required.



4/15/2019

## Initial Phase

DEQ's approach is foreseen as having two phases. During both phases proper management of street sweepings, as outlined in the Fact Sheet, will be required. During the initial phase we will also be collecting analytical data on the chemical makeup of the material. The data will be used to broadly characterize the waste, and we expect the data to show the material is non-hazardous and, further, that the material contains very low levels of contaminants, close to or below Residential Screening Levels (RSLs) or background for all tested constituents. Please note that our reference to RSLs and/or background in this context is not intended to be a "clean-up level," but, rather, an indicator that the material is appropriate for re-use in the specified manner(s). Sweeping that prove to be of low concern will be approved for the specific uses outlined in the fact sheet and will not be required to be landfilled with other solid wastes. The uses identified in the fact sheet are, generally, uses where similar contaminants are expected to already be present in the surrounding soils at equally low levels.

## Final Phase

If DEQ can establish that street sweepings are, on a statewide basis, close to or below RSLs or background for all tested constituents on a statewide basis, then analytical testing of sweepings will no longer be required for the sweepings to be used in the approved ways. Since we expect that collected data will show only very low concentrations of metals and PAHs, and very little else, we expect the regulated community will be incentivized to share their data with us in order to accelerate and end the initial data-collection phase. The fact sheet will be revised to reflect that analytical testing is not required if/when the final phase is initiated.

## FAQ

**Do I have to screen my street sweepings?** If you want to use the sweepings in any of the approved ways you will have to screen them first. Some of the suggested re-uses (i.e., aggregate in concrete or asphalt) would likely require additional screening to meet engineering specifications. If you plan to approach your local landfill about them using the material for Alternative Daily Cover (ADC) they may be willing to help with screening if multiple parties wish to do the same.

**During the initial phase am I required to perform analytical testing on my street sweepings?** Not in all cases and it depends on how you intend to manage and dispose of your sweepings. For instance, if you want to temporarily stockpile sweepings in a manner consistent with the practices identified in the Fact Sheet and then directly landfill them, the only testing that will be required will be any that the landfill requires in order to ensure it is non-hazardous. Even screening the material would not be required under this scenario.

**When you say "analytical testing" what will actually be required during the initial data collection phase?** Along with the Fact Sheet, we are sharing a basic spreadsheet of analytical data already collected in Idaho from street sweepings. This spreadsheet identifies all the constituents that have been tested thus far. Not all constituents were tested in each case. The quicker we can obtain a complete

statewide characterization of this material, the quicker we can suspend the requirement for analytical testing. At this time it appears that metals and PAHs are the primary constituents that have been found above detection limits, but we believe we need more data points to narrow testing to only these categories at this time. A result in bold font on the spreadsheet indicates a concentration that was measured above a detection limit. It does not indicate an exceedance of a screening level.

**What will be regarded as an adequate number of samples during the initial data collection phase?** This is open for consideration. There are many guidelines out there that you can reference. DEQ believes that many different protocols can adequately represent a street sweepings waste pile.

**I have been performing analytical testing on this material, or have been requiring analytical testing of other parties, for some time. If I share this data with you will it accelerate the initial data collection phase?** Yes! Please provide us with any lab results you already have on this material. It is possible that enough quality data already exists to adequately characterize street sweepings on a statewide basis. As soon as we can establish this, we can suspend the testing requirement for the approved uses of street sweepings.

**Will I be required to obtain a Tier II transfer station authorization for my sweepings storage site?** In most cases no. There may be limited instances when DEQ will ask that a site be authorized as a transfer station in order to obtain oversight of the facility: For example, if a site is proposed in a sensitive environment, or if management practices at a site have been historically poor. However, DEQ does not want, and does not see the need, to oversee sites that are only managing street sweeping and are managing them well.

**Can I get my site approved for final disposal of street sweepings?** Yes, you can go through the process to authorize a site as a Tier II landfill under IDAPA 58.01.06. Your site must meet the location standards in the rules and your facility design and operations will also be reviewed as part of the approval process. Site, design, and operations would need to be tailored to the type of waste(s) you plan to accept.

**What do I do with my existing stockpiles of old street sweepings?** Each stockpile site will need to be individually assessed to establish the volume of material, the site's environmental sensitivity, and to determine the scope of contamination, if any. DEQ will assess each site as we are made aware of them.

**Are the re-use options listed in the fact sheet the only options?** DEQ may approve additional re-uses that take into account the expected content of sweepings material and the character of its proposed final disposition/location. We will review each request on a case-by-case basis.

**From:** [Jeremiah Thomas](#)  
**To:** [Emily Montague](#)  
**Subject:** RE: City of Caldwell Street Sweeping  
**Date:** Monday, April 26, 2021 3:12:21 PM  
**Attachments:** [image003.png](#)

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Thanks for information

-Jeremiah

**From:** Emily Montague  
**Sent:** Monday, April 26, 2021 3:09 PM  
**To:** Jeremiah Thomas  
**Cc:** Taylor Enos  
**Subject:** RE: City of Caldwell Street Sweeping

Jeremiah,

My understanding is that Caldwell is resisting the street sweeping disposal requirements because they plan to eventually have a screening system in place where they can reuse such material are under the impression that at that point the material will have a designated purpose. The City does not agree with street sweepings being deemed solid waste (garbage, refuse, or discarded materials) and as such has recently told DEQ that we do not have authority regarding their street sweeping material. They have intentions to reuse the material once the screening facility is up. I think reuse is a great option for the facility however, as my information presented, some of the street sweeping material has been disposed of (they explain it was used to create or fill landscape variations) in the past near the pond shown in my maps.

It is my understanding that the Street Sweeping Fact Sheet is DEQ's first guidance on this topic.

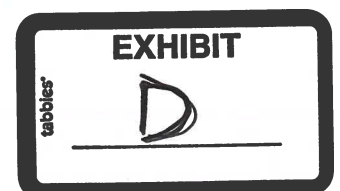
As of to date we have been told that street sweepings have been used and or stored for fill applications at:

1. The Caldwell Archery Range (in berming)
2. The Caldwell Police Shooting Range (in berming)
3. The Rotary Pond Park (in various landscape variations)

This inspection is going to unannounced (when we arrive onsite I can contact the proper City personnel (Ashley Newbry and Brent Orton) and see if they would like to join us on the inspection).

Please reach the letter from the City to Matt Beeter to help provide background on Caldwell's position if you haven't already.

Regards,





**Emily Montague | IPDES Compliance  
Officer  
Idaho Pollutant Discharge Elimination  
System Program**

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[http://www.deq.idaho.gov/water-  
quality/ipdes/](http://www.deq.idaho.gov/water-quality/ipdes/)

IPDES E-Permitting:

<http://www2.deq.idaho.gov/water/IPDES/>

**From:** Jeremiah Thomas  
**Sent:** Monday, April 26, 2021 2:40 PM  
**To:** Emily Montague; Taylor Enos  
**Subject:** RE: City of Caldwell Street Sweeping

Emily,

Thanks for providing this very helpful timeline and info on the Caldwell Street Sweeping issue. Being new to DEQ and the waste program, can I ask a few questions regarding this:

- Do you have a feel for why Caldwell is resisting the street sweeping disposal requirements? It looks like it is fairly common practice (based on some searches) that street sweepings are usually disposed of as solid waste at landfills unless characterized and reused.
- I see that there is a draft Street Sweepings fact sheet in your material. Has this been put before the public before or is this DEQ's first guidance on this topic?
- Do we know how many street sweeping disposal/storage areas we may be looking at for Caldwell?
- Is this inspection going to be unannounced or are you coordinating with Caldwell on this?

Thanks,  
Jeremiah

**From:** Emily Montague  
**Sent:** Monday, March 29, 2021 11:59 AM  
**To:** Taylor Enos; Jeremiah Thomas  
**Cc:** Valerie Greear; Matthew Beeter; James Craft  
**Subject:** City of Caldwell Street Sweeping

Good afternoon,

I compiled a PowerPoint to show the timeline of documents and conversations leading up to the City of Caldwell Street Sweeping Inspection that we will be scheduling (see attachment) and then conducting. Prior to scheduling the inspection, we will need to determine if sampling and or additional documentation needs to be obtained during the inspection process beyond photographs and accounts of conversations held with City employees. Additionally, I need to see if Matt sent a request to the City yet for any other sweeping disposal, storage, use, or processing site's owned or operated by the City. This can wait until Matt gets back into the office, but I just wanted to provide you with this timeline so we can reference if needed.

Regards,



**Emily Montague | IPDES Compliance  
Officer**

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