



Extended Treatment Package System Subcommittee Meeting

Minutes

Thursday, February 21, 2013

**Department of Environmental Quality
Conference Room C
1410 N. Hilton
Boise, Idaho**

TGC-ETPS ATTENDEES:

Tyler Fortunati, R.E.H.S., On-Site Wastewater Coordinator, DEQ
Bob Erickson, Senior Environmental Health Specialist, South Central Public Health District
Ryan Spiers, Alternative Wastewater Systems, LLC
David Loper, Environmental Health Director, Southwest District Health Department
James Bell, Bio-Microbics, Inc.
Raymond Keating, Environmental Health Specialist, Eastern Idaho Public Health District (via telephone and GoToMeeting)
Jay Loveland, Senior Environmental Health Specialist, Panhandle Health District (via telephone and GoToMeeting)
Brent Gee, Effluent Technologies, Inc. (via telephone and GoToMeeting)
Kim Walker, Simple Septic Solutions, LLC (via telephone and GoToMeeting)

GUESTS:

Chas Ariss, P.E., Wastewater Engineering Manager, DEQ
A.J. Maupin, P.E., Wastewater Program Engineering Lead, DEQ
PaRee Godsill, Everlasting Extended Treatment, Inc.
Kellye Eager, Environmental Health Director, Eastern Idaho Public Health Department (via telephone and GoToMeeting)
Ed Schloss, Jet, Inc. (via telephone and GoToMeeting)
Scott Hendrick, Norweco, Inc. (via telephone and GoToMeeting)
Nathan Taylor, Environmental Health Supervisor, Eastern Idaho Public Health District (via telephone and GoToMeeting)
Janette Young, Administrative Assistant, DEQ

CALL TO ORDER/ROLL CALL:

Meeting called to order at 9:15 a.m.
Committee members and guests introduced themselves.

MEETING MINUTES:

January 17, 2013 Draft ETPS Subcommittee Minutes: Review, Amend, or Approve

No public comment was received.



Motion: Bob Erickson moved to accept minutes as presented.

Second: Ryan Spiers.

Voice Vote: Motion carried unanimously.

Minutes will post as final. See DEQ webpage and **Appendix A**.

OPEN PUBLIC COMMENT PERIOD: This section of the meeting is open to the public to present information to the ETPS subcommittee that is not on the agenda. The ETPS subcommittee is not taking action on the information presented.

No public comments were submitted during the allotted agenda timeframe.

OLD BUSINESS:

Update on Action Items from January 17, 2013 ETPS Subcommittee Meeting

- **Delivery of Real Estate Transaction Brochure**

The brochure is still being worked on by DEQ State Office Technical Publication Department and is not yet ready for distribution. Tyler Fortunati stated that as soon as the brochure is ready for distribution DEQ will get it out to the realtor and title company association as well as the health districts.

Tyler Fortunati met with the Liaison Committee of the Land Title Association. This association represents approximately 95% of the Title companies in Idaho. This meeting occurred on February 8, 2013 for the purpose of seeking their input on how to make homeowners aware of the member agreement that is recorded to their property. The Liaison Committee recommended the following:

- Work with the real estate commission to amend their forms regarding a structure's sewer system to include an ETPS option.
- Have the agreement specifically state that there are annual fees associated with it.
- Include the O&M Entity's contact information on the member agreement.
- Try to develop a consistent format for the member agreement so it is recognizable to the title company agents.

In the future Tyler plans to speak to or meet with some of the real estate associations when the brochure is ready for distribution. This is a more difficult task in that there are 20 or more associations of realtors around the State.

David Loper suggested meeting with Home Inspectors or their association so they are capable of identifying when a home has an ETPS system installed.



- **Review of sampling port information and design from Ohio and Bio-Microbics**
James Bell presented a review of sampling port information and design requirements from the State of Ohio and Bio-Microbics, Inc. James Bell's presentation included the history of the Ohio Technical Committee and why they have the sampling port requirements. The requirements for the sampling port are linked to surface discharge units and NPDES permits.

Bob Erickson asked James Bell if NSF requires that samples be pulled from a sampling port after the treatment unit. Bob Erickson noted that if this is what NSF is requiring for testing then Idaho should be too. If a service provider in Idaho is not sampling the effluent following NSF's methods then the sample does not make sense.

James Bell will provide photos and information on the NSF sampling procedures for review at the next subcommittee meeting.

See **Appendix B** for the sampling port presentation.

- **Update from James Bell regarding nonprofits and their operations**
James Bell presented information provided by Bio-Microbics, Inc. legal counsel and financial staff regarding the legality of a nonprofit maintaining a balance related to its operations specified in the Articles of Incorporation and Bylaws (i.e., reserve fund for maintaining and sampling units where members have refused to pay). James Bell stated that a nonprofit incorporates as a nonprofit under Idaho Code but that they are looked at as a for-profit entity under the IRS tax code based on the opinion of Bio-Microbics' accountants. This means that there is no reason a Nonprofit Operation and Maintenance Entity cannot keep a reserve balance from year to year. See **Appendix C** for the information presented on this discussion.

NEW BUSINESS:

Review of two enforcement letters related to refusal of service

- **Letter 1 (and enclosure) – It Has Come to Our Attention**
This letter is designed to go out after the health district overseeing the O&M Entity receives verification in the annual report of those members refusing service for the ETPS units. Refusal of service can occur through several avenues (e.g., failure to pay annual dues, refusal of property access, etc.). This letter is meant to remind the property owner of their responsibilities and provides them with the contact information for their O&M Entity and service provider. The enclosure is an informational letter that was developed for the use by O&M Entities to provide to their members in annual statements. The enclosure provides educational information relating to the ETPS program including where an O&M member can find additional information about the program. The subcommittee provided some edits to this letter. See **Appendix D** for the edited version of this letter and the enclosure.



- **Letter 2 – Voluntary Deadline to Comply**

There was discussion on whether DEQ or the health districts would issue these letters. Tyler Fortunati stated that there is an understanding that the health districts would want DEQ to perform the initial enforcement for this program, but that it is also expected that the health districts take over the enforcement at some point. The enforcement structure is something that will have to be worked out at a later date between DEQ and the health districts and is not something that the subcommittee should tackle.

James Bell suggested including a copy of the septic permit for each member with Letter 2.

Tyler Fortunati stated that if there is no response from the O&M member after the date provided in this letter the regulatory agency would issue a Notice of Violation (NOV) to that member. See **Appendix E** for the edited version of this letter.

Motion: James Bell moved for preliminary approval of both letters pending any future changes.

Second: Bob Erickson.

Voice Vote: Motion carried unanimously.

11:10 AM Break

11:20 AM Meeting resumed.

Review of Sections 4.10.4 and 4.10.6 of the Technical Guidance Manual (TGM)

Reviewed and discussed edits to sections 4.10.4 and 4.10.6 of the TGM. These new additions were added to relay reporting and enforcement letter requirements in relation to Letters 1 and 2 discussed earlier.

David Loper requested that 4.10.4 relate to a specific subsection of section 4.10 of the TGM.

There was discussion on best place to keep the enforcement letters for future reference once implemented in the program. David Loper and Tyler Fortunati agreed that they would best be provided through a DEQ program directive and not included in the TGM or the health district's Subsurface Sewage Disposal Standard Operating Procedures manual. The reference of the enforcement letters in the SSD SOP will be amended to reference a DEQ program directive.

See **Appendix F** for the amendments to section 4.10 of the TGM.



Motion: Bob Erickson moved to table Section 4.10 for further review by the ETPS subcommittee.

Second: Ryan Spiers.

Voice Vote: Motion carried unanimously.

The meeting was adjourned for lunch
Lunch 12:10 - 1:10 p.m.

Effluent Quality Testing Discussion (TSS, CBOD, and Total Nitrogen)

Donna Archibald was unable to address the subcommittee.

Tyler Fortunati presented on why the various effluent quality constituents are tested and the importance of testing these constituents to ensure proper ETPS unit operation. Total Suspended Solids (TSS) of 45 mg/l, Carbonaceous biochemical oxygen demand (CBOD) of 40 mg/l and Total Nitrogen (site specific) have been used as an indicator on how well the ETPS is functioning. Testing is done to check the functionality of the system and verify that the ETPS achieves the reductions that the manufacturer has claimed they can achieve and DEQ has approved the units to operate at.

James Bell of Bio-Microbics, Inc., who has been a member of the Joint Council for Wastewater for NSF since 1992 and is currently the Vice-Chairman on the Council, added some information on why NSF looks at TSS and BOD level in standard 40 certification. James Bell stated that TSS and BOD are evaluated for the reduction in drainfield area.

Brent Gee relayed concern that Idaho is determining compliance on one grab sample when NSF is performing 6 months of consecutive sampling. Discussion was held on testing methods in the NSF lab setting versus units in the field. James Bell stated that the samples are pulled over 6 periods of 30 days each at NSF, and that these is also a weekly average during each period which is where the 40 mg/L BOD and 45 mg/L TSS are utilized. James Bell stated that it is critical for service providers to not waste time sampling a unit if they know it will not pass. Field indicators are useful for this and Massachusetts was provided as an example for utilizing turbidity, dissolved oxygen, and pH as indicators that the treatment unit is functioning properly. James Bell also cautioned that studies by George Hofelder indicate that pH and turbidity measurements alone are not adequate to measure the chemistry of the effluent from an ETPS and ensure adequate treatment has occurred. Bob Erickson stated that service providers should be trouble shooting units prior to testing.

Scott Hendrick asked for clarification on the 90% passing level. Tyler Fortunati provided an explanation that at least 90% of the units in operation under an O&M Entity must meet or exceed the effluent quality standards of their septic permit or the O&M Entity is suspended until they can bring 90% of the units into compliance.



Discussion on different labs results for split samples ensued.

Brent Gee shared his concern that he would like to see more manufacturer involvement with their service providers on how samples should be collected from their systems. Require that manufacturers visit systems and work with service providers to see how samples are done in the field.

3:13 PM Break

3:27 PM Meeting resumed.

Effluent Quality Testing Discussion (TSS, CBOD, and Total Nitrogen) (Continued)

David Loper requested that DEQ determine what removal of those members refusing service (and placed into a regulatory track) from the 90/10 split would do for compliance rates, look at potentially lowering the 90% compliance rate to 80% or 85%, and look into if there is a way to look at the lab variability in sampling results.

Kim Walker asked if there is a way to tier the compliance standings for the O&M Entities such as in compliance, on warning, and out of compliance.

Bob Erickson does not want to relax the limits any further than they already are.

Tyler Fortunati stated that it is important that there is an element of the program that provides verification that the ETPS units are treating effluent to the levels claimed possible by the manufacturer and approved by DEQ. It is the subcommittee's job to propose any changes to the current system. At this time there is no changes proposed to current methods of sampling or current TSS and CBOD₅ compliance levels. This discussion will be resumed at the next meeting after the action items requested of DEQ by the subcommittee are discussed. See **Appendix G** for presentation on testing.

NEXT MEETING:

The next ETPS subcommittee meeting is scheduled to be on March 27, 2013 from 9:15 a.m. – 4:30 p.m., at the DEQ State Office building.

Motion: James Bell moved to adjourn the meeting.

Second: David Loper.

Voice Vote: Motion carried unanimously.

Meeting adjourned at 3:55 pm



ETPS Parking Lot: This is an area reserved for subcommittee meeting topics for future agendas.

- How will existing O&M entities be handled
- Variability of sampling results between labs

List of Appendices

Appendix A:

January 17, 2013 Minutes FINAL

Appendix B:

Sampling Port Information

Appendix C:

Homeowners' Associations Under IRC 501(c)(4), 501(c)(7) and 528 and HOA Taxes: What's Exempt Under the 90-Percent Rule?

Appendix D:

Letter 1 with enclosure

Refusal of Service for Extended Treatment Package Systems with enclosure of initial letter sent to Extended Treatment Package Systems Owner.

Appendix E:

Letter 2

Voluntary Deadline to Comply with ETPS Maintenance and Effluent testing Requirements

Appendix F:

Sections 4.10.4 Annual Report and

4.10.6 Member Refusal of Maintenance of Testing Requirements of the TGM

Appendix G:

ETPS Program Testing Requirements (PowerPoint slides)



Appendix A

Extended Treatment Package System Subcommittee Meeting

Minutes

January 17, 2013

Department of Environmental Quality

Conference Room "C"

1410 N. Hilton

Boise, Idaho

TGC-ETPS ATTENDEES:

Tyler Fortunati, R.E.H.S., On-Site Wastewater Coordinator, DEQ

Bob Erickson, Senior Environmental Health Specialist, South Central Public Health District

Ryan Spiers, Alternative Wastewater Systems, LLC

David Loper, Environmental Health Director, Southwest District Health Department

James Bell, Bio-Microbics, Inc.

Raymond Keating, Eastern Idaho Public Health District (via telephone and GoToMeeting)

Jay Loveland, Senior Environmental Health Specialist, Panhandle Health District (via telephone and GoToMeeting)

Brent Gee, Effluent Technologies, Inc. (via telephone and GoToMeeting)

GUESTS:

Barry Burnell, Water Quality Division Administrator, DEQ

Chas Ariss, P.E., Wastewater Engineering Manager, DEQ

PaRee Godsill, Everlasting Extended Treatment, Inc.

Steve Wielang, Bedrock Excavation

Kellye Eager, Environmental Health Director, Eastern Idaho Public Health Department (via telephone and GoToMeeting)

Janette Young, Administrative Assistant, DEQ

George Miles, P.E., Advanced Wastewater Engineering (via telephone and GoToMeeting)

CALL TO ORDER/ROLL CALL:

Meeting called to order at 9:15 a.m.

Committee members and guests introduced themselves.

MEETING MINUTES:

December 12, 2012 Draft ETPS Subcommittee Minutes: Review, Amend, or Approve

Motion: James Bell moved to accept minutes as presented.

Second: Ryan Spiers.



Voice Vote: Motion carried unanimously.

Minutes will post as final. See DEQ webpage and **Appendix A**.

OPEN PUBLIC COMMENT PERIOD: This section of the meeting is open to the public to present information to the ETPS subcommittee that is not on the agenda. The ETPS subcommittee is not taking action on the information presented.

No public comments were submitted during the allotted agenda timeframe.

NEW BUSINESS:

Review of Homeowner, Realtor, and Title Company Educational Brochure on Septic Systems and Real Estate Transactions

Review and discussion of the brochure content was held at this time. Ray Keating stated that Eastern Idaho Public Health District did not perform mortgage surveys anymore. Tyler Fortunati clarified that several health districts do provide this service but it is not required of the health districts from DEQ. David Loper stated that mortgage surveys are offered by some Health Districts when they are requested by underwriters/lenders on FHA loans. David Loper stated that he would like DEQ to deliver the brochure to Realtor and Title Company Associations upon its editing by DEQ technical publications staff. Tyler Fortunati agreed to deliver the brochure to these associations as well as post it to DEQ's website and provide the weblink to the health districts for posting on their own websites and for their printing of the document.

Motion: Bob Erikson moved that the Homeowner, Realtor, and Title Company educational brochure should be finalized and put on DEQ's and the health district's websites and sent to title and real estate associations.

Second: Ryan Spiers.

Voice Vote: Motion Carried unanimously. See **Appendix B**

Subcommittee Update on Requested Information from December 12, 2012 Meeting

See **Appendix C** for the presentation given for the three following areas.

- **Review of Secretary of State Determination of Administratively Dissolved Standing of Nonprofit Entities**

Tyler Fortunati presented an overview of Administratively Dissolved standings of a nonprofit entity. This occurs if the corporation fails to submit an annual report to the Secretary of State. The entity has 10 years to reinstate along with a \$30.00 fee and



paperwork. The entities do receive an annual reminder for submission of the annual report due date. The Secretary of State does not notify DEQ when a corporation has an Administratively Dissolved standing. The Administratively Dissolved status has no effect on the TGM requirements or the ability of the corporation to conduct business in the State of Idaho.

- **Review of Suspended Nonprofit O&M Entity Reporting, Testing, and Administration Status**

Tyler Fortunati presented the current status for suspended O & M Entities in relation to their submission of annual reports, performing annual testing of their membership, and their Secretary of State standing for administration status.

- **Review of Idaho Code 30-3 Important Points Related to Section 4.2 of the Technical Guidance Manual**

Tyler Fortunati presented an overview of Idaho Code 30-3. The information presented in this discussion was selected by Tyler based upon its relevance to current subcommittee discussions. Review of Idaho Code 30-3 was not a complete overview of the Code. Subcommittee members were provided with the web link to the entire Code for their review. Discussion surrounding several of the key points was held by the subcommittee.

Review Proposed Additions to Section 4.2 Nonprofit Corporations of the Technical Guidance Manual Addressing O&M Entity Creation

Tyler Fortunati reminded the committee that the presented format of this document represents the format developed at the last ETPS Subcommittee meeting and not the current TGM format. The finished document will be presented to the full TGM committee showing all changes that are proposed by the ETPS Subcommittee in relation to the current TGM format for section 4.2. The Subcommittee reviewed changes to proposed sections 4.2.1, 4.2.2, and 4.2.3. Jim Bell requested clarification on whether the nonprofit O&M would send amendments to their Articles of Incorporation and/or Bylaws to DEQ before sending them the Secretary of State or the other way around. Tyler Fortunati clarified that the DEQ would review and issue a letter of approval. The amendments would then be provided to the Secretary of State along with the letter from DEQ approving the proposed changes. Some minor modifications were made to the document by the Subcommittee. See **Appendix D** for the changes made to this document.

10:50 Break

11:00 Meeting resumed.

Review Proposed Changes to Section 4.10 of the Technical Guidance Manual Addressing Extended Treatment Package Systems



Tyler Fortunati presented proposed changes to the current format of this section of the TGM for easier reading/understanding of the requirements. Changes were also proposed that expanded on the requirements surrounding annual reports and O&M suspensions as currently handled but not described within this section of the TGM. Changes and additions are in red and items struck out in green were kept but moved to a different section. Future changes to this section will build off of the proposed format of the document that comes out of this meeting. Tyler reminded the subcommittee that these and any other changes still need to go to the full Technical Guidance Committee and these changes may or may not be what becomes final. Committee reviewed changes that were highlighted in red and made a few minor additional suggestions.

James Bell discussed sampling of effluent from an ETPS and will provide a copy of the Operator's sampling protocol that his service providers use. James Bell stated that there are a few common issues with sampling that may affect the results of the sample including:

1. Service providers do not get the sample bottles from the lab they are using so they do not have the necessary preservatives.
2. Samples are not delivered to the lab in a timely fashion.
3. The samples are not sufficiently covered in ice to maintain a 4° C temperature during transport to the lab.
4. Operators do not know where to collect the sample from the ETPS.

Discussion ensued that as stated in the proposed version of section 4.2 Non-Profit Corporations of the TGM, service providers should be trained and certified by manufacturer and yet there is not currently a mechanism in place to ensure this is the case. However, it is in the Service Provider and O&M Entity's best interest to be sure that they are properly trained to insure that proper service and testing procedures are being followed.

Bob Erickson questioned why DEQ would not want the annual report submitted to them from the O&M Entity. Tyler Fortunati clarified that currently the O&M Entities submit their annual reports to their local health district. The health district is the best location for this to occur due to the fact that DEQ does not maintain records of the septic permits associated with the annual reports. The health districts then report the status of the O&M Entities to DEQ after the review of the annual reports. If the O&M Entity results require suspension DEQ will issue the suspension to the O&M Entity and inform the health districts of the Entity's status. If an Entity is suspended, the annual reports should go to both the health district and DEQ. The health districts receive the annual reports and DEQ relies on the health districts to review the reports since they maintain the permit records and inform DEQ of the Entities' compliance status.

Discussion was held regarding the fact that when members do not pay their annual fees it leaves the O&M Entity without the money necessary to perform the annual maintenance and testing for everyone. Failure to perform maintenance and annual testing counts



against the O&M Entity in the annual report and results in suspension if more than 10% do not pay. James Bell stated that O&M Entities need to set their fees annually, recognizing that they need to cover the costs of failed tests and re-testing fees and maintenance in addition to those that fail to pay their annual dues.

The meeting was adjourned for lunch
Lunch 12:00 - 1:00 p.m.

Review Proposed Changes to Section 4.10 of the Technical Guidance Manual Addressing Extended Treatment Package Systems (Continued)

George Miles addressed the subcommittee and would like the subcommittee to consider using operational permits as a possible alternative to the current nonprofit corporation structure. Tyler Fortunati explained that this would need legislative support and it would take roughly two years to go through the rule change process. In addition operational permits would not solve any of the issues surrounding the existing membership of the O&M Entities. David Loper stated that the ETPS Subcommittee had reviewed other possibilities in prior meetings and had made a decision to shore up the current nonprofit model and move forward rather than start all over. David Loper stressed that the health districts do not have the resources to be the administrative branch of the nonprofits in relation to tracking various service providers. In addition, the health districts do not want to be involved with homeowners not paying their O&M Entity and will not act as bill collectors for the O&M Entities. David Loper stated that the health districts are there for non-compliance, for example turning off blowers.

Ray Keating asked why annual reports for the O&M Entities are submitted in July or every year instead of December. Discussion ensued on the rationale behind the required date for submission of annual reports from the O&M Entities to the health districts. There was support for changing the reporting date back to December 31st of each year and support for maintaining it at the current July 31st date. Tyler Fortunati polled the members of the ETPS Committee on whether to keep the dates the same or change them back to December 31st. The subcommittee voted with 5 in favor of keeping the report date the same and 2 in support to change the date to December 31st. The date was left the same in the proposed revision based upon the poll results. Tyler Fortunati will make a note to have the TGC discuss the timelines for a final decision on the reporting date.

Discussion was held on how to handle medical waivers under the newly proposed section TGM section 4.10.4.2 Annual report Exemptions. There is no current verification process spelled out for this exemption. There was concern regarding the requirement of obtaining verification if someone is on long term medication that will prevent a unit from testing correctly. Tyler Fortunati clarified the intent was simply to obtain acknowledgement from a medical professional that the individual residing in the home was on long term medical care and not to obtain the diagnosis or specific prescription. The subcommittee accepted this approach.



David Loper suggested that the date for report submission deadlines be adjusted to August 31st.

The subcommittee raised the issue of what prevents a suspended O&M Entity from forming a new O&M Entity to continue their business while leaving behind the suspended Entity. Tyler Fortunati stated that DEQ reviews all Articles of Incorporation and Bylaws for new O&M Entities so a mirror O&M Entity would be recognized and not approved. Tyler Fortunati pointed out that the new suggested requirement that a manufacturer representative must be on the board of the O&M Entity may not be able to be retroactively required with already approved O&M Entities. This will need to be discussed with the Attorney General's office.

There was discussion on whether there should be separate requirements for seasonal homes and full time residences. James Bell conveyed the procedures of startup, testing, and shutdown for seasonal homes in the Cape Cod area. Tyler Fortunati stated that Idaho does not view the two home types differently in relation to septic system permitting. Currently, there is no difference in the standards and requirements between seasonal homes and year-round homes with respect to ETPS.

The subcommittee discussed making sure the ETPS installed has a readily accessible sampling port. James Bell discussed a sampling system that allowed samples from the ETPS system to flow directly into the laboratory sample bottle. James Bell will forward some information from Ohio and Bio-Microbics to DEQ on the sampling port designs. David Loper suggested developing a figure to indicate where the sample port should be installed in the effluent line after the aerobic treatment unit. See **Appendix E** for proposed changes to section 4.10 of the TGM.

Discussion on How to Handle O&M Entity Members Refusing to Pay the Required Annual Dues to their O&M Entity

Tyler Fortunati presented the following points regarding the current consequences to O&M Entity members that refuse to pay the annual dues assessed by their O&M Entity:

- O&M Entity Liens the Member's Property
- O&M Entity is still Responsible to Perform Annual Maintenance and Testing
 - If Maintenance and Testing is not Performed and Reported the Associated Property Counts Against the 10% Malfunctioning Rate of the Entity
- The Entity has the Option to:
 - Take the Member to Small Claims Court
 - May Result in the Following Consequences to Owner:
 - Pay Annual Dues
 - Pay Interest
 - Pay Court/Attorney Fees
- No Regulatory Action



James Bell added that the O&M has the option of using collection agencies. Brent Gee stated that collection agencies typically retain 33% of whatever is collected resulting in the Entity losing that money. Tyler Fortunati clarified that it is the responsibility of the O&M Entity to bill the O&M membership for services provided by the service provider. Service providers should not be directly billing homeowners under the current system.

James Bell described the situation in NC, MA and MN where there is one service provider servicing 80% of the units, and then the manufacturer needs to spend the rest of the time finding out who is servicing the remaining units. The manufacturer must attempt to contact the homeowners or utilize the health district to find out who is doing the servicing. If no service is being performed a letter from the Health District indicating non-compliance is sent by the health districts. However, enforcement is difficult.

Tyler Fortunati reminded the subcommittee of the original letters presented during the first meeting that attempted to gain voluntary compliance from homeowners which could lead to dues being paid. This was proposed as a three letter approach to encourage voluntary compliance. The first letter was meant to be informative and explains the requirements to the homeowner regarding having an ETPS and the need for annual sampling and servicing if it is not being performed. If the non-compliance through non-payment continues a second letter would be sent requesting that the homeowner comply with the service and testing requirements of their septic permit with information regarding legal issues if they do not comply, this letter would also contain a deadline for obtaining the necessary service and testing. A third letter in the form of a Notice of Violation (NOV) would follow after the deadline has passed and service and testing of the treatment unit has not occurred. These letters would be sent through the health districts assuming the health district had adequate information from the O&M Entity regarding the refusal to have the service and testing performed.

David Loper indicated that most O&M's were successful the first 2-3 years. After samples did not meet requirements and the O&M Entities and their members had additional costs of fixing them, they didn't want to pay. David Loper also conveyed that the health districts would not be comfortable taking any initial enforcement lead with homeowners or O&M Entities. Tyler Fortunati stated that DEQ understands this and

DEQ will need to discuss any enforcement action structure with the Environmental Working Group and health districts.

Bob Erikson indicated that the Health Districts have very little power over the O&M Entities and homeowners. Some health districts have good relationships with the county prosecutor's office, but others do not. Without their support enforcement would be tough.

James Bell asked what to do if no one is taking care of the ETPS, including the manufacturer. James Bell asked if the health districts could issue a non-conforming system variance. Tyler Fortunati stated that non-conforming permits are only issued for replacement systems and likely would not apply in this situation.



David Loper solicited input from the O&M Entity board members present at the meeting regarding what they felt would help gain compliance from their membership. George Miles, Brent Gee, and PaRee Godsill all provided input that some form of assistance from the health districts or DEQ would be beneficial. It was suggested that the letters discussed earlier would be a good start and would be appreciated by the O&M Entities.

The subcommittee tasked DEQ with developing draft letters to be utilized to gain compliance from homeowners. Three letters were asked for that included an informative letter discussing the required responsibilities of the homeowners and provided contact information, a second letter that provided a voluntary deadline for homeowners to comply with their permit requirements, and a third letter that is in the form of an NOV.

NEXT MEETING:

The next ETPS subcommittee meeting is scheduled to be on February 21, 2013, 9:15 a.m. – 4:30 p.m., at the DEQ State Office building.

Motion: David Loper moved to adjourn the meeting.

Second: Bob Erikson.

Voice Vote: Motion carried unanimously.

Meeting adjourned at 4:06 p.m.

ETPS Parking Lot: This is an area reserved for subcommittee meeting topics for future agendas.

- O&M notice to homeowner and health district regarding service refusal
- Service refusal letter (health district to homeowners)
- Testing requirements (TSS, CBOD₅, and Total Nitrogen)
- Variability of sampling results between labs
- Annual reporting exemptions



Appendix B

SAMPLING PORT INFORMATION

OHIO REQUIREMENTS

- Sampling ports are required for all treatment trains approved to meet the effluent standards outlined in the EPA's NPDES general permits.
- The general permits require the annual collection and testing of grab samples.
 - Samples must be collected after final treatment of the effluent in a location acceptable to the Ohio Department of Health, Ohio EPA, and the system manufacturer.
- The ODH determined that permits must include adequate access for the collection of effluent samples and the location of the port must be approved by the manufacturer.

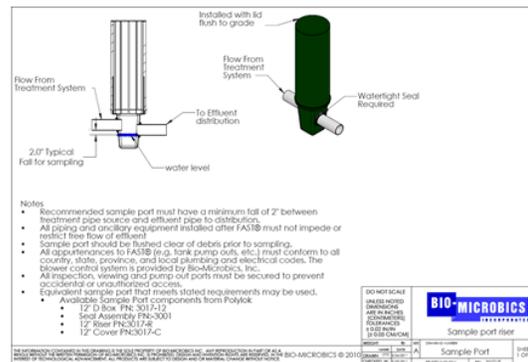
OHIO REQUIREMENTS

- Sample Port Requirements:
 - Grab samples must be collected from a free falling stream at the end of the effluent pipe within the inspection port.
 - Samples shall not come from stagnant water inside the port.
 - Ports shall be watertight
 - The inlet to the port is 8 inches above the bottom of the port
 - A minimum of 2 inches of fall is required between the inlet and outlet of the port
 - The port shall have a minimum diameter of 8 inches at the sample collection point
 - Samples must be collected in compliance with applicable standards and ODH sampling guidance or other manufacturer produced/product specific effluent collection guidance

OHIO REQUIREMENTS

- Valve in Pressurized Piping Sampling:
 - Collection of samples from a valve in pressurized piping located within a post aeration tank is acceptable provided the manufacturer has provided written guidance for the proper collection of samples from the valve, the guidance has been provided to the ODH, and the product specific guidance is followed for collection of samples.
- Point of discharge samples:
 - Allowed for NPDES surface discharges
 - Not applicable in Idaho

BIO-MICROBICS PORT



BIO-MICROBICS PORT





State of Idaho
Department Of Environmental Quality
Technical Guidance Committee

Appendix C

See the following attached pages for the PDF documents presented during this portion of the meeting.

ETPS Subcommittee Review of Nonprofit Tax Affects

February 21, 2013



Idaho Code 30-3

- Defines how Nonprofit is Incorporated
- Does not define how Nonprofit is classified per IRS Tax Code



IRS Tax Code

Under IRS Tax Code the closest example to the Nonprofit Service Company is a Homeowners' Association (HOA)



Homeowners' Association

Under IRS Tax Code:

- IRC 501 c 4
- IRC 501 c 7
- Section 508
- For Profit Corporation



IRC 501 c 4

- Must operate for the benefit of the general public
- Must provide a community benefit



IRC 501 c 7

- Must operate like a social club
- HOA does not qualify if it owns or maintains residential property that is not part of the social or recreational areas or facilities



Section 528

- Enacted under Tax Reform Act of 1976 to provide HOA with alternatives to IRC 501 c 4
- Exempts income tax on any dues or assessments received from qualified HOA when used for maintenance or improvements



528 Qualified HOA Requires

- Organized for maintenance and care of HOA
- No part of net earnings of HOA inures any private shareholder or individual
- 60% or more of HOA gross income consists of amounts received from membership fees
- 90% or more of HOA expenditures for maintenance and care of association property
- 85% or more must be residences



Tax under Section 528

- Section 528 is not without taxation
- Sets maximum tax at 30% for HOA on Interest Income on bank and reserve accounts and on nonexempt income



Questions

- Can a Non profit service entity qualify as a HOA under Section 528?
- Are lab costs exempt under the 90% rule?
- Is there a significant difference between a Non profit service entity than one that operators as a For profit corporation using a Non profit model?



Bottom Line

- Under the ETPS model for a Non profit Service organization the entity will probably pay taxes as a For profit corporation
- So reserves can be carried forth to future years



R. HOMEOWNERS' ASSOCIATIONS UNDER IRC 501(c)(4), 501(c)(7) AND 528

1. Introduction

A discussion of the exemption of homeowners' associations was included in the 1981 CPE textbook. However, because of questions and developments that have arisen since then, this topic has been updated and included in the 1982 textbook.

Generally, homeowners' associations are composed of homeowners in a particular area with membership usually being compulsory. Typically, the purposes for which these organizations are formed include the administration and enforcement of covenants for preserving the architecture and appearance of a particular area, and the ownership and maintenance of common property and facilities, such as recreational facilities, streets, and sidewalks. These organizations are usually supported by dues and assessments from members.

Depending on the activities engaged in, and also on the choice of the particular organization, a homeowners' association may generally qualify for exemption from federal income tax under IRC 501(c)(4), 501(c)(7), or 528.

2. Background - IRC 501(c)(4)

Generally, IRC 501(c)(4) provides a stricter standard for a homeowners' association to qualify for exemption than does IRC 501(c)(7) or 528. Specifically, under IRC 501(c)(4) a homeowners' association must operate for the benefit of the general public, i.e., it must provide a community benefit. The position of the Internal Revenue Service regarding the exemption of homeowners' associations under IRC 501(c)(4) is set-forth in a number of revenue rulings. The principal factor barring exemption in this area is the degree of private benefit served by the operation of the particular homeowners' organization.

Historically, the leading court case in the area of homeowners' associations is Commissioner v. Lake Forest, Inc., 305 F. 2d 814 (1962), which arose under the predecessor to IRC 501(c)(4). The case involved a nonprofit membership housing cooperative that provided low cost housing to its members. In denying exemption, the court stated that the organization was not organized exclusively for the promotion of social welfare. The court found that although its activities were

available to all citizens eligible for membership, "its contribution is neither to the public at large nor of a public character." The court looked to the benefits provided and not to the number of persons who received benefits through membership. Compare the decision in Lake Forest with that in Garden Homes Co. v. Commissioner, 64 F. 2d 593 (7th Cir. 1933), which held that a housing project formed and controlled by the local government qualified for exemption.

In the Mid-1960's the issue of exemption for an organization comprised of property owners was first considered for publication. Prior to Rev. Rul. 67-6, 1967-1 C.B. 135,* the Service had very little revenue ruling precedent delineating the differences between charitable purposes and civic (social welfare) purposes. This revenue ruling describes a membership organization formed by owners of property, consisting of less than 50 square city blocks, to preserve the appearance of its area by group action. The organization was involved in "community" type issues such as zoning, traffic, parking, lighting, sanitation and crime prevention. This revenue ruling holds that:

Combating community deterioration through remedial action leading to the elimination of the physical, economic, and social causes of such deterioration is "charitable." Preserving and maintaining a historic or scenic area for the benefit and education of the general public also is "charitable." However, preserving the traditions, architecture, and appearance of a community for the benefit solely of residents of the community (as distinguished from the general public both within and without the community involved) is not "charitable." While such activities promote the common good and general welfare of the people of the community under section 501(c)(4) of the Code, they are not..."charitable"....

* Rev. Rul. 67-6 was modified, by Rev. Rul. 76-147, 1976-1 C.B. 151, to remove any implication that preserving or improving a community does not benefit a sufficiently broad segment of the public to be charitable. So long as the community interests served by such activities are truly public in scope and not merely the private interests of a class of persons not themselves comprising a charitable class such activities may be regarded as "charitable."

Rev. Rul. 67-6 helped to provide some basis of authority for treating applications filed by homeowners' associations. It failed, however, to focus on some of the specific problems we have had with classifying certain activities of homeowners' associations as being in furtherance of truly social welfare purposes or in furtherance of the economic benefits of members.

In the late 1960's, a different type of homeowners' association than the civic type described in Rev. Rul. 67-6 appeared. For example, in Rev. Rul. 69-280, 1969-1 C.B. 152, the Service addressed the legal problems presented by a homeowners' association formed to maintain the exterior walls and roofs of members' homes in a housing development. In denying exemption under IRC 501(c)(4), the Service noted a similarity of facts and circumstances with those present in Lake Forest, Inc.; that is, the Service viewed this type of organization as failing to meet the requirements for exemption under IRC 501(c)(4) because it operated for the economic benefit or convenience of its members.

The legal problem that was developing was how to deal with cases involving benefits to the members. This problem was present in cases involving organizations applying under IRC 501(c)(3) as well as IRC 501(c)(4). Some guidance was provided by publication of Rev. Rul. 67-325, 1967-2 C.B. 113, which held that an organization providing community recreational facilities only to a restricted portion of the residents in its community, is not entitled to recognition of exemption from federal income tax under IRC 501(c)(3). The rationale behind this revenue ruling is that such facilities must be made available to the general public, and that the only exception to this would be a restriction required by the nature or size of the facility, or a restriction limiting the facilities to a particular charitable class, such as the poor. See also Rev. Rul. 80-205, 1980-2 C.B. 184, discussed later in this topic.

It was not until 1972 that the Service published the first revenue ruling describing the type of homeowners' association that is the main subject of this topic. Rev. Rul. 72-102, 1972-1 C.B. 149, deals directly with the legal significance of property owners' receiving direct economic benefits.

3. Rev. Rul. 72-102

In Rev. Rul. 72-102, the Service held that a homeowners' association, which was formed by a real estate developer to administer and enforce covenants for preserving the architecture and appearance of a housing development and to own and maintain common areas, streets and sidewalks, qualified for exemption under

IRC 501(c)(4) because it served the common good and general welfare of the people in the development. This revenue ruling noted that for purposes of IRC 501(c)(4), a neighborhood, precinct, subdivision, or housing development may constitute a community. It was also noted that although this type of organization may have helped the developer sell houses or may have served to preserve and protect property values in the community, (thereby benefiting the homeowner members of the organization), the benefits that accrued were merely incidental. Rev. Rul. 72-102 also distinguished Rev. Rul. 69-280 by stating that the organization described in Rev. Rul. 69-280 was operated primarily and directly for the benefit of the individual members, rather than for the community as a whole.

Consideration should be given to some of the background facts in Rev. Rul. 72-102. The property included in the housing development consisted of only 38 residential units and the surrounding common areas. The property owned by the association consisted of streets, sidewalks, parking area, and a common area. There were no recreational facilities.

The concern that the Service had at this time was whether a cluster of 38 townhouses within a larger residential development constituted a "community" within the meaning of Reg. 1.501(c)(4)-1(a)(2)(i). That is, can an organization of this type and size be "promoting in some way the common good and general welfare of the people of the community?" There was no question that Rev. Rul. 67-6 (preserving the appearance of a community) favored exemption, but would equating such a small development to a community be inconsistent with Rev. Rul. 67-325 (community recreational facility)? At this point, the Service considered two important factors:

1. the precise size of an organization, i.e. whether or not its size and composition are such as to justify considering it as a community, is not the pivotal question; and,
2. any attempt to define "community" solely on the basis of size or number of homes in the development would be arbitrary and unrealistic.

The Service recognized that other factors must be considered in determining whether a particular homeowners' association is providing a "community" benefit. Although a general and broad definition of a "community" is provided in Rev. Rul. 72-102, it is meant to stand for the proposition that the activities of an organization representing even one small segment of a "community" can benefit the whole

"community." It should be noted that in coming to these conclusions, the Service also realized that there was no compelling legal argument for denying recognition of exemption to homeowners' associations despite their marked differences from the "neighborhood improvement association" discussed in Rev. Rul. 67-6.

Under IRC 501(c)(4) the Service employs a primary activities test. Consequently, questions arose as to the qualification of homeowners' associations providing administrative and maintenance services for areas of condominium property that are owned by members of the organization as tenants in common. The maintenance included exterior and/or interior maintenance on each member's individually owned residential unit. The activities of these organizations seemed to fit into Rev. Rul. 72-102, but the exterior and interior maintenance activities were proscribed by Rev. Rul. 69-280.

It was the opinion of the Service, as supported by court decisions, that the concept of a condominium system of ownership, particularly the essential characteristic of a system wherein unit owners associate together for the sole purpose of regulating administration and maintenance of their own property, is fundamentally incompatible with the concept of social welfare within the meaning of IRC 501(c)(4). See Consumer Farmer Milk Coop. v. Commissioner, 186 F. 2d 68 (CA 2; 1950), affirming 13 T.C. 150 (1949); Commissioner v. Lake Forest, Inc., *supra.*; People's Educational Camp Society, Inc. v. Commissioner of Internal Revenue, 331 F. 2d 923, (CA 2, 1964). As a result, in Rev. Rul. 74-17, 1974-1 C.B. 130, the Service did not resort to a primary activities test to resolve this question.

In Rev. Rul. 74-17, the Service distinguished its treatment of homeowners' associations, as described in Rev. Rul. 72-102, from that of condominium associations. Rev. Rul. 74-17, held that while condominium associations and homeowners' associations provided similar services, a substantial distinction existed between them. Specifically, the essential nature and structure of condominium ownership, both statutory and contractual, is inextricably and compulsorily tied to the owner's acquisition and enjoyment of the property. Basic condominium ownership necessarily involves common ownership of all condominium property in the development, the care and maintenance of which would constitute the provision of private benefit to the owners to a degree that would disqualify it from exemption under IRC 501(c)(4).

At the same time the Service was publishing Rev. Rul. 74-17, Rev. Rul. 72-102 was being reconsidered because it was felt that it complicated consideration of cases like the one described in Rev. Rul. 74-17.

Since consideration of Rev. Rul. 67-6, the Service remained concerned over the degree of private benefit served by these neighborhood or community homeowners' associations. Generally, these associations:

1. are formed by a commercial land developer;
2. have compulsory membership;
3. have membership open only to the developer or builder and the lot purchasers;
4. Provide direct private benefits to the members with any benefit to the general public at best a secondary concern of the association because of the association's organizational format and operational plan; and
5. involve the existence of an association and a membership that is derived directly from, and is inextricably tied to, contracts for the sale and purchase of private property.

The Service realized that Rev. Rul. 72-102 failed to adequately address these characteristics.

As written, Rev. Rul. 72-102 equates a single housing development with a "community" as that term is used in Reg. 1.501(c)(4)-1(a). It was the legal opinion of the Service that the statutory language indicated that a broader community than one comprised of and restricted to those purchasers of homes in a single housing development, was contemplated by Congress. It was also recognized that no mention was made of the presence of any recreational facilities, and, in fact, there were no such facilities in the underlying case behind Rev. Rul. 72-102.

The Service also realized that the term "common areas" needed more precise definition to prevent unduly liberal interpretations that might encompass areas that are really little more than extensions of privately owned property. In addition, the Service continued to hold that a homeowners' association could not qualify under

IRC 501(c)(4) if it performed services directly for its members by maintenance of their private property.

Therefore, by publishing Rev. Rul. 74-99, 1974-1 C.B. 131, the Service sought to clarify the circumstances in which a homeowners' association, as described in Rev. Rul. 72-102, may qualify for exemption under IRC 501(c)(4). Both Rev. Rul. 74-99 and Rev. Rul. 72-102 presume that homeowners' associations are essentially and primarily formed and operated for the business or personal benefit of their members. Rev. Rul. 74-99 held that in order for a homeowners' association to qualify for exemption under IRC 501(c)(4):

1. it must serve a "community" that bears a reasonably recognizable relationship to an area ordinarily identified as governmental;
2. it must not conduct activities directed to the exterior maintenance of private residences; and,
3. the common areas or facilities it owns and maintains must be for the use and enjoyment of the general public.

Rev. Rul. 74-99 specifically addressed and attempted to clarify the definition of "community" that was contained in Rev. Rul. 72-102. It states that a "community," within the meaning of IRC 501(c)(4), is not merely "an aggregation of homeowners bound together in a structured unit formed as an integral part of a plan for the development of a real estate subdivision and the sale and purchase of homes therein." Although it was stated that an exact delineation of the boundaries of a "community," within the scope of IRC 501(c)(4), was not possible, it was noted that the term as used in this section, "has traditionally been construed as having a reference to a geographical unit bearing a reasonably recognizable relationship to an area ordinarily identified as a governmental subdivision or a unit or district thereof." No minimum size was set.

Rev. Rul. 74-99 was no sooner published than the National Office became aware of additional concerns that focused on whether these associations were serving the private benefit of their members. The following questions had to be considered:

1. Can a homeowners' association qualify for exemption under IRC 501(c)(4) if it provides recreational facilities such as

swimming pools, tennis courts, and/or picnic areas for use only by its members?

2. What is the effect on exemption of providing patrol or guard service for the benefit of members?
3. Can a homeowners' association own and maintain parking facilities only for its members?

Questions one and three above, as well as two additional questions were addressed in Rev. Rul. 80-63, 1980-1 C.B. 116. Question two above, has not been answered by publication.

4. Rev. Rul. 80-63

In Rev. Rul. 80-63, the Service provided answers to several questions regarding whether the conduct of certain activities would affect the exempt status under IRC 501(c)(4) of otherwise qualifying homeowners' associations. This revenue ruling states that, as contemplated by Rev. Rul. 74-99 for purposes of IRC 501(c)(4), the term "community" does not embrace a minimum area or a certain number of homeowners. The answers given to questions 2 and 4 state that a homeowners' association that does not represent a community cannot, under Rev. Rul. 74-99, restrict the use of its recreational or parking facilities to its members only and qualify for exemption under IRC 501(c)(4).

It has been noted, however, that an erroneous inference has been drawn from the answers to questions 2 & 4 in that revenue ruling. From those answers, it may be inferred that if such restrictions were imposed by a homeowners' association that represents a community, it would still qualify for exemption under IRC 501(c)(4) without determining whether there is a community benefit. Moreover, questions 2 and 4 of Rev. Rul. 80-63 are misleading in focusing attention on the concept of "community," while diverting attention from certain critical factors that must be considered to determine whether the homeowners' association can overcome the presumption that it has been formed and operated in furtherance of private benefit.

5. "Critical Factors" for Exemption Under IRC 501(c)(4)

As noted above, certain critical factors have not been given the emphasis necessary to determine whether the homeowners' association's activities benefit the

community. In addition, concern with the concept of "community" has directed attention away from these critical factors.

The first concern that must be dealt with is whether the association can overcome the presumption of private benefit. To do this, an in-depth analysis of the activities and services performed by the association is necessary. Even though the Service utilizes a primary activities test under IRC 501(c)(4) in determining qualification, a strict approach has been taken in certain areas that bear directly on the concept of promoting the common good and general welfare of the community, such as, providing for direct services to individual members. As a result, provision of interior or exterior maintenance of the home is incompatible with being an organization formed for the "common good" of the people of the community and patent evidence that the homeowners' association is operating primarily for the mutual benefit of its members. See Rev. Ruls. 69-280 and 74-99. Therefore, unless this activity was only de minimis, exemption would be precluded, notwithstanding the general primary activities test under IRC 501(c)(4).

It would also be patent evidence that a homeowners' association is not operating primarily for social welfare within the meaning of IRC 501(c)(4), if it restricts access by the general public to its "common" streets, sidewalks and green areas. Unless the restriction is a temporary one for public health or safety, such action by the homeowners' association is an exercise by the members of their private property rights. As the Supreme Court stated in Kaiser Aetna v. United States, 444 U.S. 164, 176, (1979), "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." (See also Rev. Rul. 80-107, 1980-1 C.B. 117.) Once again, no primary activities test would be employed.

In contrast to the above, the Service does not believe that restrictions on admittance to recreational facilities would be necessarily incompatible with exemption under IRC 501(c)(4). As mentioned earlier, Rev. Rul. 67-325 would allow reasonable restrictions based on the size and nature of the facility. Therefore, with respect to recreational facilities, it is the current position of the Service that all of the services and activities performed by the association must be considered to determine: first, whether the association overcomes the prima facie burden of private benefit; and, second, whether its primary activities are in furtherance of the common good and general welfare of the community, as opposed to furthering benefits to its members only. Thus, in this area, the Service utilizes the primary activities test for social welfare organizations.

This position is compatible with the Service position published in Rev. Rul. 80-205, 1980-2 C.B. 184. In Rev. Rul. 80-205, the Service stated that it will not follow the decision in Eden Hall Farm v. United States, 389 F. Supp. 858 (W.D. Pa. 1975), which held that an organization providing recreational facilities for employees of selected corporations qualifies as a social welfare organization. The Service held that an organization that imposes limitations on the use of its (recreational) facility, other than those limitations that were inherent in the nature of the facility, primarily benefits the individuals or private groups that are allowed to use the facility and any benefit to the community or promotion of the social welfare of the community is purely incidental.

6. IRC 501(c)(7)

As an alternative to exemption under IRC 501(c)(4), a homeowners' association whose primary function is to own and maintain certain recreational areas and facilities may elect exemption as a social club under IRC 501(c)(7) rather than under IRC 501(c)(4). See Rev. Rul. 69-281, 1969-1 C.B. 155, and Rev. Rul. 80-63. This alternative may prove to be desirable where the association seeks to restrict use of its facilities to members, offers incidental community benefits and has little or no nonmember income subject to tax under IRC 512(a)(3). However, Rev. Rul. 75-494, 1975-2 C.B. 214, provides that, a homeowners' association may not qualify under IRC 501(c)(7) if it owns and maintains residential properties that are not a part of its social facilities, administers and enforces covenants for preserving the architecture and appearance of the housing development, or provides the development with fire and police protection.

Therefore, a homeowners' association that does not qualify for exemption under IRC 501(c)(4) may qualify under IRC 501(c)(7) where it provides only qualifying social and recreational activities. It would, however, be subject to certain UBIT rules that are not applicable to organizations exempt under IRC 501(c)(4).

7. IRC 528

IRC 528 was enacted under the provisions of the Tax Reform Act of 1976, to provide homeowners' associations with another alternative to exemption under IRC 501(c)(4). Qualifying homeowners' associations that are exempt under IRC 528 are taxable only to the extent provided therein. IRC 528 exempts from income tax any dues or assessments received by qualified homeowners' associations from property owner-members of the organization, where these dues and assessments

are used for the maintenance and improvement of its property. All homeowners' associations described in IRC 528 may qualify for this sort of quasi-exempt status by election.

IRC 528 defines a qualified "homeowners' association" as an organization that is a condominium management association or a residential real estate management association if:

1. it is organized and operated to provide for the acquisition, construction, management, maintenance, and care of association property;
2. it elects to have the section apply for the taxable year;
3. no part of the net earnings of the association inures to any private shareholder or individual;
4. 60 percent or more of the association's gross income consists solely of amounts received as membership dues, fees, or assessments from owners of residential units, residences or residential lots (exempt function income); and,
5. 90 percent or more of the association's expenditures for the taxable year are expenditures for the acquisition, construction, management, maintenance, and care of association property.

The legislative history of IRC 528 indicates that Congress recognized the difficulty most homeowners' associations have in meeting the requirements of Rev. Rul. 74-99. IRC 528 reflects Congress' view that it is not appropriate to tax the revenues of an association of homeowners who act together if an individual homeowner acting alone would not be taxed on the same activity. House Report No. 94-658; 94th Congress, 2d Session, H.R. 10612 (November 12, 1975). (Reproduced in 1979-3 (Vol. 1) C.B. 373.)

IRC 528(b) has recently been amended to provide for a 30 percent tax on homeowners' associations exempt under IRC 528, thus lowering the tax rate. This makes exemption under this section more attractive.

Under IRC 528, a homeowners' association that qualifies for exemption under that section would be taxed on any income or support received that did not constitute dues or assessments paid by its property owner-members for maintenance and improvement of its property. Compare this with IRC 501(c)(4), which provides qualified homeowners' associations with exemption from federal income tax on all income and support received that is related to its purposes. The drawback to exemption under IRC 501(c)(4), for purposes of a homeowners' association, is the higher standard imposed by it for qualification, as opposed to IRC 528 (which provides an easier standard, but more restricted benefits). A homeowners' association that is exempt under IRC 501(c)(4) would likely also be qualified for exemption under IRC 528, although this does not automatically hold true in the reverse.*

8. Conclusion

In order to qualify for exemption under IRC 501(c)(4), homeowners' associations with the general characteristics described in Rev. Rul. 72-102 must overcome the presumption that they are essentially and primarily formed and operated for the benefit of their members. This can be done by a demonstration that the organization is primarily formed and operated for the benefit of the community. A homeowners' association may impose some reasonable restrictions on the use and enjoyment of a small portion of its overall common property or facilities and still qualify for exemption under IRC 501(c)(4). As alternatives to exemption under IRC 501(c)(4), a homeowners' association may elect to seek exemption under IRC 528, or it may restrict its primary function to the ownership and maintenance of recreational areas and, if it otherwise qualifies, qualify for exemption as a social club under IRC 501(c)(7).

* See Publication 588, Condominiums, Cooperative Apartments, and Homeowners Associations, which describes homeowners' associations in some depth.

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HOA Taxes: What's Exempt Under the 90-Percent Rule?

April 2011

Feeling taxed lately? You're not alone.

You have two options when you file your HOA's tax return. One is to file as a corporation, and the other is to file under Section 528 of the Internal Revenue Code. Most associations opt for the Section 528 treatment because if almost all your HOA's income is from assessments and almost all of your expenses are for maintaining association property, you don't have to pay taxes.

To qualify under IRC 528, your association must meet several requirements, one of which is that at least 90 percent of your association's expenses must be exempt, which means they're operating and capital expenses that directly affect association property. But which expenses are exempt, and which aren't? Here's a rundown.

The 90-Percent Rule

Let's start with some basic HOA tax information. To qualify to file Form 1120-H under IRC 528, your association must meet the following requirements:

1. The substantial majority of units, 85 percent, must be used as residences.
2. More than half, 60 percent, of the association's gross income must be exempt, which means it's received from owners in their capacity as association members, rather than from them as customers for goods or services.
3. At least 90 percent of the association's expenses must be exempt, which means they're operating and capital expenses that directly affect association property.
4. Residual income can't be used to benefit members.

When it comes to meeting the third requirement, what association expenses qualify as exempt? "Basically, exempt expenses are anything for the acquisition, construction, management, maintenance, and repair of association property," says [Robert Galvin](#), a partner at Davis, Malm & D'Agostine PC in Boston who specializes in representing condos and co-ops. "Exempt expenditures are things like insurance, maintenance of the common areas, snow plowing, payroll for the normal management of the building, security, water, and sewer, things of that nature."

Robert M. Anderson, a staff attorney at Nexon Pruet in Charleston, S.C., agrees. "The regulations give us a good definition of what qualifies as an expenditure under the 90 percent rule," he explains. "For 13 examples of what qualifies under the rule, go to [Treasury Regulation 1.528-6\(c\)](#). The main exclusion is for investments or transfers of funds to be held to meet future costs. If you have a rainy day fund into which you put money, that money can't be counted as an expenditure. For example, transfers to a sinking fund account for the replacement of the roof, even though the roof is association property, wouldn't be expenditures."

Galvin offers other examples of nonexempt expenditures. "Probably if you were renting the clubhouse and had to pay for social host liquor liability insurance or people to clean up the clubhouse after events, that's not really within the normal operation of your HOA," he says. "That's an activity you're entering into for profit."

HOA Exempt Expenditure Twists

Be aware of twists to this rule, advises Anderson. "Qualifying expenditures include those for HOA property even though they may generate income that's not tax-exempt," he explains. "If you spend funds to improve

or maintain your swimming pool or clubhouse, even though you generate money from nonmember guests, that doesn't exclude those funds from coming under the 90 percent rule. However, the fees from nonmembers are taxable."

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Tax Day: What Your Board Must Know about Homeowners Association Taxes

April 2010

"A lot of people aren't aware that associations do have to file income taxes," says Robert Galvin, a partner at Davis, Malm & D'Agostine PC in Boston who specializes in representing condos and co-ops.

That's right. Homeowners associations have to file tax returns like the rest of the corporations in the United States. Here's a primer on the rules associations must follow when they file and advice on minimizing the stress of tax day for your HOA.

Follow Corporate Rules

Associations are like any other corporation, even if they're not for profit. That means they must file tax returns with the rest of the corporations in the country. If your association hasn't filed a 2009 federal tax return yet, you'd better get cracking.

Corporations that follow a calendar-year accounting method are required to file returns by March 15 of every year, and associations must follow that rule, too. If your association doesn't follow calendar-year accounting, its taxes are due on the 15th day after the third month of your taxable year. So if your calendar year ends on July 31, your tax return is due on Dec. 15.

"Here's the problem in our industry," explains James Donnelly, president and CEO of Castle Group, a property management company in Plantation, Fla., that manages 55,000 association units. "Almost all associations operate their finances on a calendar-year basis. The CPAs who specialize in corporations and associations have to do all their work in the first 60 days of the year. It may be hard to get your association's taxes done by March 15. So we tell associations to file for an automatic extension using IRS Form 7004. That gives you six additional months to file."

There's good news and bad news when you file an extension. The bad news is that just as you have to pay interest if you personally file for an extension and end up owing the government money, your association is also on the hook for interest for that period after the March 15 deadline that its taxes weren't paid.

The good news is that most associations typically don't owe the government. They don't make much, if any, money. "That's by far the minority of associations," says Donnelly.

Choose Your Poison

Why don't most associations have much, if any, of a tax liability? In general, most take in only funds to operate their facilities; they don't conduct income-generating activities.

You have two options when you file your association's tax returns. "One is to file as a corporation, and the other is to file under Section 528 of the Internal Revenue Code," explains Bob Tankel, principal at Robert L. Tanke PA in Dunedin, Fla., a law firm that advises associations. "Section 528 is specifically for homeowners associations. It has a higher marginal tax rate, but it eliminates all exempt-function income and expenses. Assessments wouldn't even be counted as income."

Whether to file a straight corporate return or a return under IRC 528 is a judgment call. "Your accountant will advise you," says Tankel. "It's not a legal issue; it's more of a dollars-and-cents issue."

"Most associations elect to be taxed under Section 528 of the IRC," explains Galvin. "It's very useful because before this was enacted, there was a lot of ambiguity about how associations should report and pay taxes. Under IRC 528, your association has to be a homeowners association and properly legally organized for that purpose. Then, if almost all your income is from association assessments and almost all of your outgo is spent on maintaining the property, you don't have to pay taxes on that money."

To qualify to file Form 1120-H under IRC 528, your association must meet the following requirements:

1. The substantial majority of units, 85 percent, must be used as residences.
2. More than half, 60 percent, of the association's gross income must be exempt, which means it's received from owners in their capacity as association members, rather than from them as customers for goods or services.
3. At least 90 percent of the association's expenses must be exempt, which means they're operating and capital expenses that directly affect association property.
4. Residual income can't be used to benefit members.

"Most associations won't have any problem meeting these requirements," says Galvin.

Defining Taxable Income

As the IRC's test indicates, your association will have to pay taxes on interest income it earns on bank and reserve accounts and on nonexempt income. Income from for-profit activities, such as clubhouse rentals or golf-course fees, isn't exempt and is taxed at a flat rate of 30 percent.

"If you generate income from something that isn't a simple association expense—you rent out your clubhouse or have a cell tower lease—you need to pay taxes on that income," explains Galvin. "Let's say one of the owners wants to rent your clubhouse for a wedding. That rental would be counted as taxable income because the unit owner has now reserved the clubhouse for an afternoon to the exclusion of all the other unit owners. In addition, in some condo associations, there are actually apartments that are part of the common areas and are rented out. That's rental income."

Like any corporation, your association can offset income with money spent to generate that income. "Any expenses directed to the production of the rental income can be deducted," says Galvin. "If you have maintenance staff cleaning up after the wedding in your clubhouse, that's deductible. If you spend money to advertise the clubhouse rental, that's deductible."

Do A Rollover?

If you happen to have had a great income-generating year, consider rolling over some of that income so you can delay or avoid paying taxes on it altogether. "If an association has money leftover at the end of the year, the board can vote to roll it over to the next year," says Tankel. "Under Ruling 70-604, the Internal Revenue Service will treat that as a constructive return of capital to members."

If you later have a year when your association has lost money—as many associations have done in the past several years—your association can declare that rolled over income and offset it against losses. "You could roll the income over forever," says Tankel. "Five years ago, associations were flush; now they're flushed down the toilet. If they had carryovers, they could have rolled them over and used them these past few years. There'd be less tax liability. All associations should roll over income because it never hurts."

States May Want Their Cut, Too

Check with your accountant to determine whether and when you need to file a state tax return. "State taxes vary from state to state," says Galvin. "In Massachusetts, you do have to file a form and pay tax."

Though many people delay filing taxes because they consider them a painful hassle, with associations they're typically not. "Most associations really don't have a lot of taxable income," says Galvin. "The tax isn't a great burden, but you do have to file a return."

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Appendix D

April 15, 2013

[Certified Mail No.]

[Name]
[Address]
[City, State]

Re: Refusal of Service for Extended Treatment Package System

Dear [Name],

It has come to our attention that you have not had your extended treatment package system (ETPS) [maintained and/or tested] for this reporting year. The subject property is located at [address or legal description]. It is a requirement of the septic permit issued for your property that the ETPS unit has annual maintenance performed and the effluent quality tested through your Operation & Maintenance Entity (O&M Entity) and the O&M Entity's associated Service Provider. According to our records your O&M Entity and Service Provider contacts are:

O&M Entity:

Service Provider:

Entity Contact Name
Entity Business Name
Entity Address
Phone Number

SP Name
SP Business
SP Address
Phone Number

Your ETPS unit is under contract with this O&M Entity through a Member Agreement, ~~that This agreement~~ is recorded with ~~the your~~ County. ~~your property is located within to your property records.~~ It is the homeowner's responsibility to ensure the ETPS unit is provided with maintenance, and that the effluent quality discharged from the unit is tested annually. Failure to have annual maintenance performed and effluent quality tested for your ETPS unit ~~may result in this department pursuing legal action against you for~~ places you in violation of the Subsurface Sewage Disposal Rules. ~~failure to meet the responsibilities associated with your septic permit.~~ Please work with your O&M Entity to schedule your annual maintenance and effluent quality testing. If you have any questions regarding your Member Agreement or the necessary requirements to schedule your maintenance and testing appointment please contact your O&M Entity. If you have questions concerning regulatory requirements regarding your ETPS system please contact [insert department name] at [insert phone number]. Your cooperation in meeting the requirements of your septic permit is appreciated.

Sincerely,

[Regulator Name]
[Regulator Title]



c: [O&M Entity]

enclosure

Dear Extended Treatment Package System Owner,

The Department of Environmental Quality (DEQ) would like to take this opportunity to provide some information about the treatment component of your septic system and remind you of the annual service and testing of the treatment unit that is vital to your systems overall functionality. The issuance of the septic permit for your property required a treatment component in order to install the drainfield. Without the septic permit the construction of buildings necessitating sewer connections on your property would not be possible.

Treatment is required in areas that are designated as *areas of concern*. An area of concern may be designated because nutrient and/or pathogen contamination already exists within the designated area and has the potential to create a health risk. Additionally the area may have shallow soil depths or types that do not support standard septic systems, and ground water or fractured bedrock is within 10 feet of the ground surface. Under these conditions the use of a standard septic system is not feasible due to the high probability of a health risk occurring or the soils are not capable of supporting standard wastewater strengths.

Extended Treatment Package Systems provide pretreatment to your wastewater prior to its discharge to the drainfield portion of your septic system. These treatment units reduce waste strength and nutrients (particularly nitrogen) in wastewater. This allows a reduction in soil depths below your drainfield to ground water, bedrock, or unsuitable soils. In addition they allow a reduced square footage of the drainfield installation requirements for your property, which leads to less area of your property being restricted to uses that comply with the subsurface sewage disposal rules.

In order for your drainfield to operate properly and to meet wastewater quality standards that help prevent environmental contamination and public health issues, annual service and wastewater quality testing must be performed on your treatment unit. The servicing and maintenance of your treatment unit ensures proper operation of the treatment system components. It is important that this is done by a service provider that has been trained to service the components of your treatment systems and has knowledge of the system operation. Additionally wastewater quality testing is necessary to ensure that the treatment system is discharging wastewater that complies with the septic system permit requirements in order to prevent public health issues and environmental contamination.

Please work with your Operation and Maintenance Entity and Service Provider to ensure that annual servicing and testing of your treatment unit is scheduled. Protection of public health and the environment is a team effort. Your participation in this program is a critical aspect to its success and is a requirement of the septic system permit for your property. If you have any questions surrounding this program and its requirements please contact DEQ's On-Site Wastewater Coordinator at 208-373-0140. Thank you for your participation and cooperation in this program.



Appendix E
[Certified Letter No.]

April 15, 2013

[Name]
[Address]
[City, State]

Re: Voluntary Deadline to Comply with ETPS Maintenance and Effluent Testing Requirements

Dear [Name],

[Regulatory Agency Name] has been informed that you are refusing to meet your responsibility and requirements surrounding your extended treatment package system (ETPS). As described in this Department's letter sent to you dated [insert letter 1 date] you are responsible for having annual maintenance performed on your ETPS unit and for annual testing of effluent quality discharged by the unit. Per *IDAPA 58.01.03.002.04.a.i* it is the responsibility of the property owner to treat and dispose of wastewater generated on their property in accordance with their subsurface sewage disposal permit.

You ~~are~~ Operation & Maintenance (O&M) Entity is are responsible for ~~reporting~~ the completion of your unit's annual maintenance and effluent quality testing ~~to this Department annually~~. The results of the annual report maintenance and testing is are required to be submitted ~~by your O&M Entity~~ to this Department by July 31st of each year. As of the issuance of this letter you are delinquent in meeting these requirements by [insert number of days past July 31st]. This Department is providing you a 30 day window to voluntarily meet the requirements and responsibilities of your septic permit (see enclosure). You have until [insert voluntary compliance date] to accomplish your required annual maintenance and effluent quality testing. After this date this Department may ~~pursue legal action~~ issue a Notice of Violation against to you for failure to meet the requirements of *IDAPA 58.01.03.002.04.a.i, 58.01.03.004.01, 58.01.03.005.14, and 58.01.03.012.01-03*. To view the requirements of these Rules please reference the Individual/Subsurface Sewage Disposal Rules located at <http://www.deq.idaho.gov/water-quality/wastewater/septic-systems.aspx>.

Please contact your O&M Entity to schedule your required annual maintenance and testing of effluent quality.

O&M Entity:

Entity Contact Name
Entity Business Name
Entity Address
Phone Number



State of Idaho
Department Of Environmental Quality
Technical Guidance Committee

Your O&M Entity will be required to report the status of the completion and compliance of these activities on [insert voluntary compliance date]. Your cooperation in meeting the requirements of your septic permit is appreciated.

Sincerely,

[Regulator Name]

[Regulator Title]

c: [O&M Entity]

| [enclosure \(septic permit\)](#)



Appendix F

4.10.4 Annual Report

The reporting period is from July 1 of the preceding year through June 30 of the reporting year. The Nonprofit O&M Entity shall meet the following annual reporting requirements for each member of the Entity:

1. The Annual Report shall include the following items for each member of the Entity:
 - a. A copy of all service records for the reporting period.
 - b. A copy of all certified laboratory records for effluent sampling.
 - c. A copy of each Chain-of-Custody record associated with each effluent sample.
 - d. A current list of all members of the Nonprofit O&M Entity within the health district to which the Annual Report was submitted.
 - i. The member list shall clearly identify the status of each member in regards to completion of Annual Reporting requirements.
 - ii. If Annual Reporting requirements are not complete for any given member an explanation shall be included with that member's records within the Annual Report.
2. Annual Report Exemptions:
 - a. A member may be exempt from effluent testing based on extreme medical conditions.
 - i. The member's record in the Annual Report must include a doctor's note indicating that a resident of the property has been prescribed medication for the reporting period that will prevent the ETPS unit from testing correctly.
 - ii. Annual service and maintenance on the member's ETPS unit shall not be exempt due to medical conditions and record of annual service and maintenance shall still be submitted with the Annual Report.
 - b. An O&M Entity may be exempt from reporting annual service and testing results for individual members if that member's activities fall under section 4.10.6 of this manual.
 - iii.i. The O&M Entity is still required to report the activities described under section 4.10.6 of this manual for each member exempt from annual reporting through this section.
3. The annual reporting process:
 - a. The Annual Report shall be submitted by the Nonprofit O&M Entity no later than July 31 of each year for the preceding 12-month period to the local health district.
 - i. The Nonprofit O&M Entity shall submit Annual Reports to each local health district that the Entity has member agreements within which shall only include reporting records for the member agreements within the local health district jurisdiction.



- b. The local health district shall provide the Nonprofit O&M Entity a written response within 30 days of receipt of the Annual Report detailing the Entity's compliance or non-compliance with their member's septic permit requirements.
 - i. All correspondence from the health districts to the Nonprofit O&M Entity regarding the Annual Report shall be copied to DEQ.
4. Delinquent Annual Reports:
 - a. If the Nonprofit O&M Entity does not submit the Annual Report by July 31 of the reporting year the local health district shall send the Entity a reminder letter providing a secondary deadline for report submission of August 31st of the reporting year detailing the report requirements and that failure to submit the Annual Report by this date will result in the district forwarding a notice of non-report to DEQ for the suspension of the Nonprofit O&M Entity.

All correspondence from the health district to the Nonprofit O&M Entity regarding delinquent Annual Reports shall be copied to DEQ.

4.10.6 Member Refusal of Maintenance or Testing Requirements

It is the responsibility of the individual O&M Entity members to ensure the O&M Entity is capable of performing the necessary annual maintenance and effluent testing required for their ETPS unit. Failure of an individual member to permit the O&M Entity from carrying out the required services, as designated within their member agreement, is considered a violation of IDAPA 58.01.03.012.01 Failure to Comply. The following activities from a homeowner towards their O&M Entity may be considered as refusal of service actions by a member, and may not be limited to:

1. Refusal to allow annual maintenance or effluent quality testing (e.g., refusal to pay annual dues preventing the financial capability of service, denial of property access, etc.)
2. Refusal to maintain the ETPS unit in operating condition (e.g., refusal to replace broken components, refusal to provide electricity to the unit, etc.)
3. If the refusal of service continues through the Annual Reporting Period the O&M Entity shall substitute the following documents in the Annual Report for members refusing service:
 - a. Copies of all correspondence and associated certified mail receipts documenting the property owner's receipt of the correspondence regarding the refusal of service.
 - i. Failure to include this documentation within the annual report will void the property owner's exemption from the annual report and will count against the O&M Entity's overall compliance rate.



4.10.6.2

Upon receipt of an Annual Report that contains individual O&M Entity members exempt under section 4.10.6 of this guidance the reviewing regulatory authority and respective O&M Entity shall adhere to the following guidelines:

1. The regulatory authority shall issue Letter 1 and the associated enclosure that is found within section 3.3.11 of the Idaho Subsurface Sewage Disposal Standard Operating Procedures (SSD SOP).
 - i. This letter shall be sent to the property owner via certified mail and copied to the associated O&M Entity.
 - ii. The O&M Entity shall provide notice to the regulatory authority and associated property owner 30 days after receipt of Letter 1 informing the regulatory authority of the property owner's voluntary compliance status.
2. If the property owner fails to voluntarily comply within the 30 day timeframe the regulatory authority shall issue Letter 2 found within section 3.3.11 of the SSD SOP.
 - i. This letter shall be sent to the property owner via certified mail and copied to the associated O&M Entity.
 - ii. The O&M Entity shall provide notice to the regulatory authority and associated property owner by the voluntary compliance date provided within Letter 2 informing the regulatory authority of the property owner's voluntary compliance status.
3. If the property owner fails to voluntarily comply by the date provided in step 2 of this process the regulatory authority shall issue a Notice of Violation to the property owner and pursue legal action against the homeowner to ensure compliance with the property owner's septic permit requirements in regards to the ETPS unit.



Appendix G

ETPS Program Testing Requirements



Constituents Currently Sampled

- ▶ TSS (total suspended solids)
- ▶ CBOD₅ (carbonaceous biological oxygen demand)
- ▶ Total Nitrogen (TKN + (NO₃ + NO₂-N))
 - TKN (Total Kjeldahl Nitrogen)
 - NO₃ + NO₂-N (Nitrate-Nitrite Nitrogen)



Maximum Concentration

- ▶ TSS
 - 45 mg/L (or ppm)
- ▶ CBOD₅
 - 40 mg/L (or ppm)
- ▶ Total Nitrogen
 - Permit specific
 - Typically 27 or 16 mg/L (or ppm)
 - May be lower depending on NP Evaluation results



EPA Reason for Concern

- ▶ TSS
 - Suspended solids can result in the development of sludge deposits in freshwater
 - Can cause harm to all forms of aquatic life and decrease the ability of aquatic plants to increase dissolved oxygen
 - Suspended solids interfere with disinfection processes in drinking water sources



EPA Reason for Concern

- ▶ CBOD₅
 - This is caused by biodegradable organics
 - May leach metals from soil and rocks into ground and surface water
 - Stabilization of organics in the water column can deplete dissolved oxygen in surface water
 - Measures the strength of wastewater effluent



Reason for Concern

- ▶ Total Nitrogen
 - Can result in eutrophication and dissolved oxygen loss in lakes
 - Algae and aquatic weeds can contribute to trihalomethane precursors in the water column that may generate carcinogenic THMs in chlorinated drinking water, nitrogen leads to excessive plant growth
 - Excessive nitrogen in drinking water can cause methemoglobinemia in infants and cause pregnancy complications in women and livestock





Reduction of Constituents

- ▶ Allows installation of drainfields in areas where they otherwise would not be allowed
 - Environmentally Sensitive Areas
 - These areas have:
 - Inadequate soil depth to treat standard effluent
 - High ground water levels
 - High nitrogen background levels in groundwater
- ▶ Allows a reduction in drainfield square footage

